

**IN THE
COURT OF APPEALS OF MARYLAND**

September Term 2019

Misc. No. 6

BALTIMORE CITY POLICE DEPARTMENT, et al.,

Appellants,

v.

IVAN POTTS,

Appellee.

On Certified Question from the
U.S. District Court for the District of Maryland

BRIEF FOR APPELLEE IVAN POTTS

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INTRODUCTION

This case arises from the wrongful arrest, prosecution, conviction, and incarceration of Ivan Potts at the hands of three Baltimore police officers. Before the Court is the question of whether the Baltimore Police Department (BPD) may be held liable for indemnification under the Local Government Tort Claims Act (LGTC) for the conduct of its officers. The U.S. District Court for the District of Maryland certified that question to this Court, and the parties have stipulated to the material facts on which the question should be decided. As explained below, those stipulated facts demonstrate that the officers' conduct here was within the scope of their employment as police officers and actuated by a purpose to serve the interests of BPD and the City of Baltimore. For those reasons, this Court should answer the certified question in the affirmative by ruling that the City must indemnify the individual officers for the judgment entered against them.

CERTIFIED QUESTION

Under the LGTC, a plaintiff who obtains a judgment against a local-government employee may enforce that judgment against the local government if the judgment was "rendered for tortious acts or omissions committed by the employee within the scope of employment." Md. Code, Cts. & Jud. Proc. § 5-302(b)(1). Similarly, each of a series of labor agreements between the collective bargaining representative of Baltimore City Police officers and the Mayor and City

Council of Baltimore contains provisions that mirror the LGTCA, providing as follows,
in part:

The City will provide indemnification to any member of the unit who is made a defendant in litigation arising out of acts within the scope of his/her employment that results in a monetary judgment being rendered against the employee.

The certified question is:

Whether, under the above statutory and contractual provisions, in light of the undisputed facts in the record, the three former Baltimore City Police officers named in this action are entitled to indemnity for the judgments entered against them herein; that is, whether, as a matter of law on the undisputed facts, the judgment sought to be enforced by Plaintiff is based on “tortious acts or omissions *committed by the [officers] within the scope of [their] employment with [the City].*”

E.527.

STANDARD OF REVIEW

“Pursuant to the Maryland Certified Uniform Questions Act, [this Court] accept[s] the statement of facts provided by the certifying court.” *AGV Sports Grp., Inc. v. Protus IP Sols., Inc.*, 417 Md. 386, 389 n.1 (2010). Here, all of the relevant facts are contained in the stipulation the parties submitted to the district court. See E.272-300. This Court’s review is therefore limited to “answer[ing] questions of state law” based on the stipulated facts. *Price v. Murdy*, 462 Md. 145, 147 (2018) (quoting *AGV Sports Grp.*, 417 Md. at 389 n.1).

STATEMENT OF FACTS

A. Factual Background¹

Baltimore Police Department officers Wayne Jenkins, Evodio Hendrix, and Maurice Ward were assigned to a special BPD unit known as the Gun Trace Task Force. E.273. The Task Force was formed to identify, arrest, and build prosecutable cases against offenders who used firearms. E.221.

The three officers were on duty and within their assigned patrol area on September 2, 2015, when they “jumped out” of an unmarked police car and stopped Mr. Potts while he was walking home from the store. E.278. The officers lacked reasonable suspicion to believe that Mr. Potts had committed any crime or was about to do so. E.277-E.278.

Mr. Potts declined consent to search him, but the officers used force to search him anyway. They slammed him to the ground and began kicking him with their shod feet. Mr. Potts tucked into a fetal position to protect himself, but the assault continued. One of the officers pulled out his police baton and began assaulting Mr. Potts while he was helpless on the ground. The two remaining officers raised no objection and made no effort to prevent this unlawful use of force. E.277-E.278.

¹ The following facts are not in dispute and are derived from the stipulated Statement of Undisputed Material Facts submitted to the district court. See E.272-E.300.

When no contraband was found, and with Mr. Potts bleeding and injured, the officers incriminated Mr. Potts by planting false evidence on him. Specifically, the officers produced a handgun that did not belong to Mr. Potts and that he had never seen. Jenkins attempted to put the gun in Mr. Potts's hands (which were handcuffed) to get Mr. Potts's fingerprints onto the gun. When Mr. Potts resisted, Ward and Hendrix again began punching and kicking him. The beating produced a gash on Mr. Potts's leg, bruises on his ribs, and head injuries. The officers beat Mr. Potts so badly that the BPD booking unit refused to accept him until the officers first took him to the hospital for treatment. E.278.

The officers then perpetuated the unlawful detention of Mr. Potts by providing knowingly false statements to a magistrate so as to falsely incriminate him and prevent him from obtaining bail. E. 279.

The officers then manufactured a series of official police reports that falsely claimed that Mr. Potts was in possession of a gun at the time of the arrest and assault. In making these false statements, the officers knowingly misled prosecutors in the Baltimore City State's Attorney's Office with regard to the events of September 2, 2015, in a manner specifically targeted at encouraging prosecutors to pursue a criminal conviction of Mr. Potts. E.279.

Based on the false statements and evidence manufactured by the officers, the Baltimore City State's Attorney charged Mr. Potts in a six-count indictment. Mr. Potts proceeded to trial, all the while maintaining his innocence. E.279-E.280.

At Mr. Potts' trial, all three police officers were called as witnesses for the State and falsely testified under oath that they recovered a handgun from Mr. Potts. Based on the false police testimony, Mr. Potts was convicted on March 2, 2016 and sentenced to a term of eight years in prison, five without the possibility of parole. Mr. Potts was then incarcerated at various Maryland State prison facilities until his conviction was vacated in April 2017 on the motion of the Baltimore City State's Attorney. E.279-80.

In February 2017, almost a year after Mr. Potts's state-court conviction, the U.S. Attorney for the District of Maryland filed a federal indictment alleging that the Gun Trace Task Force officers abused their authority as BPD officers in order to enrich themselves through illegal conduct, including extortion, robbery, and time and attendance fraud. E.280.

Mr. Potts's false arrest, assault, and fraudulent conviction (i.e., the events of September 2, 2015 and all subsequent matters related thereto) were *not* part of the indictments and criminal prosecution of the officers. E.280. The factual bases for the guilty pleas or guilty verdicts in the federal criminal case all involved victims *other than* Mr. Potts. E.280.

Mr. Potts was not interviewed by federal investigators or prosecutors. He was also never called as a witness in the joint trial of the officers. None of the events of September 2, 2015—the day of Mr. Potts’s arrest—or any subsequent incidents involving Mr. Potts were included in any stipulation of fact, plea agreement, pre-sentence report or other document relating to the officers’ federal prosecution. E.280-E.281.

B. Procedural Background

In September 2016, Mr. Potts filed this lawsuit—*pro se* and while still incarcerated—against officers Jenkins, Hendrix, and Ward in federal court. E.5-E.6. One year later, after obtaining counsel, Mr. Potts amended his complaint to add BPD as a named defendant. E.14, E.38. His second amended complaint asserts claims against all defendants under 42 U.S.C § 1983. E.32-E.37.

In July 2019, Mr. Potts accepted an offer of judgment from the individual officer defendants in exchange for their right to indemnity as against the City under the LGTCA and the Memorandum of Understanding between BPD and Fraternal Order of Police. E.203.

With the consent of all parties, Mr. Potts then filed a supplemental complaint seeking to enforce the judgment against the Mayor and City Council of Baltimore, in keeping with LGTCA procedures laid down in *Johnson v. Francis*, 239 Md. App. 530 (2018). E.211. The parties then filed cross-motions for summary judgment on the

indemnity issue, E.12, before filing a joint motion to certify the question to this Court, along with a stipulated Statement of Undisputed Material Facts. E.216, E.503. The district court granted the certification motion on August 28, 2019. E.525-E.528. This Court docketed the case the following month. E.529.

ARGUMENT

I. The officers were acting within the scope of their employment when they arrested, booked, and testified against Mr. Potts.

To determine whether a local-government employee acts within the scope of employment under the LGTCA, this Court applies the traditional common-law test for *respondeat superior* liability. *Sawyer v. Humphries*, 322 Md. 247, 254 (1991). Under that test, an employee’s actions fall within the scope of employment if they “were in furtherance of the employer’s business and were ‘authorized’ by the employer.” *Id.* at 255. Courts weigh “various considerations” in applying this test. *Id.* Key factors include whether the employee’s conduct was “of the kind [he or she] is employed to perform,” “occur[ed] during a period not unreasonably disconnected from the authorized period of employment in a locality not unreasonably distant from the authorized area,” and was “actuated at least in part by a purpose to serve the [employer].” *Id.* (quoting *Hopkins Chem. Co. v. Read Drug & Chem. Co.*, 124 Md. 210, 214 (1914)).

Applying the *Sawyer* factors here, it is self-evident that the officers who searched, arrested, booked, and later testified against Mr. Potts at trial were acting within the scope of their employment. At all times relevant, the officers were on duty, in their assigned jurisdiction, and performing tasks that police officers are uniquely entrusted to perform. Further, they relied on their police training, equipment, and authority, and were motivated by a desire to advance BPD's interests by boosting (albeit fraudulently) the agency's gun-seizure and arrest numbers. As explained below, these factors demonstrate that the officers were acting within the scope of their employment.

A. The officers' conduct was authorized by BPD.

To fall within the scope of employment, an employee's conduct must be "authorized" by the employer. In this context, the term "authorized" does not mean "authority expressly conferred" but, rather, refers to any act of the same type "entrusted to [the employee]." *Sawyer*, 322 Md. at 255 (citation omitted); *see also* Restatement (Second) of Agency § 229(1) ("To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized."). Importantly, "authorized" conduct also includes acts taken "in opposition to [the employer's] express and positive orders." 322 Md. at 255 (citation omitted). And it even includes "consciously criminal" acts.

Sage Title Grp. v. Roman, 455 Md. 188, 212 (2017) (citation omitted); *see also infra* Part III.

In this case, the officers' conduct toward Mr. Potts reflects all of the traditional hallmarks of "authorized" police activity. The officers were in their assigned police patrol area when they stopped Mr. Potts, used their police equipment and training, and completed official police reports documenting the incident. *See Sawyer*, 322 Md. at 255.

In fact, the officers could not have committed any of their tortious acts against Mr. Potts *without* the authority that BPD entrusted to them. No other agency could have empowered them to arrest Mr. Potts, transport him to a police station, book him into a local jail, and then testify against him while wearing police badges. The police officers' conduct in Mr. Potts' case was not simply "authorized," it constituted core police duties and functions.

Wrongful acts of on-duty police officers often fall within the scope of employment even when they are performed in a manner that violates police department policy. *See* Restatement (Second) of Agency § 230 ("An act, although forbidden, or done in a forbidden manner, may be within the scope of employment."); *id.*, illus. 1 ("P directs his salesman, in selling guns, never to insert a cartridge while exhibiting a gun. A, a salesman, does so. This act is within the scope of employment.").

This Court's decision in *Houghton v. Forrest*, 412 Md. 578 (2010), illustrates this point well. In *Houghton*, the plaintiff obtained a monetary judgment against a BPD officer who had committed various torts by arresting her and detaining her without a valid justification, even after another officer warned him that she was the wrong suspect. Although the officer's decision to execute a baseless arrest plainly violated BPD policy, this Court held that his conduct nevertheless fell within the scope of his employment. *Id.* at 591-92. As the Court explained,

the test for determining whether acts were within the scope of employment is whether the challenged acts were in furtherance of the employer's business and could be fairly termed 'incident to the performance of duties entrusted to' the employee. *That is surely the case here*, as [the officer]'s arrest of [the plaintiff] was *incident to his general authority as a police officer*.

Id. at 592 (emphasis added; citations omitted); *see also Sawyer*, 322 Md. at 260

("Ordinarily when stopping a motorist or making or attempting to make an arrest, a police officer is acting within the scope of his employment."); *Montgomery County v. Wade*, 345 Md. 1, 17 n.8 (1997) (holding that "any stop executed by a participating officer is a part of that officer's regular employment" for workers' compensation purposes).

The officers' decision to stop, arrest, and book Mr. Potts here likewise falls within the scope of their employment. Just like the officer in *Houghton*, the officers here were on duty at the time of the seizure and relied on their authority as BPD

officers in making the arrest. Furthermore, they knew—just like the officer in *Houghton*—that the arrest was baseless.

Indeed, the factors in this case are stronger than those in *Houghton* because the officers here *continued* to use their police authority to inflict further harm after the unlawful arrest. They manufactured police reports, provided evidence to the bail commissioner, testified before the grand jury, and finally were called as State’s witnesses in Mr. Potts’s trial. Their reliance on their police authority was more extensive than that of the officer in *Houghton*. The continuation of the wrongful police conduct through each stage of Mr. Potts’s criminal case—extending over many months—establishes that their conduct was within the scope of their normal and customary police duties.

Consistent with *Houghton*, courts in other states have consistently held that officers act within the scope of their employment when they engage in conduct that is “arguably an outgrowth of a police officer’s duties, such as in the arrest of a suspect, the investigation of a crime, or the handling of evidence.” *Sharonville v. American Employers Ins. Co.*, 846 N.E.2d 833, 838 (Ohio 2006); *see also, e.g., McGhee v. Volusia County*, 679 So. 2d 729, 732 (Fla. 1996) (holding that an officer was acting within the scope of employment when he assaulted a handcuffed suspect because the “officer’s misconduct, though illegal, clearly was accomplished through an abuse of power lawfully vested in the officer”); *Graham v. Sauk Prairie Police Comm’n*, 915

F.2d 1085, 1095 (7th Cir. 1990) (holding, under Wisconsin law, that an officer acted within the scope of employment by shooting a handcuffed suspect because the “shooting was unquestionably a method, even though quite an improper one, of carrying out the objects of his employment”).

The officers’ use of their police training and equipment here only reaffirms that their conduct in arresting and booking Mr. Potts was “of the same general nature as that authorized” by BPD. Restatement (Second) of Agency § 229(1). It is undisputed that the officers stopped Mr. Potts by “jump[ing] out of an unmarked [police] car,” searching him for “contraband,” using a “police baton” to subdue him, and then placing him in handcuffs. E.278-E.279. These are the exact same tactics and equipment that the officers would have used to execute a lawful arrest. Plus, the officers’ reliance on their BPD training and equipment did not stop there. They also used their training and equipment in transporting Mr. Potts to a police station, then to the hospital in police custody, in photographing and fingerprinting him, and in filing official reports about the incident—the very same procedures they would have followed in any other case. E.278-E.279.

Maryland courts have recognized that an officer’s reliance on his police training and equipment provides strong evidence that he was acting within the scope of his employment. In *Prince George’s County v. Morales*, for example, the Court of Special Appeals held that an off-duty officer was acting within the scope of his

employment when he assaulted a university student while serving as a private security guard at a fraternity party. 230 Md. App. 699, 727 (2016). The court reasoned that, although the officer was off-duty at the time, he was nevertheless “using ‘tools of the trade’ knowingly supplied by the employer (i.e., training in crowd management and physical restraint), to earn his extra-duty compensation.” *Id.* at 731; *see also id.* at 727-28 (noting that the officer “used his police training, authority, and fellow officers” throughout the event); *James v. Mayor & City Council of Baltimore*, No. 24-C-19-2784, Summary Judgment Order, at 22 (Baltimore City Cir. Ct. Oct. 4, 2019) (holding that officers acted within the scope of employment where, *inter alia*, they were “identifiable as police officers” and “used the tools of the trade” when searching, arresting, and detaining the plaintiff).

Morales’s logic applies with even greater force here, given that the officers who arrested Mr. Potts were *on duty and within their authorized area of patrol* when they did so. *See Sawyer*, 322 Md. at 255 (noting that one of the key factors is whether the employee’s conduct “occur[s] during a period not unreasonably disconnected from the authorized period of employment in a locality not unreasonably distant from the authorized area”). Moreover, the officers’ tortious conduct did not end with the arrest but, rather, extended to other uses of their police training, equipment, and authority—including testifying against Mr. Potts at trial.

Regardless of the officers' motives for stopping Mr. Potts, their testimony against him as police officers called by the State in open court suffices to establish that they were acting within the scope of their employment. The City has not identified a single case holding that a police officer who is called by the State to testify at a criminal trial—and introduced to the jury as an officer—acts outside the scope of his employment when he does so. This Court should not accept the City's invitation to be the first.

B. The officers' conduct was designed to further BPD's interests.

The officers' conduct here was not only "authorized" by BPD, but also taken "in furtherance of" BPD's interests. *Sawyer*, 322 Md. at 255. Numerous courts have recognized that an employee may act "in furtherance of" his employer's interests even if he does not act *solely* for the employer's benefit. *See generally* Restatement (Second) of Agency § 236 ("Conduct may be within the scope of employment, although done in part to serve the purposes of the [employee]."). Rather, as long as the employee's conduct is "actuated at least *in part* by a purpose to serve" the employer, it must be considered "in furtherance of the employer's business." *Sawyer*, 322 Md. at 255 (emphasis added; citation omitted).

Here, the officers' conduct towards Mr. Potts was "actuated at least in part" by a desire to serve BPD. Indeed, the officers did not choose to frame Mr. Potts for a random crime—they chose to frame him for illegal gun possession, the crime that

their unit was assigned to target. That choice was consciously designed to advance BPD's public campaign to combat gun violence—a core department message. In the summer of 2015, when Mr. Potts was arrested, BPD was actively publicizing its increased gun-seizure and arrest numbers. Only a few days before Mr. Potts's arrest, BPD boasted on its official Twitter account about an increase in the number of guns it had seized during the preceding month. See @BaltimorePolice, TWITTER (Aug. 28, 2015, 11:05 a.m.), <https://perma.cc/BU2K-8TBS> (“From July 13 to Aug 25 BPD Officers have seized 314 guns, up 44% from 2014.”). And, less than a week after Mr. Potts's arrest, BPD issued a public statement praising two of the officers who had arrested him for their work in a different gun case. See BPD, FACEBOOK (Sept. 8, 2015), <https://perma.cc/RQ5L-8MXS> (“Great Job Detectives Hendrix, Ward and Taylor!”). In short, BPD was using gun-seizure statistics to measure its own effectiveness—and to promote its mission publicly—and Mr. Potts's arrest fell within BPD's announced enforcement priorities.

Mr. Potts's arrest for a gun crime not only boosted BPD's gun-seizure numbers but also served to advance the officers' own standing within BPD. After all, the officers were members of the “Gun Trace Task Force,” whose entire purpose was to

seize guns. E.279.² Every gun seizure and arrest—even fabricated ones—stood to advance the prestige of the police department and the officers’ professional careers within the Task Force.

Evidence that an employee’s conduct is motivated *in part* by a desire to increase his standing within the organization establishes that the conduct is within the scope of employment. In *Fidelity First Home Mortgage Co. v. Williams*, for example, the Court of Special Appeals held that a loan officer’s scheme to defraud borrowers fell within the scope of his employment because he was motivated by a desire to raise his monthly sales numbers. 208 Md. App. 180, 206 (2012). The court acknowledged that the employee pursued the fraudulent scheme “in furtherance of his own interests,” but nevertheless held that it was also motivated by a desire to further the employer’s metrics. *See id.*

That reasoning applies even more strongly here, given that BPD derived concrete benefits from the arrest of Mr. Potts for gun possession, even if the arrest

² BPD often singled out the Gun Trace Task Force in official publications discussing its efforts to combat gun violence. *See, e.g.,* Lt. Chris O’Ree, *Gun Trace Task Force*, YOUR BPD NEWS (Baltimore, MD), Oct. 2016, at 3 (“Ten and a half months into the year and Sergeant Jenkins and his team have 110 arrests for handgun violations and seized 132 illegal handguns.”), *available at* <https://perma.cc/4DUS-8WXS>; Commissioner Anthony Batts, *Public Safety in the City of Baltimore: A Strategic Plan for Improvement* 165 (2013) (identifying the “the six detectives in the Gun Trace Task Force” as a key component of BPD’s anti-gun efforts), *available for download at* <https://perma.cc/SCZ6-KUKX>.

led to nothing else. The officers' arrest of Mr. Potts boosted BPD's gun-seizure numbers and contributed directly to BPD's effort to highlight its success in seizing weapons and charging offenders. *Cf. Titan Indem. Co. v. Newton*, 39 F. Supp. 2d 1336, 1343 (N.D. Ala. 1999) (recognizing that, under Alabama law, "an officer who plants evidence acts in the scope of his employment as law enforcement officer"). And the "seizure" of Mr. Potts's gun may have yielded other benefits for BPD, as well. For instance, the federal government requires BPD to submit regular reports identifying the number of firearms it seizes as a condition of certain federal grant programs. *See, e.g., Bureau of Justice Assistance, Justice Assistance Grant (JAG) Program Accountability Measures 10* (updated Oct. 2016), available at <https://perma.cc/FPH6-NJ6Y>. Thus, every time BPD reports a new gun seizure—even a planted gun—it may also stand to benefit financially.

Despite the various ways that BPD benefited from the officers' conduct here, the City insists that the officers could not have acted in BPD's interests because their conduct was "antithetical to legitimate police work." City Br. 20. This Court has never taken such an overly simplistic approach to the scope-of-employment analysis. Indeed, the settled case law counsels in the opposite direction.

In *Cox v. Prince George's County*, 296 Md. 162 (1983), for instance, this Court rejected a police department's argument that its officers acted outside the scope of employment when they let their dog attack a suspect and then, "without

justification,” assaulted the suspect themselves. *Id.* at 164; *see also id.* (citing the plaintiff’s allegations that the officers “maliciously and intentionally allowed and encouraged the dog to attack and bite [him], ‘in clear and substantial excess of the force needed to restrain and detain’ him”). Although the officers’ conduct was egregious and plainly antithetical to legitimate police work, that fact did not bring their conduct outside the scope of their employment.

The LGTCA itself expressly contemplates that conduct may fall within the scope of government employment even if it is antithetical to legitimate government work. As noted above, the statute requires local governments to pay any monetary judgments entered against their employees for torts that occurred within the scope of employment. But the statute also provides that a local government may seek reimbursement for such payments from the employee who committed the tort if the employee “acted with actual malice.” Md. Code, Cts. & Jud. Proc. § 5-302(b)(2)(i). Acting “with actual malice” is, by definition, antithetical to legitimate government work. *See Smith v. Danielczyk*, 400 Md. 98, 130 n.12 (2007) (defining “actual malice” to mean “act[ing] without legal justification or excuse, but with an evil or rancorous motive influenced by hate” (citation omitted)). Yet, the LGTCA makes clear that malicious conduct still falls within the scope of local-government indemnification.

II. The officers' conduct was not purely personal.

The City contends that the officers' conduct here was not "actuated" by a desire to serve BPD because the officers "were furthering their own interests, not the BPD's, when they committed their torts against Potts." City Br. 21-22. In particular, the City speculates that the officers approached Mr. Potts in the hope of reaping personal financial rewards, then framed him to cover up their illicit motive for the attack. As discussed below, there is nothing in the stipulated statement of material facts to support that theory, and even if true, that still would not insulate BPD from liability because the test is whether the officers' conduct was actuated *in part* by a desire to serve the employer. If the motive for the conduct is mixed, defendants still lose.

A. The City's theory that the officers arrested Mr. Potts to reap financial rewards and cover up their other crimes cannot be squared with the factual record.

The City argues that the officers here harbored two "purely personal" motives for attacking and framing Mr. Potts: advancing "their own pecuniary self interests" and "conceal[ing] their illegitimate and illegal conduct from City officials." City Br. 25 (quoting E.277-E.278). Neither of these suggested motives, however, is consistent with the undisputed material facts.

First, it is undisputed that the officers did not derive any "pecuniary" benefits from planting evidence on Mr. Potts or from arresting him, booking him, and

testifying against him at trial many months later. The City cannot point to any fact that suggests that the officers used the encounter to enrich themselves. *See* E.278-E.281. Although the stipulation states that the officers stole money and property from *other* people, *see* E.281-E.299, it does not indicate that they stole, attempted to steal, or demanded anything from Mr. Potts. To the contrary, the stipulation states only that the officers searched him for “contraband”—conduct that falls squarely within the scope of ordinary police work. E.279.

Given the lack of any apparent financial motive for the officers’ conduct in *this* case, the City urges this Court to infer such a motive from the Gun Trace Task Force’s conduct in *other* cases. For support, the City repeatedly cites the generalized description of the Task Force’s misdeeds in the opening section of the stipulation. *See* City Br. 25, 28 (citing E.276-E.278). But all of those misdeeds “involved victims other than [Mr. Potts]” and many of them involved officers other than those named in this suit. E.280.

More to the point, the City stipulated that Mr. Potts’s lawsuit arose from an entirely different set of facts than the ones set forth in the stipulation’s opening section. *See* E.280 (“Plaintiff’s false arrest, assault, and fraudulent conviction (i.e., the events of September 2, 2015 and all subsequent matters related thereto) were *not* part of the indictments and criminal prosecution of the co-conspirators as described *supra* in Paragraphs 2, 3, and 9–31 [of the stipulation]; the factual bases

for the guilty pleas and/or guilty verdicts of the co-conspirators involved victims other than Plaintiff.”). Accordingly, the City cannot use the generalized facts from that section of the stipulation—which discusses the Task Force’s encounters with other people, in other locations, on other dates—to infer specific details about the present case.

The City’s reliance on the Gun Trace Task Force members’ conduct in other cases is especially inappropriate given the stark differences between that conduct and the actual conduct of the officers in this case. The stipulation states that when Task Force officers stole money from suspects, they “would intentionally fail to appear for scheduled court proceedings related to individuals they had falsely arrested, so as not to be questioned regarding their illegal activity.” E.278. With no officers present at trial, the State’s case would be dismissed.

Thus, the conduct described elsewhere in the stipulation is markedly different from the officers’ conduct here. In Mr. Potts’s case, the officers *did* appear and *did* testify before the grand jury and later at trial. E.279. Similarly, the stipulation states that Task Force members routinely extorted and robbed their victims. *See* E.281-E.299. But there was no attempted extortion or robbery in Mr. Potts’s case. *See* E.278-E.281. The material distinctions between the Task Force officers’ usual modus operandi and the officers’ conduct here underscore the tenuousness of the City’s claim that the officers here were motivated solely by personal financial gain.

Even if the initial seizure of Mr. Potts was profit-motivated, that motive would not explain the continued prosecution of Mr. Potts. If anything, the record reveals just the opposite. When the officers did steal money from suspects, they often abandoned their prosecution efforts soon after the arrest by declining to show up in court in order to minimize their chances of getting caught. E.278. Nothing in the record suggests that the officers followed that course in Mr. Potts's case.

The City's suggestion that the officers were motivated by a desire to "cover up" their criminal conduct is equally unpersuasive. Among its other shortcomings, the City's cover-up theory fails to explain why the officers insisted on framing Mr. Potts for *gun* possession (rather than some other crime). After all, if the officers' goal in arresting Mr. Potts was to conceal their other misconduct, they could have achieved that much more easily by framing him for some other offense—one that did not require physical evidence. The story the officers told at the time of the arrest would have given them ample grounds to charge Mr. Potts with any number of other crimes—including "failure to obey a lawful command"—without ever planting a gun on him. *See Potts v. State*, 231 Md. App. 398, 405 (2016) (recounting the State's theory that Mr. Potts "turned his back to the officers, and fled" as soon as he saw them). Yet, they chose to plant the gun on him anyway—even as he "resisted" their efforts to put his fingerprints on the gun, E.279—a choice that evinces their desire to serve BPD's interest in increasing its handgun-seizure statistics.

Nor does the cover-up theory explain why the officers persisted in their campaign to frame Mr. Potts long after he had served his ostensible purpose. The City offers no plausible theory, for instance, to explain why the officers sought to “prevent [Mr. Potts] from obtaining bail.” E.279. If the officers were truly acting out of pure self-interest, there would be little reason to keep Mr. Potts in pretrial detention, especially when doing so would merely increase the likelihood that he would appear for trial and reveal their perjury. Similarly, the City’s theory fails to explain what the officers stood to gain from testifying at Mr. Potts’s trial or why they would willingly expose themselves to cross-examination.

Finally, even if the officers’ motivations for the initial stop of Mr. Potts were “purely personal”—and, again, they were not—that still would not insulate BPD from liability for the officers’ subsequent misconduct. This Court’s decision in *Sawyer v. Humphries*, 322 Md. 247 (1991), illustrates why. In *Sawyer*, a motorist brought suit against an off-duty police officer who had thrown rocks at the motorist’s car, followed the motorist to a nearby town, and then pulled the motorist over and arrested him without justification. *Id.* at 250-52. This Court held that the officer’s *initial* conduct—throwing rocks at the motorist’s car—fell outside his scope of employment because he “was acting for purely personal reasons and not incidental to any State law enforcement purpose.” *Id.* at 258. But the Court refused to treat the officer’s *subsequent* conduct—including the baseless arrest—the same way. *See*

id. at 260-61. Instead, the Court held, it could not hold as a matter of law that the baseless arrest fell outside the scope of employment. *Id.* at 261. Thus, *Sawyer* makes clear that an employee’s personal motives for *initiating* a course of tortious conduct do not automatically render the employee’s entire course of conduct beyond the scope of employment. The City’s effort to draw sweeping inferences about the officers’ motives—over the course of a months-long campaign to frame and convict Mr. Potts—ignores that basic principle.

B. Even if the officers were motivated by personal reasons, they were not motivated *solely* by personal reasons.

Even if the record suggested that the officers’ conduct here was motivated in part by personal reasons, that still would not remove the officers’ conduct from the scope of employment. Numerous Maryland cases have recognized that an employee’s conduct may fall within the scope of employment even if it is designed to further the employee’s private, personal interests.³ Indeed, an employer may be held liable for an employee’s conduct even when the employee was motivated

³ See, e.g., *Sage Title Grp.*, 455 Md. at 214-15 (loan officer who stole money from employer’s client); *Morales*, 230 Md. App. at 727 (police officer who moonlighted as private security guard for extra cash); *Fidelity First*, 208 Md. App. at 206 (loan officer who defrauded employer’s client “while in furtherance of his own interests”); see also *Maron v. United States*, 126 F.3d 317, 325 (4th Cir. 1997) (applying Maryland law and holding that government employees who maligned the reputation of a colleague acted within the scope of their employment, even though they may have been motivated, in part, by “ill will” toward the colleague).

primarily by self-interest. See Restatement (Second) of Agency § 236, cmt. b (“The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment.”). Put differently, an employee’s conduct will fall outside the scope of employment only if the employee was acting *solely* for personal gain. See *Doe v. Meron*, 929 F.3d 153, 166 (4th Cir. 2019) (“To demonstrate that the individual defendants were acting outside the scope of their employment [under Maryland law], Doe must be able to show that all the defendants were *solely* motivated by a personal desire.” (emphasis added)).

Here, the officers were not motivated *solely* by a desire for personal gain. Rather, they were seeking to advance BPD’s efforts to reassure the public that the police were stemming the tide of gun violence. See *supra* Part I.B. As previously explained, that motive alone is sufficient to establish that the officers were not acting *purely* out of self-interest—regardless of whether their conduct was also motivated by independent, personal reasons. See Restatement (Second) of Agency § 236, cmt. b (“If the purpose of serving the master’s business actuates the servant *to any appreciable extent*, the master is subject to liability if the act otherwise is within the service.” (emphasis added)).

C. All of the cases that the City cites are inapposite.

The City seeks to analogize this case to several cases involving law-enforcement officers who acted for “purely personal” reasons. None of those cases, however, involved officers whose conduct could plausibly be interpreted as motivated by a desire to serve their employer. *See, e.g., Sawyer*, 322 Md. 247 (off-duty officer who, unprovoked, threw rocks at a passing motorist); *Clark v. Prince George’s County*, 211 Md. App. 548 (2013) (off-duty officer who shot a deliveryman, in self-defense, inside the officer’s own home); *Brown v. Mayor & City Council*, 167 Md. App. 306 (2006) (off-duty officer who shot a man with whom his wife was having an affair). Moreover, none of the City’s cases involved officers who *arrested* someone while *on-duty* and *in their area of authorized patrol*, and then continued to take other law-enforcement actions for many months following.

The City points to only a single Maryland case holding that an officer acted outside the scope of his employment while on duty: *Wolfe v. Anne Arundel County*, 374 Md. 20 (2003). In *Wolfe*, the officer was on traffic patrol when he stopped a motorist for driving while intoxicated, offered to drive her home, and, instead, drove her to a remote parking lot, where he raped her. *Id.* at 22. That conduct differs significantly from the conduct at issue here. Critically, the officers who arrested Mr. Potts, booked him, and testified against him were performing tasks that law-enforcement officers perform every day, even if they were performing them in a

forbidden manner. *Cf.* Restatement (Second) of Agency § 230 (“An act, although forbidden, or done in a forbidden manner, may be within the scope of employment.”). The officer in *Wolfe*, in contrast, was not engaged in anything resembling ordinary police work—in fact, he even notified his dispatcher that he would be “out of service” before he assaulted the plaintiff. 374 Md. at 23. More importantly, the officer in *Wolfe* was not even plausibly attempting to serve his employer, and his employer derived no benefit from his conduct. Indeed, unlike cases of gun seizures and arrests, police departments do not boast about how many citizens their officers have sexually assaulted. It needs little elaboration to conclude that an employee engaged in sexual assault is not furthering the interests of his employer but his own personal lascivious desires.

The City’s out-of-state cases—most of which involve off-the-job conduct—miss the mark for similar reasons. Most of them either involve incidents of sexual assault and harassment, like *Wolfe*, or do not deal with law-enforcement officers at all. *See* City Br. 37-38. To the extent that any of them do address on-duty law-enforcement activity, they involved one-time interactions between an officer and a citizen. None involved the protracted prosecution of a citizen over the course of many months and the repeated performance of different police functions.

The City nevertheless argues that, under Maryland law, the “sheer outrageousness” of the officers’ conduct offers sufficient grounds to infer a purely

personal motive. City Br. 21, 27. But that position conflicts with this Court’s decision in *Cox*, which explicitly rejected the argument that “a police officer’s malicious, intentional acts [fall] outside the scope of his employment as a matter of law.” 296 Md. at 170-71. Moreover, it conflicts with the City’s own suggestion, later in its brief, that the misconduct at issue here is so widespread among local police agencies that a ruling in Mr. Potts’s favor would “threaten the financial security of the City and every other local government in this State.” City Br. 40.

The only Maryland case that the City cites to support its “outrageousness” theory is *Sawyer*. And, as explained, *Sawyer* expressly *declined* to hold that an officer acts outside his scope of employment as a matter of law by executing a baseless arrest. See 322 Md. at 260-61; *supra* Part II.B (discussing *Sawyer*). *Sawyer* therefore does not support—and, if anything, undermines—the City’s claim that the officers’ conduct in this case was *per se* outrageous.

Nor does *Sawyer* support the City’s theory that the officers’ conduct was “outrageous” because they *also* committed torts against people other than Mr. Potts. Nothing in Maryland case law supports the proposition that an employee’s tortious conduct toward *one* individual could render his or her conduct toward *another* individual “outrageous.” Indeed, the City’s broad understanding of “outrageousness”—under which the recurring nature of an employee’s tortious conduct places it beyond the scope of employment—would pervert the LGTCA by

encouraging local governments to bury their heads in the sand. Such a regime would effectively reward local governments for both the frequency of their employees' tortious conduct and for their own failures to detect the tortious conduct before it could recur. Neither logic nor case law supports such a result.

III. The City's reliance on the federal criminal prosecutions of Gun Trace Task Force members is misplaced.

The City relies heavily on the fact that all seven members of the Gun Trace Task Force were eventually convicted on federal racketeering charges. According to the City, those convictions reveal a "far-reaching racketeering conspiracy" that places any conduct in furtherance of that conspiracy beyond the scope of employment as a matter of law. City Br. 20. This argument is flawed for several reasons.

As an initial matter, the City's focus on the criminal and malicious nature of the officers' conduct is misdirected. *See, e.g.,* City Br. 2-3 (arguing that the officers were not "acting within the scope of their employment when they committed the intentional and willfully malicious crimes against Potts"). It is well settled that "[a]n act may be within the scope of employment although consciously criminal." Restatement (Second) of Agency § 231; *see also Sage Title Grp. v. Roman*, 455 Md. 188, 212 (2017) ("That an act is 'consciously criminal or tortious' does not preclude it from falling within the scope of employment." (citation omitted)). And, as noted

above, the text of the LGTCA makes plain that malicious conduct may fall within the scope of employment. See Md. Code, Cts. & Jud. Proc. § 5-302(b)(2)(i) (allowing local governments to seek reimbursement for tort judgments from employees who acted with “actual malice”); see also *Espina v. Jackson*, 442 Md. 311, 346-47 (2015) (“Petitioners appear to suggest that the local government’s liability is dependent upon the employee’s malice or lack thereof. This is plainly incorrect.”).

In any event, the City cannot show that the officers’ conduct in this case was actually in “furtherance” of “the conspiracy laid out in the federal indictments.” City Br. 23. Once again, the stipulation expressly states that Mr. Potts’s “false arrest, assault, and fraudulent conviction (i.e., the events of September 2, 2015 and all subsequent matters related thereto) were *not* part of the indictments and criminal prosecution” of any Task Force members. E.280 (emphasis in original). And it further states that the “factual bases for the guilty pleas and/or guilty verdicts of the co-conspirators involved victims other than [Mr. Potts].” E.280. The City’s attempt to elide the many differences between the officers’ specific conduct in this case and the Task Force’s general practices in other cases is therefore untenable, for the reasons outlined above. See *supra* Part II.B (highlighting the discrepancies between the officers’ conduct and motives in this case and the Task Force’s usual conduct and motives).

But even setting aside the lack of factual support for the City's position, its claim that it can never be held liable for acts taken in furtherance of the Task Force's conspiracy sweeps far too broadly. The conduct that formed the basis for the federal indictments spanned from March 2014 through October 2016—a two-and-a-half year period during which the Task Force engaged in a wide range of illicit activities. The City's contention that *all* seven Task Force members were acting outside the scope of their employment throughout this *entire* period—even when they were on duty and using BPD resources—has no foundation in Maryland law.

To the contrary, Maryland courts have consistently taken a careful, case-by-case approach to scope-of-employment matters by examining the nature of the specific conduct at issue. In pursuing a sweeping, bright-line judgment as to its liability not just in this case but in *every* case involving *any* Task Force member, the City ignores this Court's admonition that "there are few, if any, absolutes" in resolving scope-of-employment cases. *Sawyer*, 322 Md. at 255. Indeed, the City's attempt to shift the focus from the facts of Mr. Potts's case to broad generalizations from concededly unrelated cases only serves to highlight the lack of evidence as to personal motivation here.

IV. Public policy considerations favor compensating the victims of police abuse.

In its effort to avoid responsibility for the officers' actions in this case, the City attempts to recast the LGTCA's legislative purpose in a new light. It argues that the primary objective of the LGTCA is to *insulate* local governments from liability for the type of misconduct at issue here. *See* City Br. 39-43. According to the City, granting relief to Mr. Potts here would both contravene the LGTCA's supposed purpose and "threaten the financial security of the City and every other local government in this State." City Br. 40.

This argument ignores the core purposes of *respondeat superior* liability, which the LGTCA codified: to ensure that tort victims have access to a viable remedy and to establish incentives for employers to prevent their employees from committing such torts in the first place. *See generally Ashton v. Brown*, 339 Md. 70, 107-08 (1995) ("The purpose of the [LGTCA] is to provide a remedy for those injured by local government officers and employees . . . while ensuring that the financial burden of compensation is carried by the local government *ultimately responsible* for the public officials' acts." (emphasis added)). Put differently, *respondeat superior* liability accounts for the reality that the average employee lacks the resources to compensate tort victims and, as a result, is "not very responsive to the threat of tort liability." Richard A. Posner, *Economic Analysis of Law* § 6.8, at 239 (8th ed. 2011).

In arguing that the LGTCA's main goal was to limit municipal liability, the City turns the statute's purpose on its head.⁴

The language of the LGTCA's indemnification provision is echoed almost verbatim in each collective bargaining agreement between the Mayor and City Council of Baltimore and BPD's union: "The City will provide indemnification to any member of the unit who is made a defendant in litigation arising out of acts within the scope of his/her employment that results in a monetary judgment being rendered against the employee." E.274. Thus, the indemnification requirement is not something foisted upon the City by outside legislators but, rather, is enshrined in its own voluntary contract with its sworn officers. None of the exceptions to indemnification that the City urges this Court to consider were negotiated with its police officers. Thus, even if the City's characterization of the LGTCA's legislative purpose were correct—and it is not—that still would not alter its contractual obligations.

⁴ To the extent that the LGTCA reflects any legislative desire to limit municipal liability, those concerns were expressed in a separate LGTCA provision, which caps local-government liability at \$400,000 for individual claims. *See* Md. Code, Cts. & Jud. Proc. § 5-303(a)(1). That provision only reaffirms that, if the General Assembly really wanted to limit local governments' exposure to tort liability, it would have done so directly, rather than by adopting the strained version of *respondeat superior* liability the City asks this Court to endorse.

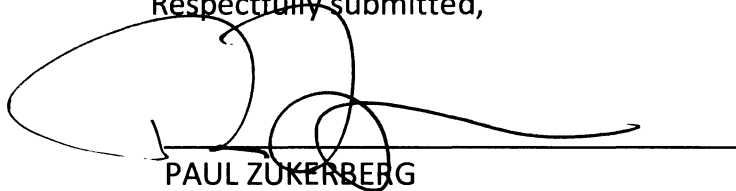
The City's remaining policy arguments fare no better. For instance, the City suggests that local governments should be held liable only for the torts of employees acting in "good faith." City Br. 40. But, as noted, the LGTCA expressly contemplates that an employee's conduct may fall within the scope of employment even if the employee "acted with actual malice." Md. Code, Cts. & Jud. Proc. § 5-302(b)(2)(i). And this Court has recognized that even consciously criminal conduct may fall within the scope of employment. *See Sage Title Grp.*, 455 Md. at 212 ("That an act is 'consciously criminal or tortious' does not preclude it from falling within the scope of employment." (citation omitted)).

Finally, the City overreaches in claiming that "the people of Baltimore will find themselves twice-cheated" if BPD is forced to compensate Mr. Potts here. City Br. 42. If anything, providing a remedy to someone who languished in jail for over a year as a direct result of police misconduct would only vindicate the public's desire for police-abuse victims not to be left out in the cold. Indeed, if the City denies Mr. Potts a remedy after its officers beat him and jailed him without justification, then he will be the one who was "twice-cheated."

CONCLUSION

For the foregoing reasons, this Court should hold that the officers who committed the torts against Mr. Potts were acting within the scope of their employment.

Respectfully submitted,

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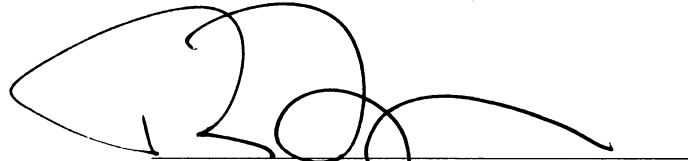
December 16, 2019

Counsel for Plaintiff-Appellee

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CERTIFICATION OF WORD COUNT & COMPLIANCE

I hereby certify that this brief contains 8,230 words, excluding the portions of the brief excluded from the word count by Rule 8-503. I further certify that this brief complies with the font, spacing, and type-size requirements of Maryland Rule 8-112.

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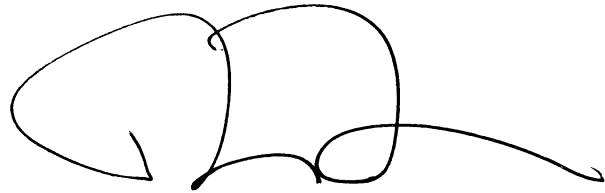
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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2019, I served two copies of the foregoing brief on the following parties via first-class mail:

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ADDENDUM OF PERTINENT AUTHORITIES

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Md. Code, Cts. & Jud. Proc. § 5-302	A1
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Md. Code, Cts. & Jud. Proc § 5-302.

Legal defense for local government employees.

In general

- (a) Each local government shall provide for its employees a legal defense in any action that alleges damages resulting from tortious acts or omissions committed by an employee within the scope of employment with the local government.

Employee liable for acting with actual malice

- (b) (1) Except as provided in paragraph (2) of this subsection, a person may not execute against an employee on a judgment rendered for tortious acts or omissions committed by the employee within the scope of employment with a local government.
- (2) (i) An employee shall be fully liable for all damages awarded in an action in which it is found that the employee acted with actual malice.
- (ii) In such circumstances the judgment may be executed against the employee and the local government may seek indemnification for any sums it is required to pay under § 5-303(b)(1) of this subtitle.

Injuries compensable under Maryland Workers' Compensation Act

- (c) If the injury sustained is compensable under the Maryland Workers' Compensation Act,¹ an employee may not sue a fellow employee for tortious acts or omissions committed within the scope of employment.

Cooperation of employee

- (d)(1) The rights and immunities granted to an employee are contingent on the employee's cooperation in the defense of any action.
- (2) If the employee does not cooperate, the employee forfeits any and all rights and immunities accruing to the employee under subsection (b) of this section.