UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2329

September Term, 2015

KIRK ALBERTSON

v.

EDWARD SCHERL

Eyler, Deborah S.,
Wright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 22, 2017

Appellant, Kirk Albertson, filed a complaint in the Circuit Court for Talbot County, Maryland, alleging four counts of malicious prosecution against appellee, Edward Scherl, in relation to criminal charges against Albertson, the subject of which we considered in our reported opinion, *Albertson v. State*, 212 Md. App. 531, *cert. denied*, 435 Md. 267 (2013). In lieu of an answer, Scherl filed a Motion for Dismissal and/or for Summary Judgment, citing Maryland Rules 2-322(b) and 2-501, contending that one of the four required elements of a malicious prosecution claim was not satisfied because the complaint failed to state that the prior criminal case terminated in Albertson's favor.

After both parties filed additional pleadings on the Motion for Dismissal and/or for Summary Judgment, the circuit court issued a Memorandum Opinion and Order, granting Scherl's motion, albeit on different grounds than were asserted in the original pleadings. The circuit court concluded that, whereas Albertson failed to show a lack of probable cause to support the original criminal charges, which is also a required element of a malicious prosecution claim, Scherl's Motion for Dismissal and/or for Summary Judgment would be granted, with judgment entered in favor of Scherl.

After Albertson's Motion to Reconsider this order was denied by the circuit court, Albertson filed a timely appeal to this Court. Summarized, Albertson asks whether the circuit court erred in granting Scherl's Motion for Dismissal and/or for Summary Judgment.

As will be explained, we hold that the circuit court erred and shall remand this case for further proceedings.[1]

BACKGROUND

Albertson and Scherl were formerly business associates engaged in the resale of used cars. *Albertson*, 212 Md. App. at 536-37. In brief, Scherl, a licensed auto-broker, would bring used cars to Albertson, part owner of Rokabil Motors, a retail-used car dealership, for resale to the general public. *Id*. The general understanding was that when a sale was made, Scherl would deliver title to the vehicle in exchange for a check in the amount of the sale. *Id*. However, because many of the resales involved buyers with poor credit who required financing, the parties disagreed over how much time, if any, Scherl was to hold the checks before depositing them. *Id*. at 537, 539.

This dispute, over what became known in our opinion as the "hold-check agreement," eventually led to the filing of criminal charges against Albertson, when

[1] Albertson asked the following three questions in his appellate brief:

> 1. Whether the court erred in granting summary judgment in favor of the defendant on an issue not raised by the defendant in the defendant's motion for summary judgment?
>
> 2. Whether the court erred in assuming the state of mind of the plaintiff as to the understanding of the tort for which the claim is based?
>
> 3. Whether the court erred by not viewing all the facts alleged in the complaint, including inferences drawn therefrom, in the light most favorable to the opposing party?

Additional facts may be found in the herein cited opinion.

Scherl, apparently dissatisfied with continued delays in receiving payment, attempted to deposit seven different checks received following the resale of seven different cars. *Id*. at 537-38. Four of those checks, drawn on Rokabil Motor's Talbot Bank account (the "Talbot Bank checks"), were dishonored for insufficient funds. *Id*. The three remaining checks, signed by Albertson and drawn on an account at Queenstown Bank of Maryland in the name of RMC Holdings (the "Queenstown Bank checks"), were dishonored due to the placement of stop payment orders. *Id*. at 538, 541.[2] Albertson was thereafter charged and convicted of four counts of passing bad checks with knowledge of insufficient funds for the Talbot Bank checks, and three counts of passing bad checks with intent to stop payment for the Queenstown Bank checks. *Id*. at 535-36, 558, 564-65.[3] Albertson was

[2] The Talbot Bank checks were for the following resales: (1) Check Number 2568, in the amount of $2,675, for a Mazda Protégé; (2) Check Number 2582, in the amount of $3,300 for a Pontiac Bonneville; (3) Check Number 2583, in the amount of $2,650 for a Saturn; and, (4) Check Number 2584, in the amount of $3,250 for a Nissan Altima. *Albertson*, 212 Md. App. at 537. Check Number 2568 was uttered on September 22, 2009, and the remaining checks were uttered on September 28, 2009. *Id*. The Queenstown Bank checks were for the following: (1) Check Number 1001, in the amount of $5,500 for a Honda Civic; Check Number 1003, in the amount of $3,600 for a Ford Ranger; and, (3) Check Number 1004, in the amount of $3,100 for a Dodge Caravan. *Id*. at 538. These three checks were uttered on October 9, 2009. *Id*.

[3] Albertson was charged under Md. Code (2002, 2012 Repl. Vol.) § 8-103(a) and (b), respectively, of the Criminal Law Article ("CL"), which provides, in pertinent part:

> (a) A person may not obtain property or services by issuing a check if:
>
> (1) the person knows that there are insufficient funds with the drawee to cover the check and other outstanding checks;
>
> (2) the person intends or believes when issuing the check that payment will be refused by the drawee on presentment; and

sentenced to an aggregate unsuspended sentence of six months, ordered to pay restitution, and was placed on supervised probation for five years. *Id*. at 535-36.

On appeal to this Court, we reversed Albertson's convictions with respect to the Talbot Bank checks on the grounds that the evidence was insufficient to prove Albertson intended to defraud Scherl. We held:

> We conclude that this evidence was insufficient to establish that appellant intended to defraud Scherl. The State's burden was to prove intent to defraud beyond a reasonable doubt, *i.e.*, to prove that no hold-check agreement actually existed. The State's case rested entirely on Scherl. But, Scherl did not recall whether there was any hold-check agreement, especially with respect to the four Talbot Bank checks. Indeed, his own testimony confirming that he held checks from time to time undermines any claim that there was no hold-check agreement in this case. Because there was no evidence before the jury that there was not a hold-check agreement, we are persuaded that the State failed to prove the requisite intent element in this case beyond a reasonable doubt. Accordingly, because the evidence was insufficient to prove intent, we shall reverse appellant's four convictions under CL § 8-103 (a).

Id. at 569.

> (3) payment of the check is refused by the drawee on presentment.
>
> (b) A person may not obtain property or services by issuing a check if:
>
> (1) when issuing the check, the person knows that the person or, in the case of a representative drawer, the person's principal intends, without the consent of the payee, to stop or countermand the payment of the check, or otherwise to cause the drawee to disregard, dishonor, or refuse to recognize the check; and
>
> (2) payment is refused by the drawee on presentment.

However, we upheld Albertson's convictions on the three Queenstown Bank checks because of preservation issues. *Id*. at 569. At trial, Albertson argued that the evidence was insufficient to show that he ordered the stop payment on these checks and/or that he had the authority to do so. *Id*. at 570. But, on appeal, Albertson abandoned that argument and instead asserted that the Queenstown Bank checks were replacement checks to cover a pre-existing debt, and that, therefore, they did not meet the statutory definition of obtaining "property or services." *Id*. Because these grounds were different than those raised at trial, we held that Albertson's sufficiency challenge to the three Queenstown Bank checks was unpreserved, leaving those convictions to stand as entered in the circuit court. *Id*. at 571.

Subsequently, Albertson filed a civil complaint against Scherl in the circuit court, alleging four counts of malicious prosecution with respect to only the Talbot Bank checks, the charges that were reversed for insufficiency of the evidence by this Court. After setting forth facts concerning the business relationship between Albertson and Scherl, including describing the aforementioned hold-check agreement, Albertson alleged, with respect to each of the four Talbot Bank checks, uttered in different amounts for different vehicles: (1) that Scherl instituted the criminal proceedings against him by filing charges in the District Court of Maryland for Talbot County; (2) that the prior proceeding on each count terminated in Albertson's favor when the counts were reversed for insufficiency of the evidence by this Court; (3) that, absent "the false testimony and misleading statements" by Scherl, there would not have been probable cause to bring the

criminal charges; (4) that Scherl not only instituted the false and misleading charges against Albertson maliciously and wantonly, but also the charges "were motived for a means other than bringing the Plaintiff to justice;" and, (5) Scherl's actions caused Albertson to sustain "attorney fees, loss of income, mental anguish, emotional pain and suffering, loss of liberties, and loss of companionship."

In lieu of an answer, Scherl filed a Motion for Dismissal and/or for Summary Judgment. After acknowledging that four of Albertson's seven criminal convictions for issuing bad checks were reversed by this Court, Scherl cited *Candelero v. Cole*, 152 Md. App. 190 (2003), for the proposition that Albertson's prior criminal proceeding did not terminate in his favor. As a termination in a plaintiff's favor is an essential element of a malicious prosecution claim, Scherl continued that Albertson's complaint failed as a matter of law. Scherl, therefore, moved to dismiss Albertson's complaint with prejudice.

Albertson responded to Scherl's Motion for Dismissal and/or for Summary Judgment by citing *March v. Cacioppo*, 185 N.E.2d 397 (Ill. App. Ct. 1962), and asking the circuit court to consider the four reversals with respect to the Talbot Bank checks separately in determining whether the prior proceeding terminated in his favor. Albertson further argued:

> In applying the four reasons of *March* to the present case; (1) counts 1-4 of the complaint have been decided in favor of the Plaintiff and coupled with the factual allegations there was not probable cause, (2) the present "case is not a collateral attack upon the previous judgment or decision of the court" and "not an effort to retry the case," (3) that the criminal action against the Plaintiff was unsuccessful and as a result suffered damages [sic], and, (4) the Court of Special Appeals already decided the charges "were not well brought and recovery in this case will not be contrary to the

court's finding." Quotes added as *March* mirrors the present case as to the commentary.

Scherl replied to Albertson's response, maintaining that the prior proceedings did not terminate in Albertson's favor, and that *March*, *supra*, was an Illinois case, not based on Maryland law. Albertson filed a counter-reply, contending, in essence, that the Illinois case of *March, supra,* was persuasive authority that could be considered by the circuit court in determining whether the prior proceeding terminated in Albertson's favor.

Thereafter, the circuit court granted Scherl's motion for summary judgment. However, after setting forth the grounds for summary judgment and the elements of a malicious prosecution claim, the court found as follows:

> Albertson conflates the Court of Special Appeals' determination that there was insufficient evidence to sustain a conviction with the concept of probable cause. Probable cause is a reasonable ground for the belief of guilt. *Haley v. State*, 398 Md. 106, 132 (2007). The function of the jury is to determine guilt. *Ehrlich v. State*, 42 Md. App. 730, 737-38 (1979). The determination that the State had offered insufficient proof to the jury does not mean that there was not probable cause to have brought the charge.
>
> Albertson urges that the Court defer disposition of the Motion for Summary Judgment pending discovery. However, he has not produced any facts through affidavit to show that his defense to the Motion for Summary Judgment is not available.

The court therefore granted the Motion for Summary Judgment, entered judgment in favor of Scherl, and ordered Albertson to pay all court costs. After Albertson's timely Motion to Reconsider Decision for Summary Judgment was denied, Albertson appealed to this Court.

DISCUSSION

On appeal, Albertson avers that the circuit court erred in granting Scherl's Motion for Dismissal and/or for Summary Judgment. Specifically, Albertson contends the circuit court erred: (1) by granting summary judgment on a ground not raised by the parties; (2) in considering an alternative ground, *i.e.*, probable cause, where Albertson argued that Scherl's misrepresentations to the police were the primary reason criminal charges were brought against him; and, (3) by not considering disputed facts in the light most favorable to the non-moving party, *i.e.*, Albertson.

In response, Scherl maintains his reliance on *Candelero*, *supra*, asserting that the prior criminal proceedings did not terminate in Albertson's favor. Scherl also, for the first time, responds that Albertson's convictions by a jury establish that there was, in fact, probable cause for the underlying charges. Accordingly, Scherl responds that the circuit court properly granted his Motion for Dismissal and/or for Summary Judgment.

On the merits, Maryland Rule 2-322(b) permits a party to file a motion asserting that the plaintiff's complaint fails "to state a claim upon which relief can be granted." In reviewing the grant of a motion to dismiss, "we must determine whether the complaint, on its face, discloses a legally sufficient cause of action," and we "presume the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom." *Fioretti v. Md. State Bd. of Dental Exam'rs*, 351 Md. 66, 71-72 (1998) (citations omitted).

Maryland Rule 2-501(f) governs motions for summary judgment and provides that 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." "The standard of review of a grant of summary judgment is whether the trial court was legally correct." *Poole v. Coakley & Williams Constr., Inc*., 423 Md. 91, 108 (2011) (quoting *Walk v. Hartford Cas. Ins. Co*., 382 Md. 1, 14 (2004)). Thus, "[b]ecause the decision turns on resolution of a legal issue, a trial court's grant of summary judgment is 'subject to a non-deferential review on appeal.'" *State v. Roshchin*, 446 Md. 128, 137-38 (2016) (quoting *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 554 (2011)). Similar to a motion to dismiss, "[t]he record is reviewed 'in the light most favorable to the non-moving party and [we] construe any reasonable inferences that may be drawn from the well-pled facts against the moving party.'" *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012) (quoting *Muskin*, 422 Md. at 554-55).

Albertson alleges that he was subject to malicious prosecution with respect to the four Talbot Bank checks. Generally, "[s]uits for malicious prosecution are viewed with disfavor in law and are to be carefully guarded against." O*ne Thousand Fleet Ltd. P'ship v. Guerriero*, 346 Md. 29, 37 (1997) (citation omitted). The elements of the claim are as follows:

> In order to succeed in a claim for malicious prosecution, the plaintiff must show (1) that a criminal proceeding was instituted or continued by the defendant against the plaintiff, (2) that the proceeding terminated in favor of the plaintiff, (3) the absence of probable cause for the proceeding, and (4) malice, meaning that a primary purpose in instituting the proceeding was other than that of bringing the plaintiff to justice.

DiPino v. Davis, 354 Md. 18, 54 (1999) (citations omitted).

Albertson now argues that the circuit court erred in granting summary judgment because it decided the merits of Scherl's motion on a ground not raised. Albertson cites *Davis v. Goodman*, 117 Md. App. 378 (1997), in support. In that lead poisoning case brought on behalf of a minor against the minor's family's landlord, the defendant landlord moved for summary judgment on the grounds that there was no evidence that the property was contaminated with lead. *Id*. at 388. After the plaintiff filed an affidavit from an expert that lead was found on the exterior of the house, the defendant responded by asserting there was no evidence that the minor had been exposed. *Id*. 389-90. After a hearing, the circuit court, *sua sponte*, granted the motion on grounds that were never raised, *i.e.*, whether the landlord had notice of the lead contamination. *Id*. at 391.

On appeal, this Court reversed the order granting summary judgment, explaining:

> As shown previously, the trial judge did grant summary judgment, based, in part, on the fact that the [landlord] did not have notice of the existence of lead paint on the interior of the premises. This fact, however, was never a ground for summary judgment advanced by the [landlord] in their summary judgment motion. A non-moving party is not required to respond to issues not raised by the moving parties. Put another way, a trial judge cannot, *sua sponte*, and without prior warning, appropriately grant summary judgment based on the plaintiff's failure to prove an element of his or her case if the defendant has not previously contended that the plaintiff's proof was deficient as to that element. The trial judge, therefore, should not have granted summary judgment based on plaintiff's failure to prove notice.

Id. at 394 (internal citations omitted).

Here, Scherl's Motion for Dismissal and/or Motion for Summary Judgment alleged that the criminal proceedings against Albertson did not terminate in Albertson's favor. Albertson's response, although briefly mentioning the phrase "probable cause,"

addressed Scherl's argument on the termination element. In its order, the court clearly stated that it was granting summary judgment (not dismissal). The court's order did not address the termination element, instead finding that there was probable cause for the original criminal charges against Albertson. We are persuaded that the court decided the merits of the motion on a different ground than was raised and argued by the parties. Accordingly, under *Davis*, the circuit court erred in granting summary judgment, and we shall remand this case for further proceedings.

Ordinarily, this would end our inquiry. Whereas the element of probable cause was not litigated by the parties, including whether there were disputed facts material to that element, it was error for the court to consider that issue, and our review of that issue is similarly constrained. *Kimmel v. SAFECO Ins. Co.*, 116 Md. App. 346, 354-55 (1997) ("Appellate courts generally review a grant of summary judgment based only on the grounds relied upon by the trial court") (citations omitted).

However, in this case before the circuit court, the parties raised the alternative question of whether the prior criminal proceeding terminated in Albertson's favor.[4] This appears to be a pure issue of law. This Court has recognized that:

[4] Neither the parties nor the court addressed the remaining two elements for a malicious prosecution claim, *i.e.*, whether Scherl "instituted" the criminal proceedings and whether Scherl acted with malice or for the primary purpose other than bringing the plaintiff to justice. As they were not raised below, we shall not consider these issues on appeal. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . .").

> If the alternative ground is one upon which the circuit court would have had no discretion to deny summary judgment, summary judgment may be granted for a reason not relied upon by the trial court. *Blades v. Woods*, 338 Md. 475, 478, 659 A.2d 872 (1995). It is only when the motion is based upon a pure issue of law that could not properly be submitted to a trier of fact, that we will affirm on an alternative ground. *Presbyterian Univ. Hosp. v. Wilson*, 99 Md. App. 305, 313-14, 637 A.2d 486 (1994), *aff'd*, 337 Md. 541, 654 A.2d 1324 (1995).

Davis, 117 Md. App. at 395 n.3; *accord Shader v. Hampton Imp. Ass'n, Inc.*, 217 Md. App. 581, 604 (2014), *aff'd*, 443 Md. 148 (2015).

Generally, "[t]o subject a person to liability for malicious prosecution, the criminal proceedings must have terminated in favor of the accused." Restatement (Second) of Torts § 658 (1977). The Supreme Court has considered this element, stating:

> One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused. [W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 888, at 874 (5th ed. 1984)]; *Carpenter v. Nutter*, 127 Cal. 61, 59 P. 301 (1899). This requirement "avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the claimant [sic] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." 8 S. Speiser, C. Krause, & A. Gans, *American Law of Torts* § 28:5, p. 24 (1991). Furthermore, "to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit." *Ibid*. This Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack[.]

Heck v. Humphrey, 512 U.S. 477, 484-85 (1994) (citations and footnote omitted) (considering a claim under 42 U.S.C. § 1983).

This Court has concluded that:

> [A] criminal proceeding is terminated when any of the following occur: a judge discharges the accused at a preliminary hearing, "refusal of a grand jury to indict, 'the formal abandonment of the proceedings by the public prosecutor,' quashing of an indictment or information, acquittal, or a final order in favor of the accused by a trial or appellate court." *State v. Meade*, 101 Md. App. 512, 530, 647 A.2d 830 (1994) (quoting Restatement (Second) of Torts, § 659). If the facts are undisputed about the termination of a proceeding, then a "court has no need for a finding of the jury." *Palmer Ford, Inc. v. Wood*, 298 Md. 484, 498-99, 471 A.2d 297 (1984).

Candelero, 152 Md. App. at 199-200.

The issue presented here is whether a malicious prosecution claim for the purpose of a proceeding is terminated in favor of the plaintiff, when some of the plaintiff's original criminal charges were reversed on appeal, while others were affirmed.

In *Candelero, supra*, relied upon by Scherl, Brenda Candelero was arrested and charged with various offenses following a traffic stop in Baltimore County by Trooper Christopher Cole of the Maryland State Police. *Id*. at 192. After all the charges except disobeying the lawful order of a police officer were *nol prossed* by the State at trial, Candelero filed a complaint against Trooper Cole, the Maryland State Police, and the State of Maryland ("Appellees"), alleging, *inter alia*, malicious prosecution. *Id*. at 193. Pertinent to this discussion, the Appellees filed a motion for summary judgment because the arrest and the criminal proceeding were based on probable cause. *Id*. The court granted the motion, primarily on the ground that Candelero had been convicted "for some event, some crime arising out of that event." *Id*. at 194. On appeal, this Court affirmed on the grounds that the prior criminal proceedings were not terminated in Candelero's

favor. *Id*. at 200. We considered the entirety of the criminal proceedings against Candelero:

> The malicious prosecution claim adopted "all factual allegations of the previously numbered paragraphs" and referred to the "charges [TrooperCole] lodged against . . . Candeloro [sic]," but did not identify the charges resulting from the incident. The charges included assault, resisting arrest, disorderly conduct, wearing and carrying mace, and disobeying the lawful order of a police officer. At trial, the State *nolle prossed* all of the charges except disobeying the lawful order of a police officer, for which Candeloro [sic] was convicted. Because the outcome of the proceeding was not favorable to Candeloro [sic], the malicious prosecution claim failed as a matter of law.

Id.

However, a year later, we reached a different result when considering this question. In *Hines v. French*, 157 Md. App. 536 (2004), Mary Ann Hines was stopped while driving her vehicle on Route 40 by Deputy Sheriff John French, of the Harford County Sheriff's Department, on suspicion of being involved in a prior hit-and-run accident. *Id*. at 545-47. Although the facts of the stop were disputed, ultimately, Hines was charged with failure to drive in a designated lane, eluding police, and negligent driving. *Id*. at 547. In the District Court for Harford County, the parties agreed to place the eluding charge on the stet docket, a *nolle prosequi* was entered on the negligent driving charge, and Hines was eventually found guilty by the court of failure to drive in a designated lane. *Id*. at 548.

Hines subsequently filed a complaint against Deputy Sheriff French, other officers, the Sheriff's Department, Harford County, the State of Maryland, and various other entities, alleging, *inter alia*, malicious prosecution. *Id*. at 544. The circuit court

granted summary judgment on that claim. *Id*. at 553. On appeal, this Court considered the three original charges, and their associated disposition, separately. *Id*. After setting forth the elements of a malicious prosecution claim, we concluded that two of the three charges had not been resolved in Hines's favor. *Id*. Hines was convicted of failing to drive in a designated lane, and the stet for the eluding charge was not a verdict in favor of Hines. *Id*.

However, this Court considered the *nol pros* of Hines's charge of negligent driving separately from the other two charges. *Id*. at 554. Recognizing that "a *nol pros* acts as a dismissal," we concluded that the prosecution of that separate charge was in Hines's favor. *Id*. Therefore, one of the four elements of malicious prosecution, at least for the negligent driving charge, was satisfied. *Id*.

Although not precisely on point, *Candelero* and *Hines* offer conflicting answers on the question of determining whether prior criminal proceedings terminate in a person's favor when there are multiple counts with differing outcomes. Generally, conflicts between opinions of courts with coordinate jurisdiction are resolved by the court of last resort, in this case, the Maryland Court of Appeals. *See, e.g.*, *Conway v. State*, 15 Md. App. 198, 213 (1972) (noting a "divergence of opinion" concerning in the state of the law at the time with respect to photographic identifications, and that the court of last resort for the federal circuits is the United States Supreme Court). However, absent a case from the Maryland Court of Appeals, none of which has been found in our research or otherwise identified by the parties, we may consider other persuasive authority. *See Cates v. State*,

21 Md. App. 363, 372 ("The rulings of courts of other states are classified not as binding, but as persuasive authority. If the reasoning which supports them fails to persuade, they are no authority at all"); *see also Reeves v. State*, 192 Md. App. 277, 295 n.5 (2010) (noting the court's consideration of persuasive out-of-state authority); *Ohm v. Ohm*, 49 Md. App. 392, 396 n.2 (1981) (noting, in a divorce case, that out-of-state authority from community property states may be considered in Maryland, an equitable distribution state, "because the concepts in all the jurisdictions are similar").

Albertson directs our attention to *March, supra*, 185 N.E.2d 397. There, a landlord, John Cacioppo, brought an action against one of his tenants, Walter March, for unpaid rent for the month of November and the following six months. *Id*. at 399. An initial judgment in the entire amount of $1,370 was obtained, and March's wages were garnished. *Id*. That amount was reduced to $175, the amount due only for November's rent. *Id*. Subsequently, March filed a malicious prosecution case claiming that Cacioppo was wrongfully claiming November's rent because it was agreed that November was covered by an earlier deposit paid when March originally became Cacioppo's tenant. *Id*.

On appeal from the circuit court's order dismissing March's complaint, the appellate court considered the facts favorable to March and concluded that there were pleaded facts sufficient to show probable cause and malice to support the malicious prosecution claim. *Id*. at 399, 401-02. On whether the prior case terminated in March's favor, the court recognized that there was still a judgment against March for the November rent in the amount of $175. *Id*. at 402. That portion of the judgment was not

in March's favor. *Id*. However, pertinent to Albertson's claim here, the Illinois appellate court stated:

> There has been, however, a final and favorable determination of a substantial portion of the suit. The suit, under the factual situation prevailing, is divisible into two parts: the rent for the month of November and the rent for the following six months. The former is still in controversy; the latter has been resolved. It would not be just to hold that the defendants must be absolved from liability simply because a small part of their suit might end in judgment for them, when the far larger part, the equivalent of a separate claim, has been decided against them, and when there is reason to believe that this separate claim was prosecuted with malice and without probable cause.

Id.

Although *March* helps Albertson here, we are not persuaded that it offers an adequate analysis of this issue. Instead, we conclude that *Kossler v. Crisanti*, 564 F.3d 181 (3d Cir. 2009), is most persuasive. In that case, after a fight erupted in a parking lot outside a Pittsburgh bar, Steven Crisanti, an off-duty police officer working as uniformed security at the bar, and Michael Kossler engaged in an altercation that resulted in Kossler being charged with aggravated assault, disorderly conduct, and public intoxication. *Id*. at 184. Kossler was tried by the court and was found not guilty of aggravated assault and public intoxication, but was found guilty of disorderly conduct and fined one hundred dollars. *Id*. at 185.

Subsequently, Kossler filed a lawsuit against Crisanti and the bar for malicious prosecution, citing 42 U.S.C. § 1983 and Pennsylvania common law. *Id*. When the case finally was ripe for adjudication in the United States Court of Appeals for the Third Circuit, the issue presented was whether Kossler could prevail on this claim by

establishing the favorable termination of his underlying criminal proceeding. *Id*. at 186. The Court initially observed that the purpose of this element was to avoid "the possibility of the claimant [sic] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Id*. at 187 (quoting *Heck*, *supra*, 512 U.S. at 484 (alteration in original) (internal quotation marks omitted)). Consistent with that purpose, the Court noted that "a prior criminal case must have been disposed of in a way that indicates the *innocence of the accused* in order to satisfy the favorable termination element." *Id*. at 187 (citations and footnote omitted) (emphasis added).

The Court then stated that this case was one of first impression because Kossler was relying on his acquittal on one charge out of three to show that the prior proceeding terminated in his favor. *Id*. at 187-88. The Court considered this novel question to be problematic, explaining:

> [Kossler's] acquittal is accompanied by a contemporaneous conviction at the same proceeding. We are thus faced with a question of first impression in this Circuit: Whether acquittal on at least one criminal charge constitutes "favorable termination" for the purpose of a subsequent malicious prosecution claim, when the charge arose out of the same act for which the plaintiff was convicted on a different charge during the same criminal prosecution. On these facts, we conclude that this question should be answered in the negative. As an initial observation, we note that various authorities refer to the favorable termination of a "proceeding," not merely a "charge" or "offense." *See* [*Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003)]; [*Haefner v. Burkey*, 626 A.2d 519, 521 (Pa. 1993)]; W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 119 (5th ed.1984); 52 Am.Jur.2d *Malicious Prosecution* § 32 (Supp. 2007) ("In the context of a malicious prosecution action, to determine whether a party has

> received a favorable termination in the underlying case, the court considers the *judgment as a whole* in the prior action; . . . the termination must reflect the merits of the action and the plaintiff's innocence of the *misconduct* alleged in the lawsuit." (Emphasis added [in *Kossler*])). Therefore, the favorable termination of some but not all individual charges does not necessarily establish the favorable termination of the criminal proceeding as a whole.

Id. at 188.

The Court continued that "upon examination of the entire criminal proceeding, the judgment must indicate the plaintiff's innocence of the alleged misconduct underlying the offenses charged." *Id*. This required a consideration of the totality of the circumstances. *Id*. The Court explained:

> The favorable termination element is not categorically satisfied whenever the plaintiff is acquitted of just one of several charges in the same proceeding. When the circumstances - both the offenses as stated in the statute and the underlying facts of the case - indicate that the judgment as a whole does not reflect the plaintiff's innocence, then the plaintiff fails to establish the favorable termination element.

Id.

The Court then applied this test to the charges and their resolution by the trial court, holding that the prior criminal proceeding did not terminate in Kossler's favor:

> On this indivisible factual basis, [the District Court Judge] found Kossler guilty of disorderly conduct and imposed a fine upon him. These particular circumstances indicate that the judgment as a whole that resulted from the bench trial, which resolved all the charges aimed at punishing Kossler's role in the altercation, did not reflect Kossler's innocence on the night of the fight. As a result, Kossler's acquittal on the aggravated assault and public intoxication charges cannot be divorced from his simultaneous conviction for disorderly conduct when all three charges arose from the same course of conduct. Therefore, we must conclude that the state criminal proceeding - the entirety of which resolved Kossler's guilt and punishment for intentionally making physical contact with a city police

> officer after consuming alcohol - did not end in Kossler's favor, even when we view the facts in the light most favorable to him.

Id. at 189.

Thus, in determining whether a prior proceeding terminated in the favor of a plaintiff asserting a malicious prosecution claim, *Kossler* instructs that a court should consider a plaintiff's overall innocence of the prior charges, as an entire course of conduct, when that course of conduct arose from the same underlying act(s). We conclude that this is the proper test to apply in this case. Therefore, although Albertson's entire course of conduct might be characterized as some sort of scheme to pass bad checks, it is clear that each of the acts charged against Albertson in the original criminal proceeding are distinct. Indeed, the separate Talbot Bank and Queenstown Bank charges all related to seven different checks, for seven different cars, uttered on at least three different days.

Accordingly, as the issue of whether the prior criminal proceedings terminated in Albertson's favor is a pure question of law, we hold that the proceedings for the Talbot Bank checks terminated in his favor and that element of his malicious prosecution claim is satisfied. And, as explained above, the court erred in granting summary judgment, *sua sponte*, by concluding that there was probable cause to support the Talbot Bank charges, as provided in *Davis, supra*, when that issue was not raised in Scherl's Motion for

Dismissal and/or for Summary Judgment or adequately litigated by the parties in the circuit court.[5]

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY VACATED AND CASE IS REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

[5] We note that there are Maryland appellate cases that have addressed probable cause when a prior proceeding terminated in a plaintiff's favor. *See, e.g., Zablonsky v. Perkins*, 230 Md. 365, 368-69 (1963) ("The conviction of the accused by a magistrate or trial court although reversed by an appellate tribunal, conclusively establishes the existence of probable cause, unless the conviction was obtained by fraud, perjury or other corrupt means") (quoting Restatement, Torts, § 667); *Brown v. Dart Drug Corp.*, 77 Md. App. 487, 493 (1989) (observing that "a civil defendant may not avoid liability for malicious prosecution by relying on the independent judgment of a prosecutor or attorney unless that defendant has made a full disclosure of all material facts relative to the charges being made") (citations omitted).