Circuit Court for Anne Arundel County
Case No. C-02-CV-16-002647

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2323

September Term, 2018

CITY OF ANNAPOLIS, *et al.*

v.

CARLA CLEMENS

Fader, C.J.,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: June 17, 2020

On August 20, 2013, appellant Corporal Andrew Ascione[1] of the Annapolis Police Department took Carla Clemens to the Anne Arundel Medical Center ("AAMC") for an involuntary mental health evaluation. Nearly three years later, Ms. Clemens filed a Complaint and Demand for Jury Trial in the Circuit Court for Anne Arundel County against Corporal Ascione, Anne Arundel Medical Center and nine medical providers, the City of Annapolis, and the Annapolis Police Department.[2] Her claims included false imprisonment, assault, battery, deprivation of constitutional rights under Article 24 of the Maryland Declaration of Rights, and Intentional Infliction of Emotional Distress.

A jury returned a verdict in favor of Ms. Clemens on a single count of false imprisonment and awarded $10,000 in damages. The City of Annapolis ("City") and Corporal Ascione[3] (collectively, the "appellants") filed a timely appeal, presenting four questions which we have rephrased and reordered:

[1] Andrew Ascione was an Officer First Class on August 20, 2013. He was promoted to the rank of Corporal prior to trial. We will refer to him as Corporal Ascione.

[2] Before the trial, Ms. Clemens settled her claims with Anne Arundel Medical Center and the nine medical providers.

[3] In her Complaint and Demand for Jury Trial, Ms. Clemens sued the City on counts of vicarious liability and respondeat superior. The City continues to be a party in the case. In regard to the Local Government Tort Claims Act ("LGTCA"), we have explained:

> The LGTCA provides local government employees an "indirect statutory qualified immunity" from liability for tortious acts or omissions so long as they are acting within the scope of their employment. A plaintiff must sue the allegedly negligent employee directly; the LGTCA does not authorize suit against the local government for its employee's actions. Nevertheless, the plaintiff "*may not execute against an employee* on a judgment rendered

I. Did the Circuit Court abuse its discretion in denying defendants' motion to dismiss with prejudice for insufficiency of service of process and for lack of prosecution?

II. Did the Circuit Court err in prohibiting defendants their right to impeach plaintiff?

III. Did the Circuit Court err in denying defendants' motion for judgment without the opportunity for argument, and defendants' motion for judgment notwithstanding verdict?

IV. Did the Circuit Court err in the management of the jury's verdict form as to count I for false imprisonment?

We answer the first two questions in the negative, and questions three and four in the affirmative.

FACTUAL & PROCEDURAL BACKGROUND

On August 20, 2013, Bonnie Simonds called 911 and reported the following:

> I have a friend who[']s] more of an acquaintance than a friend, I haven't talked to her in a long time, but I did just talk to her tonight. And she is totally distraught, she's in tears, she said that she's avoiding my calls

(…continued)

> for tortious acts or omissions committed by the employee within the scope of employment," unless the employee is found to have acted with what the statute refers to anachronistically as "actual malice." CJP§ 5–302(b).
>
> * * *
>
> Instead, the plaintiff may recover against the local government. . . . The judgment is not even entered against the local government; it remains nominally against the employee.

Holloway-Johnson v. Beall, 220 Md. App. 195, 207–11 (2014), *aff'd in part, rev'd in part*, 446 Md. 48 (2016) (cleaned up).

The LGTCA, subject to an exception not applicable in this case, requires the local government "to provide a defense for any act arising within the scope of the [employee's] employment or authority." CJP § 5–507(b)(1).

> because she didn't want to have this conversation with me. Um she said that everyone hates her, she can't hold a job, um there's nothing good that is ever going to happen in her life, and she's going to kill herself or get in her truck and drive off and if I hear from her in a week that means that she didn't do it. But I'm just really, really concerned about this woman, like I said I don't know her very well.[4]

When Corporal Ascione responded to Ms. Simonds's home in response to the 911 call, she identified Ms. Clemens as the person who had "called her in absolute hysterics." In her written statement, she stated:

> I received a text message from an acquaintance at 7:30 pm from Carla Clemens. She sounded depressed. I called her and we spoke for approx[imately] 10 minutes. She was in tears, distraught and out of control. She said she was either going to get in her truck and drive or kill herself!
>
> I called suicide hotline and then 911. I tried calling her. She didn't answer or return my messages. I am very concerned about Carla's welfare mentally. I think she needs psychiatric help so that she does not harm herself!

After speaking with Ms. Simonds, Corporal Ascione, along with Officer Robert Moore, drove to the home of Ms. Clemens's parents, Barbara and Robert Clemens. The officers informed Ms. Clemens's mother that "they had a call or something to that effect

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[4] Ms. Clemens recalled the call differently. She testified that she was not "hysterical" or "utterly out of control," and did not convey any suicidal thoughts:

> One of my favorite sayings is I'm going to get in my truck and drive far away and find a new life. And everybody knows that I love (indiscernable 10:15:53).
>
> * * *
>
> I would have never, ever, ever conveyed anything other than I think I'm going to get in [an] SUV and drive for a vacation and find a new life.

[and] that someone was worried about [Ms. Clemens] and couldn't find her." The officers asked the parents to "get in touch with them if [Ms. Clemens] happened to get in touch."

Robert Clemens gave Corporal Ascione the address of Ms. Clemens's apartment in Annapolis, and agreed to meet him there. Upon arrival, Corporal Ascione knocked on the door. When there was no response, he asked an apartment employee to allow him entry to the apartment, where he, along with Officer Moore and a Sergeant Kandtado, conducted a welfare check. Ms. Clemens was not there.

Ms. Clemens testified that she was at a pier near her parent's home and later at a friend's home when the police were looking for her. During that time, she "left [her] phone in the car" because she "wasn't expecting any calls." On her way home, she received a message from her parents that they were looking for her. She called them immediately and let them know where she was.

Corporal Ascione was preparing a missing-persons report when he heard from Ms. Clemens's mother. She told him she had heard from Ms. Clemens and that she was fine and on her way home. Corporal Ascione then drove to Ms. Clemens's apartment, where he found her in her vehicle with the lights on and the motor running in the travel area of the parking lot.

Ms. Clemens testified that when she saw Corporal Ascione, she identified herself and told him "I'm fine" and "I want to go inside." He asked her to move her vehicle to a designated parking space, which she described as "very dark."

According to Ms. Clemens:

> He asked me a couple questions. He asked me if I was okay and I said yes. He asked me if I had been drinking. I said yes. He asked me where I had come from. I said I came from a friend's house – a friend's house, I enjoyed a couple of glasses of wine with my friend and now I'm here. These are the keys to my apartment building, which is right there. And I am home and I want to go home, I'm tired. I had a long day.
>
> * * *
>
> Officer Ascione asked me, I think he asked me if I had ever been institutionalized or had a mental problem or was I – something to that effect and I – I – I felt absolutely terrified and very intimated from him and I got very upset.[5] And I started to cry. And he took his handcuffs and slapped them on my wrists and threw me into the back of his vehicle and handcuffed me to the door so fast, it happened in the blink of the eye.

Corporal Ascione testified that, when he asked if she had relayed suicidal thoughts to Ms. Simonds, Ms. Clemens began to "break[] down in tears," which he took as an indication that "maybe [it] did happen." According to Officer Ascione, Ms. Clemens responded that "Bonnie Simon[d]s hasn't cared about her in years and then asks, you know, the rhetorical question of, why does she care now." Her response to his question

[5] On cross-examination, she added:

> He may have asked me whether or not I had ever sought out counseling or – I don't remember his specific words, but I remember what my answer was. And that was yes, after my breakup with my fiancé, whom I was with for 18 years, I had a very, very horrible breakup and I had a lot of anxiety about that. And at some point in time, which I believe I said was maybe 11 years ago, now 16 years ago, I then wanted to talk to a professional to try to help me get over that anxiety and sense of loss.
>
> * * *
>
> I took myself to the hospital and I asked if I could speak to someone.

about what she said to Ms. Simonds did not sound to him "like a statement that's made by somebody who has had an individual false report something about them":

> So at this point I knew she needed to talk to somebody about this, whether it was, whether some sort of resource from the Department could be brought to bear or some, you know, if she'd be willing to go to the hospital on her own, you know, there are still options that are available.

But, when Ms. Clemens said she was going to her apartment and pushed him out of the way, he decided that "[t]ime [was] no longer on [his] side" and to take her into protective custody because "given the information [he] had at this point," he didn't think letting her into her apartment was "a viable option."[6] He handcuffed her behind her back, placed her into his vehicle, and drove her to AAMC.[7] She testified that, on the way to AAMC, she "screamed bloody murder."

At AAMC, Corporal Ascione prepared and signed a Petition for Emergency Evaluation stating that a previous petition had been filed and "granted" approximately "11 years ago." Ms. Clemens was released approximately eight hours later when her

[6] He stated that in the average person's home, "there are a lot of different means by which somebody can harm themselves."

[7] In challenging the actual-malice finding, appellants argue:

> [a]lthough [Ms. Clemens] testified that [Corporal] Ascione threw her into the police vehicle and hand cuffed her to the door, this testimony was not credible in light of Corporal Ascione's testimony that it is against police policy to handcuff a person in the front unless there is a medical reason to do so, and that it was not physically possible to handcuff anyone to the door on the police vehicle because of the absence of any mechanism on the door making that possible.

treating physicians and medical support staff determined that there were insufficient grounds to further restrain her for additional testing and evaluation.

Additional facts will be included in our discussion of the questions presented.

I.
Whether the Circuit Court Abused its Discretion in Denying Appellants' Motion to Dismiss.

Ms. Clemens filed her complaint on August 19, 2016, and writs of summons were issued on August 22, 2016. As of December 20, 2016, no defendant had been served. On March 7, 2017, the circuit court issued a Md. Rule 2-507 notice of contemplated dismissal. Ms. Clemens moved to defer dismissal on April 6, 2017. In her motion, she stated that she had been "unable to obtain proper service prior to the expiration of the original summonses." But she now had additional address information for "certain Defendants," and expected new summonses to be served "during the week of April 10-15, 2017." On April 14, 2017, the circuit court deferred dismissal of her Complaint for four months.

The AAMC defendants filed an answer on June 2, 2017, and, although the appellants had not been served, the circuit court issued a Scheduling Order on June 22, 2017. On September 11, 2017, approximately three weeks after the four months provided in the April 14, 2017 order had passed, the appellants filed a motion to dismiss for insufficiency of service, arguing that Ms. Clemens had, without any "apparent or justified reason and without good cause" failed to serve the appellants for over thirteen months

after the filing of the complaint. Approximately four weeks later Ms. Clemens served the appellants on October 10, 2017.

The hearing on the motion to dismiss was held on December 19, 2017. The motion court expressed confusion as to why there had been a delay in getting a trial date when the complaint had been filed in August of 2016. Ms. Clemens's counsel explained it was "[b]ecause of service on the City" and its motion to dismiss. In addition, counsel stated that a settlement with AAMC had been negotiated, which they "had hoped would end the case in its totality." The court denied the motion to dismiss, finding that the appellants could not "articulate any prejudice" as a result of Ms. Clemens's failure to effect service.

Standard of Review

Md. Rule 2-507(e) provides that, if within 30 days after the issuance of a notice of contemplated dismissal, the plaintiff moves to defer dismissal, the court may, for good cause shown, defer entry of the order of dismissal. The "decision to grant or deny . . . dismissal [under Rule 2-507] is committed to the sound discretion of the trial court," and will be "overturned on appeal only 'in extreme cases of clear abuse.'" *Reed v. Cagan*, 128 Md. App. 641, 648 (1999) (quoting *Stanford v. District Title Ins. Co.*, 260 Md. 550, 555 (1971))." It is "an abuse of discretion where no reasonable person would take the view adopted by the [trial court] . . . or when the court acts without reference to any guiding principles." *Hariri v. Dahne*, 412 Md. 674, 687 (quoting *Wilson v. John Crane, Inc.*, 385 Md. 185 (2005) (internal quotation marks omitted).

Contentions

Appellants assert six reasons why the motion court abused its discretion in denying the motion to dismiss. First, it failed to evaluate whether Ms. Clemens had shown good cause for the lack of diligence with respect to service of process. Second, it disregarded what should be a "public demand for prompt resolution of litigation." *Reed v. Cagan*, 128 Md. App. 641, 646 (1999) (citing *Langrall, Muir & Noppinger v. Gladding*, 282 Md. 397, 400 (1978)). Third, it failed to apply the correct legal standard in determining whether the defendants were prejudiced by Ms. Clemens's lack of diligence. Fourth, it did not allow for issuance of another Scheduling Order although the original one was issued in error because appellants had not been served with process. Fifth, it impermissibly allowed its opinion of the merits of the case to influence the decision. And, sixth, it failed to consider their assertion that Ms. Clemens was in contempt of the deferred dismissal order.

Ms. Clemens responds that the court correctly denied the motion to dismiss because appellants could not demonstrate how they were prejudiced by the delayed service. In her view, the City "convolutes" the action taken against it and Corporal Ascione with the action against the "lead Defendants," i.e., the AAMC and the nine individual medical providers she had "had difficulty serving."

Analysis

Rule 2-507 provides:

> (b) For Lack of Jurisdiction. An action against any defendant who has not been served or over whom the court has not otherwise acquired jurisdiction

> is subject to dismissal as to that defendant at the expiration of 120 days from the issuance of original process directed to that defendant.
>
> . . . .
>
> (e) Deferral of Dismissal. On motion filed at any time before 30 days after service of the notice, the court for good cause shown may defer entry of the order of dismissal for the period and on the terms it deems proper.

The decision of "[w]hether to dismiss rests in the sound discretion of a trial judge in the first instance, based on his or her weighing of the balance of the rights, interests, and reasons of the parties for the delay and the public demand for prompt resolution of litigation. Dismissal is not an automatic remedy for delayed service." *Hariri v. Dahne*, 412 Md. 674, 686–87 (2010) (quoting *Flanagan v. Dept. of Human Resources, Baltimore City Office of Child Support Enforcement Ex Rel. Baltimore City Dept. of Social Servs.*, 412 Md. 616 (2010)) (internal citation omitted).

Under Rule 2-507(e), a court may defer dismissal of a case when "the delay is not completely unjustified" and did not "substantially prejudice" the defendant. *Reed*, 128 Md. App. at 648. We have explained:

> The test under the Rule is whether there is "good cause" to defer dismissal and, in applying that test, there are several factors that a court must consider, weigh, and balance. Two factors pertain to the status and conduct of the plaintiff: (1) is the plaintiff currently ready, willing, able, and desirous of proceeding with prosecution of the case, and (2) was there any justification for the delay?
>
> From the defendant's perspective, the court must consider whether the defendant "has suffered serious prejudice because of the delay, so as to impede substantially his [her, or its] ability to defend the suit." *Id.* at 308. Where appropriate, the court must take into account that the defendant also has a responsibility "to promote the orderly resolution of litigation" and may not "sit back and allow the prescribed period under the Rule to pass in

> the hope that the court will dismiss the case irrespective of the vitality of the litigation." *Id.* at 309. Thus, where the defendant claims prejudice because of the plaintiff's delay, "the trial court must include as a consideration in the weighing process the efforts made by the defendant to secure a resolution of the case." *Id.* at 308–09.

Spencer v. Estate of Newton, 227 Md. App. 154, 160–61 (2016) (cleaned up).

When he was asked about the delay in service in this case, Ms. Clemens's counsel responded:

> [T]he last delay and the primary defendant was the [AAMC] and what we did in that time period between April and September was work out [a] settlement with those people that I had hoped would end the case in its totality. It didn't. But, we have taken 10 other defendants out of the case thereby significantly making the case easier to deal with.

Appellants posited that they were prejudiced because they were unable to participate in discovery and that service occurred after the date specified to identify experts for trial. But, as the court observed, they had made no effort to conduct discovery after they were served.

According to the court, "this case has been pending for over a year" and the appellants "just opted to . . . put all its eggs in one basket by thinking this case might be dismissed." And that appellants could not "sit back and allow the prescribed period under the Rule to pass in the hope that the court will dismiss the case." *Powell* at 309. In short, we are not persuaded that the court abused its discretion in denying the motion to dismiss.

II.
Whether the Circuit Court Erred in Prohibiting the Defendants, for Impeachment Purposes, From Using Plaintiff's Emergency Evaluation Records

Produced by Plaintiff Pursuant to a Trial Subpoena Served on Her by City Defendants.

At trial, Ms. Clemens testified that, on the evening in question, she had half of "a plastic 8-ounce glass" of wine at the community pier and two additional glasses of wine later at her friend's house. During Corporal Ascione's testimony, counsel for the City tried to impeach Ms. Clemens's credibility based on what he alleged was a "prior inconsistent statement" in her emergency evaluation medical records. The statement was "an oral statement to hospital staff that she had only one glass of wine on that day."

Ms. Clemens's counsel objected, and a bench conversation followed:

> [APPELLANTS' COUNSEL]: (Indiscernible 11:37:26) provided by her pursuant to a subpoena and via the Medical Center (indiscernible 11:37:33), I used a trial subpoena where I asked her to give me any records she had in her possession and this was in the folder that was given to me. She's (indiscernible 11:37:41), she filed a suit claiming her mental health is (indiscernible 11:37:52) — you know, damages for, you know, concerns that she's having with her mental health. And she's described to (indiscernible 11:37:55) testimony something to the effect. I'm not sure why I can't ask her the questions, especially if it's for impeachment purposes or impeachable.
>
> [MS. CLEMENS'S COUNSEL]: Your Honor, he's got medical records that are not authenticated. He's not an expert to do it.
>
> He's got to have somebody come in here and interpret them, he's not capable of interpreting them.
>
> The trial court sustained the objection.

Standard of Review

The Court of Appeals has explained:

> Our standard of review on the admissibility of evidence depends on whether the "ruling under review was based on a discretionary weighing of

> relevance in relation to other factors or on a pure conclusion of law." *Parker v. State*, 408 Md. 428, 437 (2009) (quoting *J.L. Matthews, Inc. v. Md.–Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 92 (2002)). Generally, "whether a particular item of evidence should be admitted or excluded is committed to the considerable and sound discretion of the trial court" and reviewed under an abuse of discretion standard. *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594, 619 (2011) (internal quotation marks omitted). However, we determine whether evidence is relevant as a matter of law. *State v. Simms*, 420 Md. 705, 725 (2011). The *de novo* standard of review applies "[w]hen the trial judge's ruling involves a legal question." *Parker*, 408 Md. at 437. Although trial judges have wide discretion "in weighing relevancy in light of unfairness or efficiency considerations, trial judges do not have discretion to admit irrelevant evidence." *Simms*, 420 Md. at 724.

Perry v. Asphalt & Concrete Servs., Inc., 447 Md. 31, 48 (2016) (cleaned up).

Contentions

Appellants contend that the "prior inconsistent statement was material because of the obvious difference, which the jury can consider from personal experiences, that one glass of wine and three glasses of wine can have on memory and judgment." Because Ms. Clemens produced the records pursuant to a trial subpoena without objection, they argue that the statements contained therein were admissible for impeachment purposes.

On appeal, Ms. Clemens's contentions are directed less at authentication and more toward the levels of hearsay contained in "the medical records [appellants] sought to use." She argues that the sections appellants would use for impeachment involve one person telling another person that she said something and another person "transcribing that information."

Analysis

We need not determine the appropriateness of the medical records for impeachment purposes to resolve the question before us. We will instead assume, without deciding, that the medical records could have been used with compliance with Md. Rule 5-613(a).

Md. Rule 5-613(a) provides:

> Examining Witness Concerning Prior Statement. A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.

In *Canela v. State*, 193 Md. App. 259, 303 (2010), *rev'd on other grounds*, *Perez v. State*, 420 Md. 57 (2011), we held that Md. Rule 5-613 did not apply when defense counsel attempted to introduce a prior statement for impeachment purposes and the declarant was not on the stand. We explained:

> Nothing in Md. Rule 5–613(a) is of aid to the appellants. By its plain terms, Rule 5–613(a) would be applicable only if [the declarant] was on the stand and counsel was attempting to *impeach her* about a contradictory prior statement.

Id. at 303.

Here, when appellants attempted to impeach Ms. Clemens with her prior statement, she was not on the stand. And, when she was, she was not shown the medical

records, and given an opportunity to explain or deny the statement.[8] We perceive neither error nor an abuse of discretion in the court's ruling.

III.
Whether the Circuit Court Erred in Denying Appellants' Motion for Judgment and for Judgment Notwithstanding the Verdict Based on the Absence of Evidence Legally Sufficient to Support a Finding of Actual Malice.[9]

Standard of Review

The standard of review of a denial of a motion for judgment notwithstanding the verdict is the same as the standard of review of a court's denial of a motion for judgment: "whether on the evidence presented a reasonable fact-finder could find the elements of

[8] Had she had the opportunity to explain, she might have stated that the medical records were not materially inconsistent with her trial testimony. At trial, she testified that she had two glasses of wine at a friend's house and, before that, a glass of wine in what she described as a "plastic tumbler." In the AAMC evaluation form, the authoring mental health consultant indicated that Ms. Clemens said she "had one glass of wine," and then later at another friend's home "she had a few glasses of wine."

[9] In *Holloway-Johnson v. Beall*, 220 Md. App. 195, 228–33 (2014), *aff'd in part*, *rev'd in part*, 446 Md. 48 (2016), Judge Moylan, writing for the Court, explained that in the twenty-year period beginning in 1972 and ending in 1992, "actual malice" was used to distinguish "malice," an intentional harmful act from "implied malice," or gross negligence, in regard to punitive damages. But then *Owens–Illinois v. Zenobia*, 325 Md. 420 (1992), eliminated gross negligence or "implied malice" as a basis for punitive damages, and, for that reason, the term "actual malice" was rendered a "linguistic fossil." *Id*. at 233. In other words, "malice" by any other name is still malice. CJP § 5–301(b) uses "actual malice" and defines it as "ill will or improper motivation"; the immunity instruction given to the jury states that "actual malice" is "conduct characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, or ill will" which is consistent with case law. We will continue to use "actual malice" in this opinion.

the cause of action by a preponderance of the evidence."[10] *Univ. of Maryland Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (2012) (citing *Washington Metro. Area Transit Auth. v. Djan*, 187 Md. App. 487, 491–92 (2009)).

The question presented is one of legal sufficiency of the evidence offered to prove actual malice. "[T]his is a question of law, which we review under a de novo standard of review. *Estate of Blair by Blair v. Austin*, —— Md. ——, No. 35, slip op. at 11 (Sept. Term 2019) (citing *Howell v. State*, 465 Md. 548, 561 (2019)). We will reverse the trial court "only if the facts and circumstances permit but a single inference" as it relates to the issue on appeal. *Id*. at 10 (quoting *Jones v. State*, 425 Md. 1, 30-31 (2012)).

Contentions

Appellants contend that the evidence was not legally sufficient to support the jury's finding that Corporal Ascione acted with actual malice when he took Ms. Clemens "into protective custody for emergency evaluation." They argue that Ms. Clemens "presented no rational reason why [Corporal] Ascione, given what he knew, would have suddenly formed feelings of hatred towards her or otherwise acted with actual malice

[10] Appellants complain that the court did not give them an opportunity to argue their motion for judgment and thereby restricted their ability to establish a record for purposes of a motion for judgment notwithstanding verdict." To be sure, the trial court ruled summarily on both parties' motion for judgment but from what is discernible in the transcript, appellants' motion for judgment was based on "the absence of . . . showing any malice," which is the basis for their motion for judgment notwithstanding the verdict. The court was obviously anxious to instruct the jury, and when it denied their motion, appellants' counsel did not ask for further argument and simply responded "Okay." Because the record was sufficiently established for our review, we perceive no harm.

towards her." And that "a plain reading of all evidence clearly fails to support the jury's verdict that there was no legal justification for taking [Ms. Clemens] into protective custody and that [Corporal] Ascione exhibited actual malice in doing so."

Ms. Clemens contends that the facts, viewed in a light most favorable to her, support an inference that Corporal Ascione acted with actual malice. She argues that Corporal Ascione's "plan to confront Ms. Clemens alone" coupled with his question to his supervisor, "are you okay with me just going ahead and evaling her if I make contact with her," would be sufficient alone to prove actual malice.

More particularly, she argues that Ms. Simonds was the "only person who provided any information to [Corporal] Ascione that Ms. Clemens might be a danger to herself" and that Corporal Ascione knew that Ms. Simonds was only an acquaintance of Ms. Clemens. She adds that Corporal Ascione attributed statements to Ms. Simonds in his official report regarding a prior psychiatric evaluation at AAMC that Ms. Simonds did not make. According to Ms. Clemens, Corporal Ascione "simply made up a statement and attributed it to Ms. Simonds in order to support his unilateral decision" to have her evaluated.

Analysis

Ms. Clemens had the burden to prove "actual malice" by a preponderance of the evidence. In the absence of direct evidence, it could be established by circumstantial evidence supporting "a reasonable and probable inference of actual malice to be

drawn."[11] *Henderson v. Maryland Nat. Bank*, 278 Md. 514, 522 (1976). That burden cannot be sustained by "a mere scintilla of evidence, amounting to no more than surmise, possibility, or conjecture." *Cavacos v. Sarwar*, 313 Md. 248, 259 (1988) (quoting *Ford v. Bradford*, 240 Md. 240, 247 (1965)). To be legally sufficient, the evidence must "serve[] to prove a fact or permit[] an inference of fact that could enable an ordinarily intelligent mind to draw a rational conclusion therefrom." *Id.* at 259 (internal citations and quotation marks omitted).

In challenging Corporal Ascione's actions in this case, Ms. Clemens questions his entry into her apartment without a warrant, and throughout her brief, she speaks in terms of arrest and incarceration,[12] all of which invokes Fourth Amendment reasonableness

[11] Maryland Civil Pattern Jury Instructions ("MPJI-Cv") 1:14, Burden of Proof—Preponderance of Evidence Standard, provides:

> The party who asserts a claim or affirmative defense has the burden of proving it by what we call the preponderance of the evidence.
>
> In order to prove something by a preponderance of the evidence, a party must prove that it is more likely so than not so. In other words, a preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces in your minds a belief that it is more likely true than not true.

[12] Appellants respond that Corporal Ascione placed her into protective custody and that his "encounter with [Ms. Clemens] is governed by Annotated Code of Maryland, Health General Article ("Health General"), § 10-620 *et. seq*., not by the laws of arrest."

In the text of his reports of the August 20, 2013 incident, Corporal Ascione stated that Ms. Clemens "was place[d] into protective custody, and transported to Anne Arundel

standards. But, as we explained in *State v. Alexander*, 124 Md. App. 258, 266 (1998), "[t]he standard of reasonableness obviously shifts as the reason for the intrusion varies and anti-police wariness is not always the appropriate prism through which to view an officer's conduct."

Much of what local police officers do involves "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973); *see Stanberry v. State*, 343 Md. 720 (1996) (recognizing a distinction between police conduct when conducting a criminal investigation and when "acting to protect public safety pursuant to their community caretaking function.").

Examples of community caretaking cited by Professor Wayne R. LaFave include "seek[ing] an occupant reliably reported as missing" and "thwart[ing] an apparent suicide attempt." *Alexander*, 124 Md. App. at 270 (1998) (citing 3 Wayne R. LaFave, *A Treatise on the Fourth Amendment*, § 6.6, p. 396 (3d ed.1996)). When her apartment was entered, Ms. Clemens had not been located and police had reason to believe she was possibly

(…continued)
Medical Center, where a petition for emergency evaluation was filed[.]" But the "Disposition" block at the bottom states "Adult arrested." At trial, he explained:

> The next entry [on the Incident Report] is under, unit, 112, again, that's me. It says, 1095. And 1095 is a code that's used whenever . . . somebody is placed into one type of custody or another, whether they're arrested for a crime, placed into protective custody, whatever the case is. It just – it's all enveloping. And that took place at 01:13:41 hours.

contemplating suicide. The welfare check of her apartment would in no way support an inference of malice.

In Maryland, local peace officers, who are not health professionals, are authorized by statute to determine whether a person should be detained for an involuntary emergency evaluation. Detainment for that purpose is warranted "if the [officer] has reason to believe that the individual: [h]as a mental disorder[13] [that] [p]resents a danger to the life or safety of the individual or of others." Health–Gen. § 10–622(a); *see J.H. v. Prince George's Hosp. Ctr.*, 233 Md. App. 549, 582 (2017). And, having made that detainment, the officer's authority and duty are clear. The officer "shall take [the individual] to the nearest emergency facility." Heath-Gen. § 10–624(a)(1).

Cases in which malice or actual malice has been both found and rejected in the criminal context help inform our review of whether the facts in this case support a reasonable inference of actual malice. In *Lee v. Cline*, 384 Md. 245, 249 (2004), a white officer pulled over a luxury car missing a front license plate. The car was driven by Keith Lee, an African-American male, and the license plate had come off in a car wash. *Id*. at 249. With "no basis for such a search," the officer asked to search Lee's car, and when Lee did not consent, the officer told Lee that he did not need permission to conduct

[13] "Mental disorder" is defined in Md. Code Ann., Health-Gen. § 10-620 as:

> (e)(1) "Mental disorder" means the behavioral or other symptoms that indicate:
> (i) To a lay petitioner who is submitting an emergency petition, a clear disturbance in the mental functioning of another individual[.]

a search. *Id.* at 270. The officer, referring to Lee as a "suspect" insisted on obtaining a canine unit despite the fact that there was no evidence of drugs or other violations of law and the plaintiff had no criminal history. *Id.* The Court of Appeals concluded that an approximately forty-minute stop for which there was no basis would permit a reasonable inference "that the only factors which motivated [the officer] calling Lee an uncooperative 'suspect' were that Lee was an African–American male driving a luxury car who refused to consent to a search." *Id.*

In *Nelson v. Kenny*, 121 Md. App. 458, 489 (1998), a teacher intervened in a fight between two students. This Court held that a rational inference of malice could be drawn from facts indicating that the officer, who did not see the incident in question, willingly responded to a parent's demand in overtly racial terms to arrest the teacher and that doing so in front of co-workers and spectators was inspired by the officer's own racial bias. *Id.* at 493–95.

In *Thacker v. City of Hyattsville*, 135 Md. App. 268, 300, 307 (2000), a police officer arrested Robert Thacker, an apartment complex manager, for disorderly conduct related to a parking dispute between Thacker, who was white, and an apartment tenant who was African-American. There was a history of animosity between the officer and Thacker, "based on [the officer's] past experiences in responding to calls from Thacker." *Id*. at 307. And the officer admitted that "he disliked Thacker, disapproved of the way he dealt with [his] tenants, and felt that he was the worst manager he had seen in his eight years on the police force." *Id*. On the day in question, the officer expressed frustration

when Thacker refused his attempts to mediate the parking dispute, and he left the management office with his arm around the tenant. *Id.* at 305. It was undisputed that the officer said to the African-American tenant, "[w]e know why he won't give you a parking permit," which Thacker understood to be "racial." *Id.* After leaving the building, the officer arrested Thacker when Thacker followed him out saying "If I'm a bad manager, you're a bad police officer." *Id.* at 295–96. According to Thacker, the officer then said that if Thacker said another word, he would arrest him. *Id.* at 296. We held that the evidence was sufficient to support an inference that that officer's "decision to arrest resulted from his dislike of Thacker, or from his anger and frustration at Thacker's actions, and not because of any public disturbance":

> When all of the evidence is considered in context, a fact-finder could conclude that, even if [the officer] did not have any specific racial or financial animus, nevertheless, he made the decision to arrest out of "ill will and spite" toward Thacker, in reaction to what he perceived to be Thacker's disagreeable personality, unfair management, and/or disrespectful conduct.

Id. at 307.

In *Town of Port Deposit v. Petetit*, 113 Md. App. 401 (1997), *cert. denied*, 346 Md. 27 (1997), the Chief of Police of the Town of Port Deposit, dressed in plain clothes and driving an unmarked car, observed Pierre Petetit speeding away from a local bar in a truck. The chief pursued the vehicle, and, when the truck did not stop, he fired several shots at the truck's wheels. *Id.* Eventually, the "truck car came to a stop when the right tire blew out as he attempted to make a U-turn in order to get the attention of a passing state trooper." *Id.* at 406. We held that "an inference can be drawn that [the chief]

became so enraged at what appeared to him to be grossly reckless conduct by Petetit, endangering others on the highway, and that he fired at Petetit or Petetit's vehicle with the intention of injuring Petetit. *Id.* at 418.

In *Espina v. Prince George's* County, 215 Md. App. 611 (2013), an officer shot and killed an unarmed Espina. An eyewitness testified that "when [the officer] entered the apartment, he had a furious expression on his face," yelled profanity, and "continued to strike Espina despite Espina's screams." *Id.* at 656. Another eyewitness testified that the officer beat Espina with his baton, that Espina did not resist or fight back, and that the officer shot Espina while he was crouched on the floor. *Id.* We held that the evidence supported an inference of actual malice. *Id.*

We reached a similar conclusion in *Francis v. Johnson,* 219 Md. App. 531 (2014). In *Francis*, several detectives approached Michael Johnson and began questioning him. One of the detectives advised Johnson that if Johnson even looked at him in the wrong way, he would "ram th[e] stick up [his] ass." *Id.* at 538. He then threw Johnson into a van, searched him for money, and broke the cell phone he was carrying and threw it out the window. *Id.* Johnson was driven around for a couple of hours before being pushed out of the van, outside of the city limits, in the rain with no money, cell phone, shoes or socks. *Id.* We held that this evidence was "sufficient for the jury to find that appellants' actions were intentionally performed without legal justification or excuse, but with an evil or rancorous motive influenced by hate, and with the purpose to deliberately and willfully injure Mr. Johnson." *Id.*

We reached a different conclusion in *Williams v. Prince George's County*, 112 Md. App. 526 (1996). In *Williams*, Jesse Williams, Jr.'s mother had previously reported that her vehicle had been stolen. *Id.* at 533. Sometime after the vehicle had been recovered, a police officer had the occasion to run a check on the vehicle and found that it was still reported stolen. *Id.* at 524. The police officer stopped Williams, who was driving the vehicle, pulled his gun, and ordered him to put his hands in the air. *Id.* at 535. When a backup officer arrived, one of the officers "put [Williams's] hands behind [his] back," and held his shoulder; they eased him down, but didn't "didn't rough [him] up, or anything" before handcuffing him. *Id.* Once the officer discovered that the vehicle was not stolen, he released Williams and "gave [Williams] his card; he said call me if you have any trouble." *Id.* at 536. We held that the evidence did not support an inference of malice because "there was not a scintilla of evidence that the arresting officers harbored ill will or an evil motive toward appellant." *Id.* at 551.

In *Green v. Brooks*, 125 Md. App. 349 (1999), Green was arrested by Officer Brooks and incarcerated for five days based on a bench warrant issued for his cousin who had falsely identified himself as Green at the time of his arrest. Green sued the arresting police officer for false imprisonment and malicious prosecution among other charges. *Id.* at 355. We affirmed the trial court's grant of summary judgment for the arresting officer because there was no evidence that the officer harbored any ill will towards the plaintiff or "harbored a nefarious motive in not believing appellant's assertion that he was not the man sought for the crime, particularly when the warrant provided an accurate description

of Green and identified his correct address." *Id*. at 380. Nor was there any "history of animosity between Green and the officers that might have led a jury to infer that, on this occasion, appellees intended to harm appellant personally." *Id.* at 379. At most, there was a failure to take steps to corroborate the information that they had but "mere negligence . . . cannot satisfy the malice element of malicious prosecution." *Id.* at 372 (quoting *Montgomery Ward v. Wilson*, 339 Md. 701, 719 (1995)).

We distill from the above cases that a reasonable inference that a police officer acted with ill will or an improper motivation in carrying out an authorized responsibility may be established by words or actions evidencing animosity or bias; but that evidence of negligence or a mistake in judgment is not sufficient.

Ms. Clemens asserts that the following facts would permit the jury to draw an inference of malice:

- In prior actions "before he arrested Ms. Clemens, [Corporal Ascione] had with him another officer. However, when he learned that Ms. Clemens was on her way home, [he] decided to see Ms. Clemens by himself."

- Before arriving at Ms. Clemens's residence alone, he asked his direct supervisor "are you okay with me going ahead and evaling her if I make contact with her."

In her view, "actual malice would be proven sufficiently" by the latter statement "coupled with his plan to confront Ms. Clemens alone[.]" She, however, advances other facts to bolster her argument:

- Ms. Simonds, who was only an acquaintance,[14] was the only person who provided any evidence to Corporal Ascione that Ms. Clemens might be a danger to herself. He talked to her for less than thirty minutes, and she never told him that Ms. Clemens had previously been to AAMC for a psychiatric evaluation as he reported.[15]

- Corporal Ascione rejected her parents' statements that Ms. Clemens had never been suicidal or made any threats to harm herself, and that she had called her father to tell him that she was fine and on her way home.

- When he found her in her vehicle and not moving, he directed her to a "very dark" parking space.

- As she got out of the vehicle and began to walk to her residence, he approached her "asking questions."

[14] In her statement to the Annapolis Police Department by Bonnie Simonds identified herself as an "acquaintance" of Ms. Clemens and that she had spoken to her on the phone. She reported that Ms. Clemens was "distraught," "in tears," and "out of control," and that "[s]he said she was either going to get in her truck and drive or kill herself! She had called a suicide hotline and 911. She was "very concerned" about Ms. Clemens's welfare mentally, and thought she needed "psychiatric care."

In her 911 Call, Ms. Simonds, who identified herself as a "friend who's more of an acquaintance than a friend," stated that Ms. Clemens was "totally distraught, [and] in tears" and had said that she was "going to kill herself or get in truck and drive off."

Dispatch reported to Corporal Ascione that Ms. Clemens "need[ed] a check of welfare" and that "a friend of hers" said Ms. Clemens "said she was suicidal."

Ms. Simonds testified that she uses the words "interchangeably," and that, for her, a friend is someone she knew "very well and an acquaintance is somebody you know and could possibly get to know them better as a friend."

[15] Ms. Clemens contends that Corporal Ascione "made up" a prior psychiatric evaluation referenced in his report to argue that he acted with actual malice. On the other hand, Ms. Clemens testified that she had told Corporal Ascione that she had sought counseling years prior due to anxiety and stress that resulted from a breakup.

- Without informing her "why she was being arrested, [he] slapped handcuffs on Ms. Clemens, shoved her in the back of his vehicle and drove to [AAMC]."

The question is whether those alleged facts, which are essentially undisputed, and viewed most favorably to Ms. Clemens, are sufficient to permit a reasonable inference that Corporal Ascione acted with malice when he took her to AAMC.

In our review, Ms. Clemens urges us to "assume that the jury was rational and consistent, rather than irrational or inconsistent." But whether the jury was rational and consistent is not the issue before us. We are not reviewing what the jury did; we are not assessing credibility, finding facts, or drawing inferences. The question before us is whether the evidence was legally sufficient to generate a jury question.[16]

[16] We will discuss the verdict form in more detail in Part IV of this opinion. That said, we note that the verdict form indicates that the jury found that Corporal Ascione "falsely imprisoned" Ms. Clemens on August 20, 2013 and that she had proved by a preponderance of the evidence that he in doing so "acted with actual malice towards her." But to the claimed assault and battery (presumably approaching, handcuffing, and placing Ms. Clemens in his vehicle), the jury found Ms. Clemens had "failed to prove by a preponderance of the evidence that [Corporal Ascione had] acted with actual malice on August 20, 2013."

That suggests that the jury's only finding of ill will or an improper motivation related to the decision to take Ms. Clemens to AAMC for an involuntary evaluation. Rationality and consistency indicates that the jury believed Corporal Ascione's reliance on Ms. Simonds's report over that of Ms. Clemens and her parents and continuing his investigation after Ms. Clemens reported to her parents that she was safe and on her way home was not reasonable.

In regard to punitive damages, and recognizing that the burden of proof is greater, the jury also answered "no" when asked if "Carla Clemens proved by clear and convincing evidence that [Corporal Ascione] acted with actual malice."

Looking at the asserted facts in the light most favorable to Ms. Clemens—and even assuming that Corporal Ascione knowingly attributed a prior evaluation at AAMC to Ms. Simonds to support taking Ms. Clemens into protective custody—we are persuaded that the evidence produced does not support a reasonable inference that Corporal Ascione harbored ill will towards Ms. Clemens or that his decision to have her evaluated manifested an evil motive. As in *Williams* and *Green*, and unlike in *Lee*, *Nelson*, *Espina*, *Francis*, and *Thatcher*, there was no history of animosity or personality conflict between them and no indication of racial or any other form of bias. They had never met before August 20, 2013 and their face-to-face contact was limited to the parking-lot encounter. Corporal Ascione's investigation of Ms. Clemens began with a dispatch communication based on a 911 call from Ms. Simonds, who reported that Ms. Clemens was suicidal. Ms. Clemens contends that Corporal Ascione should not have relied on Ms. Simonds's account over that of her parents.[17] But even assuming that a more thorough investigation should have been done, and that crediting Ms. Simonds's account over the report from Ms. Clemens's parents reflected bad judgment, the evidence would not generate a reasonable inference of ill will or an evil motive. Reasonableness and malice have separate evidentiary DNAs. An unreasonable action does not, without more, mean that the action was the product of ill will or improper motivation.

[17] Jurors are instructed to draw reasonable conclusions from evidence based on common sense and their own experience. MPJI-Cv 1.7. To either an adult child and/or the parent of an adult child, common sense and experience might not lead to a finding that children necessarily confide in their parents when things are not going well.

At oral argument, Ms. Clemens's counsel advanced a theory as to why Corporal Ascione felt ill will towards Ms. Clemens:

> I'm suggesting that in that four-hour period between when was driving around looking for her, calling and trying to get information . . . . a big search went into place. *I think that by the time Ms. Clemens's parents tells them, the police, that she's not a risk to herself that I think the evidence shows that Corporal Ascione was upset wasting all of his time doing this* . . . . Ascione gets that information and what does he do? He calls his boss and says I'm going to go out there and look at her [and asks] is it okay if I eval her as soon as I see her. He had already decided what he was going to do. It was not a "I'm going to go talk to her and see if she's a risk."

(Emphasis added). But that is merely "surmise, possibility, or conjecture" in the absence of some supporting evidence that Corporal Ascione was upset about the length of the search. The evidence is that he did not "eval her as soon as [he saw] her." He asked for and followed the instructions of a supervising sergeant and talked with her when he saw her. In fact, Ms. Clemens testified that Corporal Ascione, when he first made contact with her, approached and questioned her for twenty to thirty minutes, focusing on her well-being:

> He asked me if I had been drinking. I said yes . . . . He asked me I think how my day was. How was I feeling. Was I feeling depressed. . . . He didn't tell me that I had done anything. He asked me if I had a conversation with a woman that evening named Bonnie. . . . Officer Ascione asked me, I think he asked if I had ever been institutionalized or had a mental problem or was I – something to that effect and I – I – felt absolutely terrified and very intimidated from him and I got very upset. And I started to cry.[18]

[18] According to Corporal Ascione, she pushed him out of way and said she was going to her apartment. And according to Ms. Clemens, she "screamed bloody murder" on the way to AAMC.

There was no reference to or any threat of any criminal charge. Only after personally observing and assessing her mental state—which by Ms. Clemens's own testimony was emotional—did he take her into protective custody and drive her to AAMC. Perhaps another officer would have made a different decision. But there is simply no evidence, direct or circumstantial, of anything that Corporal Ascione did or said that could reasonably support an inference of personal hostility towards Ms. Clemens. In short, it was error to deny the motion for judgment and the motion for judgment not withstanding the verdict.

IV.
Jury Verdict Form

Even though our decision that the evidence in this case was insufficient to support an inferential finding of malice has effectively rendered the handling of the verdict form issue moot, we will address it. As we explained in *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 68 (2015):

> "A case is moot when there is no longer an existing controversy when the case comes before the Court or when there is no longer an effective remedy the Court could grant." *Prince George's Cty. v. Columcille Bldg. Corp.*, 219 Md. App. 19, 26 (2014) (quoting *Suter v. Stuckey*, 402 Md. 211, 219 (2007)). . . . "In rare instances, however, we 'may address the merits of a moot case if we are convinced that the case presents unresolved issues in matters of important public concern that, if decided, will establish a rule for future conduct.'" *Roth*, 398 Md. at 143–44 (quoting *Coburn v. Coburn*, 342 Md. 244, 250 (1996)).

When the jury first returned with its verdict, the trial judge read the Verdict Form silently and, without conferring with counsel, instructed the jury as follows:

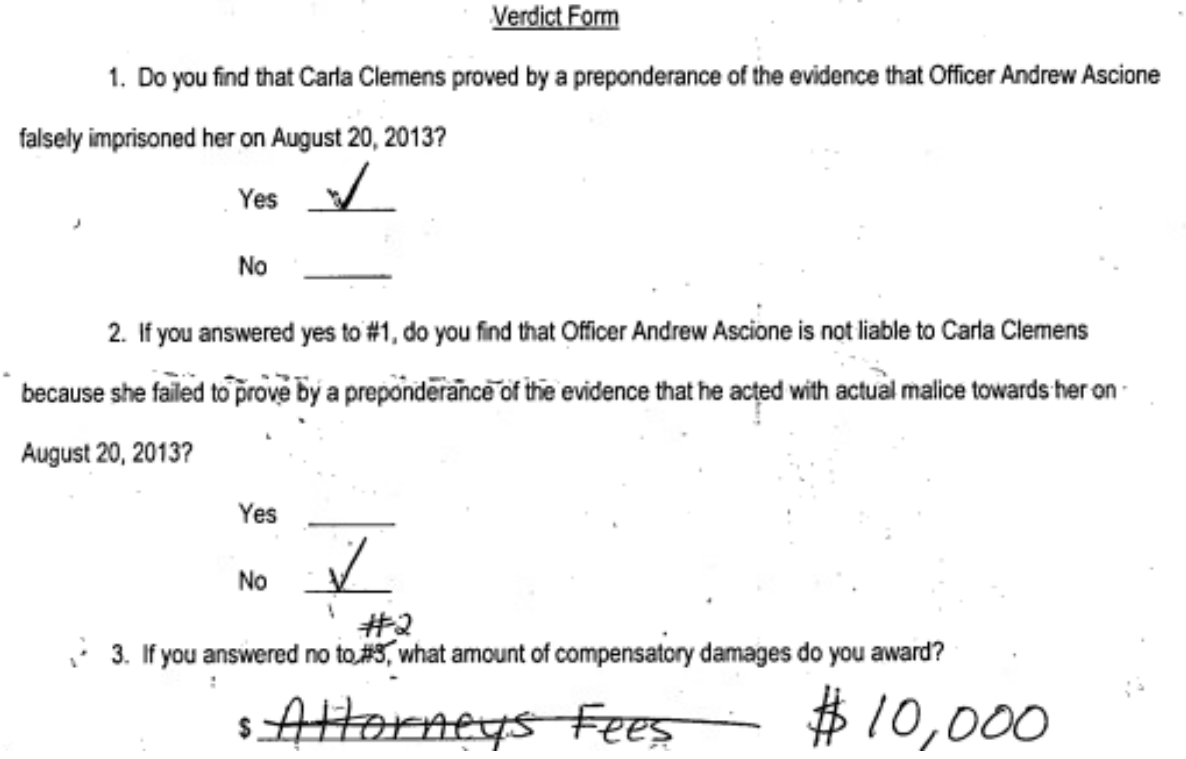
> All right, ladies and gentleman of the jury, I am going to have to ask you to return to your deliberations. The error is question number three.[19] I'm going to have to ask you to return and enter a number in accordance with the evidence that was presented.

After the jury returned, the jury foreperson announced that Corporal Ascione had falsely imprisoned Ms. Clemens and that he acted with actual malice toward her in doing so. The award of compensatory damages was $10,000.00.

Prior to filing their motion for judgment notwithstanding the verdict, appellants obtained a copy of the verdict sheet. They discovered that in response to the question "what amount of compensatory damages do you award," the sheet indicated: "Attorneys Fees" with a strikethrough across it and followed by "$10,000."

Contentions

[19] Below is a copy of the actual "Verdict Form" related to this issue:



Verdict Form

1. Do you find that Carla Clemens proved by a preponderance of the evidence that Officer Andrew Ascione falsely imprisoned her on August 20, 2013?

Yes ✓

No _____

2. If you answered yes to #1, do you find that Officer Andrew Ascione is not liable to Carla Clemens because she failed to prove by a preponderance of the evidence that he acted with actual malice towards her on August 20, 2013?

Yes _____

No ✓

3. If you answered no to ~~#3~~ #2, what amount of compensatory damages do you award?

$ ~~Attorneys Fees~~ $10,000

Appellants contend that the trial court erred in regard to how it handled the Verdict Form when the jury first returned the form. They argue that it "did not show the parties' attorneys the 'error'" or indicate its "exact nature"; and its management of the jury's verdict form as to the false imprisonment count. They argue that they "did not restate or clarify instructions for an award of damages, and did not query the jury to determine whether there was confusion as to those jury instructions." Noting that there is no Maryland case on point, appellants cite federal cases where courts have addressed situations where a jury form has indicated liability without awarding damages.

In particular, appellants cite *U.S. Equal Employment Opportunity Comm'n v. Consol Energy, Inc.*, 860 F.3d 131 (4th Cir. 2017), where a jury found that the defendant had failed to accommodate an employee's religious beliefs. The trial court had instructed the jury to award compensatory damages if it found a violation of law but not to consider lost wages in that award. In the space on the verdict form for compensatory damages, the jury foreperson had written "salary plus bonus & pension, court cost." *Id.* at 140. In response, *after conferring with the parties*, the trial court "reinstructed the jury on compensatory damages and sent the jury back for further deliberations, clarifying that '[t]he fact that I am sending you back does not indicate my feelings as to the amount of damages or whether damages . . . should be awarded.'" *Id*. Ten minutes later, the jury returned with a verdict of $150,000 in compensatory damages, which did not include lost wages, as the court had instructed. *Id.*

On appeal, the defendant contends that the jury's answer on the first verdict form "indicate[d] that the jury intended to award no damages, a decision not inconsistent with its finding of liability, and the [trial] court therefore erred in directing further deliberations on the question." *Id.* at 147. The Court of Appeals of the Fourth Circuit disagreed, explaining:

> even where an initial failure to award damages is not necessarily inconsistent with a finding of liability, a district court retains discretion under Rule 49(b)(3) of the Federal Rules of Civil Procedure to determine whether the damages verdict "reflects jury confusion or uncertainty," and, if it does, to "clarify the law governing the case and resubmit the verdict for a jury decision." *Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d 658, 674 (4th Cir. 2015) (internal quotation marks omitted). And the district court here followed precisely the "sensible" procedure that we approved in *Jones*: Faced with a "discrepancy" between its original instructions to the jury and the jury's statement on compensatory damages, it "conferred with counsel, then administered a supplemental jury instruction and sent the jury back to redeliberate." *Id.* Moreover, the court emphasized that the jury was free to return no compensatory damages—"[t]he fact that I am sending you back does not indicate my feelings as to the amount of damages or whether . . . compensatory damages should be awarded," J.A. 1162–63—and conducted a post-verdict poll of the jury to confirm that its award of $150,000 did not reflect any compensation for lost wages. We see no grounds for disturbing the district court's careful exercise of its discretion.

U.S. Equal Employment Opportunity Comm'n v. Consol Energy, Inc., 860 F.3d 131, 147 (4th Cir. 2017).

Ms. Clemens contends that appellants did not object "to either the process selected" by the trial judge or to "the additional instruction provided to the jury." That is true and we do not address the "additional instruction" except to say that offering any

specific objection could be difficult without having been shown or knowing the nature of the "error." Our remarks will address only procedure.

Ms. Clemens also contends that appellants' argument is "based on conjecture and speculation that is insufficient to create a basis for the relief sought." She asserts that "[t]here is no evidence or indication that the court's handling of the verdict sheet was anything other than sensible and appropriate." She adds that "[o]ne can speculate that there are a number of ways in which the jury completed the verdict form." For example, one can "speculate that both the words 'Attorneys Fees' and the number '$10,000' were placed on the form at the same time with the jury subsequently striking the words 'Attorneys Fee.'"

Analysis

Even though no Maryland case directly addresses the facts of this case, Md. Rule 2-521(d)(2)(C) (Communications with Jury) and Md. Rule 2-522(b)(3) (Return in Open Court) are instructive. Md. Rule 2-521(d)(2)(C) states:

> If the judge determines that the communication pertains to the action, the judge shall promptly, and before responding to the communication, direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response. The judge may respond to the communication in writing or orally in open court on the record.

Md. Rule 2-522(b)(3) states:

> A verdict shall be returned in open court. If the verdict is in the form of written findings pursuant to subsection (b)(2) of this Rule, the verdict sheet shall be handed to and examined by the judge prior to the announcement of the verdict or any harkening or polling. If there is any material inconsistency between the verdict as announced and the written findings,

> the court shall inform the jury and the parties of the inconsistency and invite and consider, on the record, the parties' position on any response.

As the Court of Appeals has stated, the "rules governing communications between the judge and the jury" are "not abstract guides"; they are "mandatory and must be strictly followed." *Winder v. State*, 362 Md. 275, 322 (2001).

To be sure, both parties' arguments on this issue are largely based on speculation. But we need not speculate as to what the trial court did or did not do when the jury first returned its verdict. The court reviewed the Verdict Form without conferring with and explaining the "error" to counsel, and instructed the jury "to return and enter a number in accordance with the evidence that was presented." Whether the jury had not intended to award any damages or had written "Attorneys Fees" on the verdict sheet as the award, either was potentially an inconsistent response to the question on the Verdict Form. In that situation, the court should have informed the parties of the "error" and have invited their response before instructing the jury to return and enter a number on the Verdict Form. In jury communications generally and verdict forms reflecting an inconsistency or uncertainty in particular, a court should inform the parties, invite their positions, and consider them on the record prior to any response. Failure to do so is error.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED; COSTS TO BE PAID 50% BY APPELLANTS AND 50% BY APPELLEE.