UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2009

September Term, 2014

ADAM LEWELLEN

v.

DAVID ESTEPPE

Hotten,
Reed,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Hotten, J.

Filed: December 4, 2015

Appellant, Adam Lewellen, a former detective with the Baltimore City Police Department, pled guilty to perjury and misconduct in office after fabricating evidence included in an application for a search warrant. Appellee, David Esteppe, who was the target of the fraudulent search warrant, thereafter filed a complaint for damages against appellant in the Circuit Court for Baltimore City. After a bench trial, the circuit court found that appellee had established negligence, violations of Articles 24 and 26 of the Maryland Declaration of Rights, and civil conspiracy. The circuit court awarded appellee $166,007.67 in compensatory damages, and appellant challenges that order, presenting four questions for our review:

I. Does a [circuit] court err in admitting as substantive evidence in a civil trial a statement of facts to support a guilty plea from a related criminal proceeding?

II. In an action in which a [circuit] court finds [appellant's] actions to initially have been unlawful but to have then converted into being lawful, does a trial court err in awarding damages occurring after [appellant's] conversion to lawful conduct?

III. Does a [circuit] court err in not granting judgment in favor of [a] police officer on a claim of negligence when the [circuit] court finds all elements of the defense of public official immunity in favor of the [appellant]?

IV. Does a [circuit] court err in finding against a defendant for a claim of civil conspiracy when a plaintiff fails to establish all elements?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL BACKGROUND

On March 27, 2014, appellant pled guilty to one count of perjury and one count of misconduct in office. After the circuit court found that appellant's plea was knowing and voluntary, the Assistant State's Attorney ("ASA") proffered the factual basis for the plea:

> If this matter had gone forward, the State would have produced evidence to show that the [appellant] before the Court today seated left of counsel at trial table, was a sworn public officer for the Baltimore City Police Department since 2007 and, in particular, the periods in question with respect to these two cases he was still, in fact, an officer in March 2012 as well as June 2012, the dates pertinent in this case.
>
> Your Honor, State would have produced evidence to show that [appellant] knew a young lady by the name of Ms. Brandi Chelchowski. He had been friends with her for years and their relationship was a close one.
>
> The State would have also produced evidence to show that Ms. Chelchowski entered into a relationship in late 2011 with a gentlemen by the name of David Esteppe [(appellee)]. That relationship between Chelchowski and [appellee] ended sometime between January and February 2012.
>
> We would have produced evidence to show that [appellee] was the one who ended that relationship with Ms. Chelchowski which angered her. She became more and more aggressive and threatening towards [appellee] to include saying things to the effect, "I have cop friends and you're going down." Most specifically, on March 19, 2012, after a hearing between the two of them, between Chelchowski and [appellee], subsequent to that hearing, she pulled up next to [appellee] and said something to the effect of, "You're going down next week."
>
> That brings us, Your Honor, to March 27, 2012. State would have produced evidence to show that [appellant] before the court today, obtained, applied for and obtained a search warrant for [appellee's] home located at 3127 Foster Avenue. He swore out that application for a search warrant before the Honorable Judge Avery, then of the District Court. He swore under oath and under penalties of perjury before Judge Avery and in the Affidavit in Support of Probable Cause for that application, [appellant] averred that he had a Confidential Informant [("CI")], No. 2688, who he

explained in that Affidavit, during the third week of March 2012 had made a phone call to [appellee] in order to arrange a purchase of cocaine.

[Appellant] further averred that CI 2688 did, in fact, make a control purchase from [appellee] at his home at 3127 Foster Avenue which is in Baltimore City, Maryland and that he was – in fact, purchased cocaine from [appellee] at that location. That was the basis – the phone call and the purchase was the basis for the search warrant that the [appellant] swore out before Judge Avery.

[Appellee] came forward, as well as other witnesses came forward, indicating that they believed that the search warrant was, in fact, false and fraudulent. The Internal Affairs Division of the police department began an investigation. They interviewed both [appellee] and CI 2688. Both of them said they did not know each other, they had never met each other, they had never seen each other. [Appellee] explained the CI had never ever been to his house. The CI explained he had never ever set foot nor met [appellee]. He had never bought or sold any type of controlled dangerous substance to or from [appellee]. He had never been to that house, and had never called him on the phone and, in fact, did now know his phone number.

Investigators went further and obtained phone records of both the CI and [appellee] and they corroborated that there had never been any phone contact in March 2012 between those two.

On March 27, in addition to obtaining the search warrant, they then, in fact, executed the search warrant. [Appellant] was the lead on that execution of that search warrant and, Your Honor, no CDS was found during that execution of search warrant.

The investigation began in June 2012 as all of this started being investigated by Internal Affairs. They first interviewed the CI on June 11, 2012 and began asking him these questions about whether or not he knew [appellee] or whether or not he had ever sold or bought drugs or been to his house. At that point, that is when he said, as I've already explained to the Court, he did not know [appellee], had never bought or sold from him and never been to his home.

Subsequent to that interview by IAD of the CI, the CI then explained that later that day, the next morning, he called [appellant]. He worked only at that point in time in June – in March through June 2012 with [appellant].

So he called the [appellant] to say what's going on, why is internal affairs talking to me, am I in trouble?

The next day, June 12, the CI would have testified that before this Court that [appellant] then picked him up at his home, took him to a nearby school – and all this happening in Baltimore City – and told the CI – [appellant] told the CI that he needed him, meaning the CI, he needed the CI to do him a favor and that they were going to call the detective, the IAD detective and recant.

CI would have explained that [appellant] dialed the phone number and had the phone there standing right over him, if you will, directing him what to say and recant what he had told Internal Affairs investigators on June 11 and, in fact, changed his story to say, "I forgot. I did in fact buy from that guy [appellee] one time. I totally forgot."

Also present during that encounter was the [appellant]'s partner, an Officer Sills. He would have testified, Your Honor, that [appellant] appeared agitated that day. He recalls that event when they took the CI to this school parking lot and that [appellant] was agitated, red in the fact and angry, and standing right over the CI as this phone call was made, although he did not hear the particulars of the phone call as he was not close enough to it.

Two days later, June 14, Internal Affairs detectives were – spoke again with the CI. In light of the fact that he sounded very nervous and was stammering and stuttering during that June 12 recantation, they wanted to reach out to him again. They did so, brought him into the Internal Affairs Office and interviewed him again. He then explained to Internal Affairs detectives that [appellant] was there, made him make this phone call saying to him, "You owe me a favor," stood over him and directed him what to say.

The CI would indicate to that Court that on that June 12 day when he was picked up by [appellant], [appellant] was working in full uniform in his police car, as his partner Officer Sills would have indicated, the same as they were on duty when they went and picked him up.

Your honor, again getting back to the execution of the search warrant on March 27, as I indicated, although no controlled dangerous substances were found in [appellee's] home, he did have two hunting guns or shotguns in the home. And due to a prior second degree assault conviction, unbeknownst to [appellee], he's prohibited to having those guns. So he was, in fact, arrested that day, taken to Central Booking and spent a night in jail,

> all based on, obviously, this bogus and fraudulent perjurious warrant sworn out and obtained by [appellant].

Appellant's attorney stated that he had "[n]o additions, corrections or deletions[]" to this statement. Appellant was also asked by the court whether he had "[a]ny additions, corrections or modifications[,]" and appellant responded "[n]o, Your Honor." The court indicated that it was satisfied, beyond a reasonable doubt, that, "based on the agreed Statement of Facts that has been read into the record," appellant was guilty of perjury and misconduct in office.

On April 23, 2013, prior to appellant's guilty plea, appellee filed an amended complaint against appellant for damages caused by appellant's fabrication of evidence in applying for the search warrant.[1] This complaint alleged assault, battery, false imprisonment, intentional infliction of emotional distress, malicious prosecution, negligence, violation of rights secured under Articles 24 and 26 of the Maryland Declaration of Rights, and civil conspiracy.

On November 6, 2014, the parties appeared before the circuit court for pretrial motions and a bench trial. Appellant first moved the court to preclude appellee from making any reference to appellant's conviction in the criminal matter. The court granted this motion and ruled that:

[1] Appellee had initially filed a complaint against appellant, the Baltimore City Police Department, the Mayor and City Council of Baltimore, and the State of Maryland on March 3, 2013. However, appellee's amended complaint only included claims against appellant.

> No mention of a conviction in a criminal case, stemming from the facts of this underlying case, will be mentioned during the course of the trial. There will be no mention of a conviction.
>
> Two, there will be no mention of a guilty plea made by [appellant], stemming from the underlying facts of this case.

The court next ruled on appellee's motion to enter the transcript of the statement of facts recited by the ASA in support of appellant's guilty plea into evidence.[2] Appellee sought to enter the transcript as "substantive evidence of [appellant's] conduct, which led to the wrongful arrest and eventual prosecution of [appellee]." Over appellant's objection on hearsay grounds, the court held that the statement was admissible through the adoptive admission exception to the rule against hearsay, Maryland Rule 5-803(a)(2), because appellant adopted the statement of facts read by the ASA when he informed the circuit court that he had no "additions, corrections or modifications." Consistent with the court's previous ruling concerning appellant's conviction, the circuit court agreed to only consider the portion of the transcript containing the statement of facts.

After pretrial motions, the parties stipulated to the admission of various exhibits,[3] and appellee, the only witness at trial, took the stand. Appellee testified how his

[2] This statement of facts is quoted in its entirety starting on page two, *supra.*

[3] The following exhibits were entered into evidence by stipulation of the parties, with the exception that number 18 was only marked for identification purposes:

3. Application for the Search and Seizure warrant signed by appellant.
4. State's recommendation to the District Court commissioner that appellee be held with no bail following his arrest.
5. The District Court commissioner's recommendation that appellee be held on a $25,000 signature bond.

(continued . . .)

relationship with Ms. Chelchowski ended prior to March of 2012. According to appellee, when he stopped seeing Ms. Chelchowski, she began to call him incessantly and threatened him, which prompted him to file multiple peace orders against her.

Appellee testified that during the late afternoon hours of March 27, 2012, he was working from his home in the Canton neighborhood of Baltimore when six or seven police officers, including appellant, broke down his door and charged into his home yelling "[p]olice, police." Appellee was handcuffed, accused of being a drug kingpin, and officers began searching his home for drugs. During this search, a crowd was outside the residence with video cameras, and the crowd could see appellee through the open blinds. While appellee was handcuffed in his living room, appellant told appellee that "Brandy led us to it."

(. . . continued)

6. Appellee indictment in the Circuit Court for Baltimore City.
7. Statement of Charges and Probable Cause against appellee.
8. A drug analysis report indicating that a scale found in appellee's home tested negative for CDS.
9. Pretrial paperwork given to appellee.
10. Appellee's pretrial scheduling order.
11. A certified copy of the disposition of all charges against appellee.
12. A photo of appellant and Brandi Chelchowski.
13. Seven photographs depicting the appellee, and the evidence seized when police executed the search warrant at his home.
14. Printouts of blogs on the internet concerning appellee.
15. Printouts of internet search pages concerning appellee.
16. Appellee's legal bills stemming from his criminal prosecution.
17. An employment agreement between appellee and his employer.
18. The report of psychiatrist who treated appellee (Identification only).
19. A report by a company that specialized in cleaning up adverse internet content.

Ultimately, police discovered two rifles that appellee used for hunting purposes, and a scale which tested negative for traces of controlled dangerous substances. According to appellee, he was unaware that he was barred from possessing the rifles because of a prior second degree assault conviction.

Appellee testified that he was eventually taken to central booking, spent the night detained, and appeared before a District Court commissioner the following day. That commissioner set a $25,000 signature bond, and appellee was released during the evening hours of March 28, 2012. Appellee subsequently retained an attorney, was arraigned in District Court, and had multiple court appearances during the ensuring several months. He was given a plea offer of five years with no parole for the gun charge, but rejected this offer.

Prior to appellee's trial date of July 25, 2012, appellee filed a complaint with the Internal Affairs Division of the Baltimore City Police Department. After Internal Affairs investigated appellant's actions in seeking a search warrant for appellee's residence, the charges against appellee were nolle pross'ed on the date scheduled for trial.

Appellee also testified that he was a business owner, but had sold his business in March of 2012 to a company he was scheduled to work for. He testified how being arrested, missing a day of work while detained following his arrest, and having to inform his employer about the charges against him, strained his relationship with his employer. He testified that he has since been removed from certain projects with his new employer

because of fear that clients may learn of his arrest. According to appellee, he continues to worry that these impediments to his work may result in him losing his job.

Appellee testified how the stress, anxiety and embarrassment of being arrested, detained and prosecuted negatively impacted him psychologically, and compelled him to begin seeing a psychiatrist. Appellee provided proof of content on the internet which continues to associate his name with guns and drugs, and as a result, he has had to hire an online reputation specialist to work on cleaning some of this content. Lastly, appellee provided legal bills which were incurred as a result of his criminal prosecution.

After considering appellee's testimony, the circuit court heard motions for judgement on each of the counts within appellee's complaint. As a result of appellee's concession that he was no longer arguing malice, the court dismissed appellee's claims of malice for the purpose of punitive damages. The court also dismissed the counts of assault, battery, false arrest, false imprisonment and malicious prosecution. The court then found that appellee had satisfied his burden of proof, by a preponderance of the evidence, on the counts of negligence, violations of article 24 and 26 of the Maryland Declaration of Rights, and civil conspiracy. The Court awarded $166,007.67 in damages on these counts.

Appellant timely noted an appeal in the Circuit Court for Baltimore City on November 11, 2014.

Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

DISCUSSION

I. Did the circuit court err in admitting the transcript of appellant's guilty plea into evidence?

Appellant first contends that the circuit court erred by admitting the transcript of his guilty plea hearing into evidence. According to appellant, the entry of the transcript into evidence was erroneous for three reasons: (1) "'[i]t is a well-settled rule in Maryland that a criminal conviction is inadmissible to establish the truth of the facts upon which it is rendered in a civil action for damages arising from the offense for which the person is convicted[,]'" (quoting *Aetna Cas. & Sur. Co. v. Kuhl*, 296 Md. 446, 450 (1983)); (2) the factual basis recited by the State in support of appellant's guilty plea was hearsay that did not fall under the adoptive admission hearsay exception under Maryland Rule 5-803(a)(2); and (3) the ASA's statement of facts contained hearsay within hearsay, because the statement of facts described how other individuals would testify if they were called as part of the prosecution's case.

We disagree, and hold that the transcript of appellant's guilty plea hearing was not used for any impermissible purpose. Instead, while appellant correctly argues that the transcript contained hearsay within hearsay, appellant adopted both layers of hearsay when he pled guilty without denying or challenging any portion of the agreed statement of facts. Therefore the transcript was properly admitted into evidence under Maryland Rule 5-803(a)(2).

a. Standard of review

In reviewing the circuit court's admission of evidence under a hearsay exception, we apply a "two-fold" standard of review:

> [T]he trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed de novo, *see Bernadyn,* 390 Md. at 7-8, 887 A.2d at 606, but the trial court's factual findings will not be disturbed absent clear error, *see State v. Suddith,* 379 Md. 425, 430-31, 842 A.2d 716, 719 (2004) (and citations contained therein).

Gordon v. State, 431 Md. 527, 538 (2013).

b. The use of criminal convictions and guilty pleas as evidence in civil proceedings.

As noted by appellant, the Court of Appeals has ruled that, in a civil suit, a criminal conviction is inadmissible as proof of the facts necessary to sustain that conviction. *Aetna Cas. & Sur. Co. v. Kuhl*, 296 Md. 446, 450 (1983) (citation omitted). The Court of Appeals has justified this prohibition on the grounds that the parties to a criminal case are different, "[t]he rules of evidence are different[,]" "the purposes and objects sought to be achieved are different[,]" *id.* at 452, and "[i]n a civil proceeding, the act complained of is the essential element, but in a criminal prosecution it is the intent with which the act is done." *Id.* at 450-51 (citation omitted).

There is, however, a well-settled exception to the aforementioned prohibition: "[A]lthough a plea of guilty to a criminal charge does not conclusively establish liability in a civil action arising out of the incident that resulted in the criminal charge, such a plea

constitutes an evidentiary admission that may be introduced into evidence during a subsequent civil proceeding." *State v. Westpoint*, 404 Md. 455, 497 (2008) (Murphy, J., dissenting); *see also Brohawn v. Transamerica Insurance Company,* 276 Md. 396, 403 (1975); *Campfield v. Crowther,* 252 Md. 88, 100 (1969). In *Crane v. Dunn,* 382 Md. 83, 102 (2004), the Court of Appeals applied this exception to hold that the trial court erroneously excluded evidence that the defendant had plead guilty to negligent driving where the plaintiff in the subsequent civil suit sought to introduce evidence of this plea as a party admission. The Court observed that:

> Admissions, in the form of words or acts of a party-opponent, may be offered as evidence against that party. It is reasoned that allowing such an admission into evidence is fair, as the party-opponent's case cannot be prejudiced by an inability to cross-examine him or herself. Generally, when a guilty plea to a criminal charge is admitted in a subsequent civil action, it is under the auspices of an admission by a party-opponent. For this reason, a defendant may choose to plead *nolo contendere* in order to avoid the admissibility of the plea.

Id. at 96 (quoting *Briggeman v. Albert*, 322 Md. 133, 135 (1991)). Thus, the plaintiff in *Crane* had the right to use the defendant's admission of guilt as proof that "[the defendant] had taken responsibility for the accident, and [the defendant] had every right to explain or rebut that assertion." *Id.* at 101.

In the case at bar, the transcript of appellant's guilty plea hearing did not fit into the former category, where evidence of a conviction is inadmissible, but also did not fit into the latter category, where proof of a guilty plea is admissible as a party admission. In moving to admit the transcript as substantive evidence of appellant's conduct, appellee noted that he only intended to enter the portion of the transcript containing the agreed

statement of facts. Accordingly, appellee planned on "redacting from the transcript, the statement with respect to the plea and the finding [of guilt]." The circuit court noted that redacting the transcript in this manner was not necessary because the court would "disregard anything [that is] not appropriate for the case[,]" but this exchange between the court and appellee reveals that the transcript was neither entered as evidence of appellant's conviction, nor as a party admission of fault.

The transcript was offered as substantive evidence of appellant's conduct under the adoptive admission exception to the rule against hearsay under Maryland Rule 5-803(a)(2), and we must analyze the circuit court's decision within the confines of this hearsay exception. In doing so, we first discuss whether the transcript was simply hearsay or whether it contained hearsay within hearsay, and then determine whether the transcript was properly admissible under the hearsay exception for adoptive admissions under Maryland Rule 5-803(a)(2).

c. Was the transcript of appellant's guilty plea simply hearsay, or did it contain hearsay within hearsay?

Hearsay – defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted[]" – is generally inadmissible under the Maryland Rules of evidence. Md. Rule 5-801(c) and 5-802.

In the case at bar, the parties and the circuit court were in agreement that the statement of facts read by the ASA at appellant's guilty plea hearing was hearsay. The transcript of the statement of facts was an out-of-court statement (made at the guilty plea

hearing), used at the civil trial to prove the truth of the facts contained in the statement of facts.

The disputed issue is whether the transcript contained hearsay within hearsay. Under Maryland Rule 5-805, "[i]f one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule." The purpose of this rule is to ensure that "inadmissible evidence does not become admissible simply by being clothed within evidence that is admissible…." *Streater v. State*, 352 Md. 800, 813-14 (1999) (footnote omitted).

According to appellant, there is a hearsay within hearsay problem that should have rendered the transcript inadmissible because "[t]he statements by the Assistant State's Attorney [contained in the transcript of the guilty plea hearing]… surmised what certain witnesses would testify to if [appellant's] criminal trial had gone forward." To determine whether the guilty plea hearing transcript contained hearsay within hearsay, we remove the first level of hearsay (the ASA's out of court statement), and ask whether the ASA, if called as a witness at the civil trial, could testify to the statements made at the guilty plea hearing. If the testimony would have been objectionable on hearsay grounds, then the transcript contained hearsay within hearsay.

In examining a portion of the transcript, we are of the opinion that the statement of facts would have been objectionable as hearsay if produced through in-person testimony:

> The Internal Affairs Division of the police department began an investigation. They interviewed both [appellee] and CI 2688. *Both of them said* they did not know each other, they had never met each other, they had never seen each other. [*Appellee*] *explained* the CI had never been to his

> house. *The CI explained* he had never ever set foot nor met [appellee]. He had never bought or sold any type of controlled dangerous substance to or from [appellee]. He had never been to that house, had never called him on the phone and, in fact, did now know his phone number.
>
> Investigators went further and obtained phone records of both the CI and [appellee] and *they corroborated* that there had never been any phone contact in March 2012 between those two.
>
> * * *
>
> Subsequent to that interview by IAD of the CI, *the CI then explained* that later that day, the next morning, he called [appellant]. He worked only at that point in time in June – in March through June 2012 with [appellant]. So *he called the* [*appellant*] *to say* what's going on, why is Internal Affairs talking to me, am I in trouble?

(emphasis added). As illustrated by the italicized language above, the ASA's statement of facts contained statements which were made outside of the guilty plea hearing (those of the CI and appellee), and those statements were used to prove of the truth of their content in the civil matter, *i.e.* that appellant fabricated the drug transaction in the search warrant application. Accordingly, the transcript containing the statement of facts contained hearsay within hearsay.

d. Was the transcript of appellant's guilty plea admissible under an exception to the rule against hearsay?

Having decided that the guilty plea transcript contained hearsay within hearsay, we must decide whether the transcript was properly admitted under a hearsay exception. There are numerous exceptions to the rule against hearsay, one of which is frequently referred to as the "adoptive admission" exception under Maryland Rule 5-803(a)(2). Under this exception, an out-of-court statement is admissible if the statement is offered against a

party, and "the party has manifested an adoption or belief in its truth[.]" Md. Rule 5-803(a)(2).

According to the circuit court below, appellant adopted a belief in the truth of the agreed statement of facts supporting his guilty plea, when he answered "no" to the court's inquiry whether there were any "additions, corrections, or modifications[.]" Appellant contends that this decision was erroneous, because Md. Rule 5-803(a)(2) generally applies where adoption of the statement involved unambiguous "positive conduct on the part of the declarant."

The Court of Appeals discussed the adoptive admission hearsay exception at length in *Gordon v. State*, 431 Md. 527 (2013). In *Gordon*, the defendant was charged with third-degree sex offense, and as one of the elements of this charge, the State had to prove that "[Gordon] was at least twenty-one years old at the time he had the alleged inappropriate contact with a fourteen-year-old girl." *Id.* at 529. To satisfy this element, the State called a police officer who had interviewed Gordon four days after the incident with the minor female. *Id.* at 530. This Officer testified "that he had 'personal knowledge' of Gordon's age from Gordon's 'Florida Driver's License[,]'" which Gordon had presented to the officer during the examination and on an unrelated encounter the day prior to the alleged sex offense. *Id.* Gordon objected, arguing that the officer's testimony was hearsay, and the State countered that the testimony was admissible under the adoptive admission exception under Md. Rule 5-803(a)(2). "According to the State, by providing the driver's license to [the police officer], Gordon was 'manifesting a belief that [the driver's license,

prepared by the Florida Motor Vehicle Administration] is a true document,' and that the date of birth stated on it was correct." *Id.* The circuit court agreed with the State, and the jury ultimately convicted Gordon of third degree sex offense. *Id.* at 530-31.

On appeal from his conviction, Mr. Gordon argued that, for a statement to qualify as an adoptive admission, "the manifestation of an adoption or belief must be unambiguous." *Id.* at 544 (citing *Bellamy v. State,* 403 Md. 308, 326 (2008). Gordon contended that, by handing the police officer his license, he did not "'manifest []an adoption or belief' in the truthfulness of the information listed" on the license. *Id.* at 532. Instead, "according to Gordon, '[a] fair reading of the record indicates that [he] produced his driver's license" either to confirm his identity or to enter police headquarters.'" *Id.* at 544. As such, handing his license to the police officer was an ambiguous adoption of the license's contents. *Id.*

In denying Gordons's argument, the Court of Appeals first observed that a party may manifest an adoption or belief in the truthfulness of a statement in a variety of ways:

> [I]n *Richardson v. Anderson,* the defendant's statement that the accounting report "was correct except as to two items contained therein" made the report itself "admissible as an admission of the defendant." 109 Md. 641, 649, 72 A. 485, 488 (1909). In *Brandon v. Molesworth,* the defendant employer adopted the statement of an employee by nodding in agreement, when the employee acknowledged that the plaintiff was fired, in part, because she was a woman. 104 Md. App. 167, 196, 655 A.2d 1292, 1307 (1995), *aff'd in part, rev'd in part,* 341 Md. 621, 672 A.2d 608 (1996); *see also Ewell v. State,* 228 Md. 615, 619–21, 180 A.2d 857, 860–61 (1962) (defendant's failure to respond, under the circumstances, when companion said "we just yoked a man," was admissible).

Id. at 539. The Court further clarified that:

> on appeal of an allegedly erroneous admission of evidence as an adoptive admission, the question is not whether the evidence before the judge clearly proved that the person against whom the statement was admitted unambiguously adopted the statement. Rather, the question is whether "there is sufficient evidence from which a jury *could* reasonably conclude that the defendant unambiguously adopted another person's incriminating statement." *Id.* at 8 (citation and quotation marks omitted) (footnotes omitted).

Id. at 547 (emphasis in original) (footnotes omitted). Once the evidence of adoption meets this threshold requirement, the court should admit the evidence and allow the fact finder to decide whether "it *should* reach the conclusion which the judge has held that it *may* reach[.]" *Id.* (emphasis in original) (citation omitted).

In applying the above principles, the Court of Appeals held that the trial court's admission of the detectives testimony was not erroneous, because "the jury could reasonably conclude that—by giving his driver's license to the detective, Gordon manifested an adoption or belief in the truth of the information listed on the license." *Id.* at 548 (footnote omitted). The Court noted that the exchange where a citizen provides a driver's license to a police officer is a "[c]ustomary and familiar one," and "[i]n the absence of something to suggest that this is not a typical exchange, the factual inference the trial court made was reasonable." *Id.* at 549.

Like the Court in *Gordon*, we also hold that the circuit court did not err because the fact finder could, and did, reasonably conclude that appellant manifested an adoption of belief in the truthfulness of the agreed statement of facts, along with any hearsay statements contained therein, during his guilty plea hearing. *Gordon* illustrated that one of the ways a person may adopt the statement of another is by failing to object where the statement is

made in their presence, and under such circumstances where the person would ordinarily be expected to object to the statement if untrue. *Id. at* 545 (citing *Ewell,* 228 Md. at 620–21 ("We think a jury of reasonable men could have found that it would have been natural for Ewell to reply under the circumstances, and, this being so, we cannot find error in the submission of the testimony complained of to the jury.")) (footnote omitted).

During the guilty plea hearing, appellant was expected to reply if he disagreed with a portion of the State's factual recitation, because he was invited to do so when the circuit court inquired whether he had any "additions, corrections, or modifications[.]" By answering "no," appellant not only acknowledged that the ASA accurately described the evidence that would be produced at trial, he also adopted the State's proffer as an accurate account of the facts as they existed. *See State v. Thornton*, 73 Md. App. 247, 255 (1987) (Noting that a factual basis for a guilty plea is required so that the circuit court can "determine that the conduct which the defendant admits constitutes the offense charged to which he has pleaded guilty.") (citation omitted); *see also Parren v. State*, 89 Md. App. 645, 650 (1991) (noting that, prior to the court accepting a guilty plea, "[t]here must be some statement as to the underlying facts which constitute the offense and which the defendant moreover admits.").

Accordingly, when appellant pled guilty and answered that he had no "additions, corrections or modifications[,]" appellant necessarily manifested an adoption of belief in the truthfulness in the first level of hearsay (the ASA's statement of facts), and also the second level of hearsay (the statements of witnesses contained within the ASA's statement

of facts).[4] Had appellant wished to accept punishment without accepting the accuracy of the State's narrative, he could have entered an *Alford* plea, whereby a defendant "understandingly consent[s] to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Bishop v. State*, 417 Md. 1, 20-21 (2010) (quoting *North Carolina v. Alford*, 400 U.S. 25, 37 (1970)) (footnote omitted). However, as observed by the circuit court, appellant simply pled guilty. We therefore hold that the transcript of appellant's plea hearing, although hearsay within hearsay, was properly admitted into evidence under the adoptive admission exception under Maryland Rule 5-803(a)(2).

II. Did the circuit err in awarding appellee damages where police found appellee in illegal possession firearms?

Appellant next contends that the circuit court erred in awarding appellee damages caused by his arrest, incarceration and prosecution, because probable cause existed for

[4] According to appellant, "a criminal defendant accepting a guilty plea is analogous to… an individual paying a traffic citation at a preset fine,… which the Court of Appeals has decided is not an adoptive admission." Appellant's brief at 7 (citing *Briggeman v. Albert*, 322 Md. 133, 138 (1991)). However, the Court of Appeals, in the very decision cited by appellant, clarified that a guilty plea to a traffic offense is admissible in a subsequent civil proceeding as an admission of guilt, whereas mere payment of a traffic citation is not:

> [A]n *admission of guilt* in the traffic court is admissible in evidence in a subsequent civil proceeding arising out of the same accident." (Emphasis added.) *Campfield v. Crowther,* 252 Md. 88, 100, 249 A.2d 168, 176 (1969) (citing *Miller v. Hall,* 161 Md. 111, 113-14, 155 A. 327, 329 (1931)). The submission of payment personally or by mail in satisfaction of a traffic fine, however, is not the evidentiary equivalent of a guilty plea in open court.

Id. 135-36.

appellant's arrest when police discovered firearms in his residence. According to appellant, appellee's damages should have been "limited to the damages that he incurred from the point of the police breaking down his front door to the time the police discovered the guns illegally in his possession." Appellee characterizes appellant's position as "inconsistent with fundamental tort law[,]" because appellant's "deliberate unlawful entry into [appellant's home]" proximately caused all of the damages which were suffered by appellee. For the reasons that follow, we agree with appellee and hold that the circuit court did not err in awarding appellee damages.

a. Standard of review

"We review a trier of fact's computation of damages for clear error." *Spacesaver Sys., Inc. v. Adam*, 212 Md. App. 422, 436 (2013) (citing *State Highway Administration v. Transamerica Ins. Co.,* 278 Md. 690, 710-11 (1976)).

b. Were appellee's damages proximately caused by appellant?

A tortfeasor is generally liable for all legally cognizable damages which are proximately caused by his or her actions. *Pittway Corp. v. Collins*, 409 Md. 218, 243 (2009) (citation omitted). An act is the proximate cause of a plaintiff's injuries where there is both causation-in-fact, and legal causation. *Id.* (citation omitted).

Causation-in-fact will generally be satisfied where "the injury would not have occurred absent or 'but-for' the defendant's negligent [or otherwise tortious] act." *Id.* at 244. Legal causation typically hinges on the question of foreseeability, *i.e.* whether the injuries sustained by the plaintiff were a foreseeable result of the defendant's conduct. *Id.*

at 246-47 ("The defendant may not be liable if it appears highly extraordinary and unforeseeable that the plaintiffs' injuries occurred as a result of the defendants' alleged tortious conduct."). We have described the requirement of proximate cause as limiting a defendant's liability, despite but-for causation, in the interest of "fairness" or considerations of "social policy":

> Thus, although an injury might not have occurred "but for" an antecedent act of the defendant, liability may not be imposed if for example the negligence of one person is merely "passive and potential, while the negligence of another is the moving and effective cause of the injury." *Id.; Bloom v. Good Humor Ice Cream Co. of Balt.,* 179 Md. 384, 18 A.2d 592 (1941), "or if the injury is so remote in time and space from defendant's original negligence that another's negligence intervenes." *Dersookian v. Helmick,* 256 Md. 627, 634, 261 A.2d 472 (1970); *see Liberto v. Holfeldt,* 221 Md. 62, 66, 155 A.2d 698 (1959). If there is no causation in fact, we need go no further for our inquiry has reached a terminal point. If, on the other hand, there is causation in fact, our inquiry continues. *Mackin & Assocs. v. Harris,* 342 Md. 1, 8, 672 A.2d 1110 (1996). If causation in fact exists, a defendant will not be relieved from liability for an injury if, at the time of the defendant's negligent act, the defendant should have foreseen the "general field of danger," not necessarily the specific kind of harm to which the injured party would be subjected as a result of the defendant's negligence. *Stone v. Chicago Title Ins. Co.,*330 Md. 329, 337, 624 A.2d 496 (1993); *Yonce,* 111 Md.App. at 137–39, 680 A.2d 569.

Collins v. Li, 176 Md. App. 502, 540-41 (2007).

Instead of focusing on the requirement of proximate causation, appellant mistakenly argues that appellee cannot recover for damages incurred after he was discovered to be in possession of firearms because his arrest and prosecution became lawful at this point. However, regardless of when appellee's arrest became supported by probable cause, the task of the court was determining what damages, if any, were a proximate result of appellant's actions.

In the case at bar, appellant's tortious conduct was the fabrication of evidence in applying for a search warrant for appellee's residence. As a result of this conduct, appellee was awarded the following damages:

> $442 to compensate appellee for the day of work he missed while detained following the search of his home.
>
> $8,565.67 to compensate appellee for legal fees expended in defending the criminal case initiated after the search of his home.
>
> $15,000 for the appellee to spend on "computer cleanup" over the following two years, *i.e.* the cost of paying a third party to cleanup appellee's online reputation.
>
> $143,000 to compensate the appellee for pain and suffering which resulted from the stress, anxiety and embarrassment which accompanied his arrest, detainment, and prosecution.

Regarding causation-in-fact, the circuit court did not err in awarding the above damages because none of appellee's damages would have resulted if law enforcement had not executed a fraudulent search warrant at appellee's residence.

Concerning the element of proximate causation, we also hold that the circuit court's award of damages was not clearly erroneous, because the harm for which appellant was compensated was certainly in the "general field of danger" created by appellant's fabrication of probable cause. Search warrants are executed by law enforcement for the very purpose of discovering evidence of criminal activity, and prosecuting those individuals who are implicated by the evidence discovered. The process of being charged and prosecuted for a crime, even where the individual is not convicted, can be an embarrassing and traumatizing experience, and extremely damaging to an individual's

personal and business reputation. Certainly, these consequences should not come as a surprise to an officer who knowingly includes false information in a search warrant application.

Only where appellee's illegal possession of firearms is characterized as a superseding cause of appellee's damages, would we hold that the circuit court erred in awarding the aforementioned damages to appellee. Regarding the interplay between intervening and superseding causes, the Court of Appeals has observed that "a defendant guilty of primary negligence remains liable 'if the intervening event is one which might, in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation.'" *Atl. Mut. Ins. Co. v. Kenney*, 323 Md. 116, 129 (1991) (quoting *State v. Hecht Company,* 165 Md. 415, 421 (1933)). The Court of Appeals has also noted that:

> "[T]he defendant is liable where the intervening causes, acts, or conditions were set in motion by his earlier negligence, or naturally induced by such wrongful act, or omission, or even it is generally held, if the intervening acts or conditions were of a nature, the happening of which was reasonably to have been anticipated, though they have been acts of the plaintiff himself."

Hartford Ins. Co. v. Manor Inn of Bethesda, Inc., 335 Md. 135, 158 (1994) (quoting *Penn, Steel Company v. Wilkinson*, 107 Md. 574, 581 (1908)).

Applying this guidance to the case at bar, while appellee may not have been prosecuted in the absence of possessing firearms which he was prohibited from owning, it was not entirely improbable or unforeseen that police would discover evidence of a crime while executing the illegally obtained search warrant. Furthermore, the entire process by

which appellee was detained and prosecuted was set in motion by appellant's fraudulent warrant application. We therefore hold that the circuit court properly awarded all damages in favor of appellee, regardless of whether there was probable cause to arrest appellee when firearms were discovered in his residence. As noted above, the issue of proximate cause often involves considerations of social policy. To hold otherwise, would shield an officer from liability merely because he or she had the good fortune of fabricating evidence against an individual who just happened to be engaged in an unknown violation of Maryland law.

III. Did the circuit court err in holding that public official immunity did not bar appellee's claim of negligence?

Appellant next contends that the circuit court erred in denying appellant's motion for judgment on the count of negligence where appellant had established all of the elements necessary for the application of public official immunity. Appellee responds by alleging that "the [circuit] court stated that '[there] was evidence of ill-will and malice,'" and public official immunity does not apply in the event of gross negligence or malice. Appellee also contends that "the [circuit] court rejected [appellant's] public official immunity argument because [appellant] was grossly negligent[,]" and "[appellant] never disputed that finding." For the reasons that follow, we hold that the circuit court correctly ruled that public official immunity should not apply, because the evidence indicated that appellant acted with gross negligence.

a. Standard of review

An appellate court reviews without deference a trial court's application of common law public official immunity. *See, e.g., Livesay v. Balt. Cnty.,* 384 Md. 1, 9-10 (2004).

b. Was appellant grossly negligent, thus removing the protection of public official immunity?

A defendant must demonstrate the following to be exempt from liability under public official immunity:

> (1) the actor must be a public official, rather than a mere government employee or agent; (2) the conduct must have occurred while the actor was performing discretionary, as opposed to ministerial, acts; and (3) the actor must have performed the relevant acts within the scope of his official duties.

Thomas v. City of Annapolis, 113 Md. App. 440, 452 (1997) (quoting *James v. Prince George's County*, 288 Md. 315, 323 (1980)). The purpose of this immunity is to ensure that public officials are able to act in accordance with their judgment, as opposed to being bound by rules that are inflexible or "hard and fast[.]" *Lee v. Cline,* 384 Md. 245, 261 (2004) (citation omitted). "Thus, the situation where public official immunity is applicable involves a tort claim based upon alleged mis-judgment or a negligent exercise of judgment by a public official[,]" *Id.*, as opposed to situations where a public official has acted with malice or gross negligence. *See generally Cooper v. Rodriguez*, 443 Md. 680 (2015) (clarifying that public official immunity does not apply in the event of malice or gross negligence).

The parties do not dispute that the initial requirements for the application of public official immunity have been satisfied because (1) appellant, as a police officer, was a public official; (2) the decision whether to apply for a warrant, and the decision about what to include in that application, was a discretionary decision; and (3) appellant applied for the search warrant in his capacity as a police officer. However, the parties disagree on whether

there was sufficient evidence of malice and/or gross negligence to preclude the protection of public official immunity.

This Court has described grossly negligent conduct as:

> an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them. Stated conversely, a wrongdoer is guilty of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist.

Brooks v. Jenkins, 220 Md. App. 444, 459 (2014) (quoting *Barbre v. Pope,* 402 Md. 157, 187 (2007)) (emphasis omitted); *see also Taylor v. Harford Cnty. Dep't of Soc. Servs.*, 384 Md. 213, 229 (2004) ("[W]e view gross negligence as something *more* than simple negligence, and likely more akin to reckless conduct[.]").

In the case at bar, appellant correctly notes that the trial judge did not render a finding of gross negligence, and that the term 'gross negligence' does not appear anywhere in the circuit court record. However, the circuit court justified its denial of appellant's motion for judgment on the count of negligence as follows:

> I'm going to deny your motion on Count No. 7 in the light most favorable to the Plaintiff. I think they presented a case of reckless disregard that caused injury to his duties and responsibilities; that caused injury to the plaintiff.
>
> The lying on his Statement of Facts that caused the damages that were set forth by the Plaintiff are undeniable. And therefore, on the issue of negligence, your motion is denied.

In light of the opinions of this Court and the Court of Appeals which equate gross negligence with reckless disregard for the rights of others, the circuit court's rational for

ruling that public official immunity was inapplicable was in essence, that appellant acted with gross negligence. We hold that this finding was not erroneous where the evidence before the circuit court indicated that appellant had sworn to a drug buy involving appellee and a CI that had never met appellee.

IV. Was the evidence produced at trial sufficient for the circuit court to find that appellant had been involved in two separate civil conspiracies?

The circuit court found that the appellant entered into two different conspiracies: one with Ms. Chelchowski, and one with the confidential informant who appellant alleged to have purchased drugs from appellee. According to appellant, the evidence produced at trial was insufficient to support the circuit court's finding that appellant had participated in a civil conspiracy with either one of these individuals. We disagree, and hold that the evidence at trial was sufficient to support the circuit court's finding of civil conspiracies involving Ms. Chelchowski and CI #2688.

a. Standard of review

In reviewing the sufficiency of the evidence, "[w]e do not evaluate conflicting evidence but assume the truth of all evidence, and inferences fairly deducible from it, tending to support the findings of the trial court, and, on that basis, simply inquire whether there is any evidence legally sufficient to support those findings." *Mid S. Bldg. Supply of Maryland, Inc. v. Guardian Door & Window, Inc.*, 156 Md. App. 445, 455 (2004).

b. Civil Conspiracy involving appellant and Brandi Chelchowsky.

The elements of civil conspiracy are as follows:

(1) A confederation of two or more persons by agreement or understanding;

(2) some unlawful or tortious act done in furtherance of the conspiracy or use of unlawful or tortious means to accomplish an act not in itself illegal; and

(3) Actual legal damage resulting to the plaintiff.

Lloyd v. Gen. Motors Corp., 397 Md. 108, 154 (2007) (citation omitted).

In the case at bar, there was sufficient evidence to support the court's finding, by a preponderance of the evidence, that the above elements were satisfied in relation to Ms. Chelchowski. The evidence before the circuit court indicated that Ms. Chelchowski and appellee had been in a relationship, that Ms. Chelchowski was angered when appellee ended that relationship, that Ms. Chelchowski threatened appellee by telling him that "I have cop friends and you're going down," that Ms. Chelchowski told appellee that he was "going down next week" on March 19, 2012 – approximately one week before appellee had been surprised by police at his house, and that appellant told appellee while searching his house that "Brandi led us to it." In light of this evidence, the court was justified in circumstantially finding an agreement between Ms. Chelchowski and appellant, and appellant's fraudulent application for the search warrant was surely an act committed in furtherance of that agreement. Lastly as discussed in Part II, *supra*, appellee experienced damages as a result of appellant's negligence and constitutional violations in applying for the search warrant.

c. Civil Conspiracy involving appellant and CI #2688.

The evidence at trial was also sufficient to support of civil conspiracy between appellant and the CI. The circuit court found that the CI conspired with appellant in his

constitutional attack against appellee by "join[ing] with him in the falsehood[.]" In support of that finding, there was evidence of an agreement between the CI and appellant when the CI was picked up by appellant in his police cruiser and, at appellant's request, called the Internal Affairs investigators. The CI's fraudulent statement to investigator's – that he had bought drugs from appellee, but this fact had slipped his mind when he had previously told them that he had never met appellee – was reasonably viewed as an unlawful act committed in furtherance of the constitutional attack against appellee. Lastly as discussed in Part II, *supra*, appellee experienced damages as a result of appellant's violation of his constitutional rights, and appellant conspired to further that violation by conspiring with CI #2688.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.