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 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

APPELLANTS' REPLY BRIEF

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ARGUMENT

The Co-Conspirators' outrageous, personally motivated, willfully criminal acts were outside the scope of their employment.

Stripping away the sensationalism found throughout Potts's brief, a simple fact remains: Potts has the burden of proving that the Co-Conspirators' crimes against him were committed in the scope of their employment. *See, e.g.*, *Carroll v.*

Hillendale Golf Club, Inc., 156 Md. 542, 544–45 (1929) (recognizing that, in tort law, it is the plaintiff's burden to prove that a tortfeasor was acting within the scope of employment); *Johnson v. Francis*, 239 Md. App. 530, 548 (2018) ("It is the plaintiff's burden to establish its right to collect from the Department, either through an enforcement action, or some other permissible mechanism."), *cert. denied*, 463 Md. 155 (2019); *Fearnow v. Chesapeake & Potomac Tel. Co. of Md.*, 104 Md. App. 1, 47 (1995) ("[S]cope of employment is recognized as a fundamental element of a respondeat superior claim that must be affirmatively plead and proved by the plaintiff."), *rev'd on other grounds*, 342 Md. 363 (1996).

Unable to meet this burden on the undisputed facts before this Court, Potts ignores the true nature of employment at issue, seriously downplays the outrageousness of the Co-Conspirators' criminally tortious acts, and invites this Court to consider only elements of the Co-Conspirators' conduct in isolation rather than the totality of the circumstances.

The role of police officers is not simply to make as many arrests as they can or to help prosecutors attain the most convictions possible. The purpose of law enforcement is just as its name suggests: to enforce the laws, to prevent crime, and to incapacitate those who perpetrate crime by, for example, making arrests. Making **knowingly false** arrests is entirely inconsistent with law enforcement. So, too, are fabricating evidence and lying in court to convict an innocent person.

Perhaps for this reason, Potts seeks to tone down the tortious conduct at issue and strains to characterize the Co-Conspirators' acts as nothing more than "tasks that police officers are uniquely entrusted to perform." Appellee Br. 8. Nothing could be further from the truth. The Co-Conspirators did not merely make "use of their police training and equipment," *id.* at 12, or carry out "core police duties and functions" that simply "violate[d] police department policy," *id.* at 9. The Co-Conspirators violated all standards of basic decency, and *abused* – not merely used – their status as police officers to commit the most shocking and shameful criminal acts. They did not collect evidence, they planted it. They did not merely make an arrest, they made a knowingly false arrest. They did not testify at a criminal trial, they perjured themselves to aid in the conviction of a person that they knew was innocent. To properly resolve the scope-of-employment issue, this Court must not lose sight of the truly horrific nature of the Co-Conspirators' acts, or the fundamental purpose of law enforcement.

The Court must also decline Potts's invitations to view aspects of the Co-Conspirators' conduct in isolation. That the Co-Conspirators were in uniform, on duty, and in patrol cars when they committed their outrageous, criminally tortious acts is not dispositive. Although these factors in isolation may suggest that the Co-Conspirators were acting within the scope of their employment as police officers, the analysis requires this Court to review all the circumstances. *See, e.g.*, *Larsen v.*

Chinwuba, 377 Md. 92, 106 (2003) (recognizing that the scope-of-employment analysis entails "various factors"); *Tall v. Bd. of Sch. Comm'rs of Baltimore City*, 120 Md. App. 236, 253 (1998) (noting that the "*Sawyer* Court enumerated a host of factors that apply to ascertain whether the conduct in issue" falls within the scope of employment).

In this case, the Stipulated Statement of Undisputed Material Facts speaks for itself and leaves no question that the Co-Conspirators were **not** acting within the scope of their employment as law enforcement officers when they committed their outrageous, criminally tortious conduct against Potts. In particular, paragraphs 19 through 31 of the stipulation are the key to this case. (E. 276–78). The Co-Conspirators:

- "violate[d] the legitimate purposes of the BPD in order to enrich themselves," (E. 276 ¶ 19);
- "grossly depart[ed] from any authorized or legitimate police conduct," (E. 277 ¶¶ 20, 23);
- engaged in conduct that "failed to serve any legitimate purpose of the City's or BPD's business," (E. 277 ¶ 24), was not "recognized, supported or otherwise authorized by any of BPD's training provided to law enforcement officers," (E. 277 ¶ 25), and was inconsistent with "any of BPD's policies, standard operating procedures, general orders or guidelines," (E. 277 ¶ 26);
- "performed [actions] during and in furtherance of their outrageous criminal conspiracy and in pursuit of their own pecuniary interests." (E. 277 ¶ 27);

- "purposefully and willfully and regularly deviated from the legitimate law enforcement aims of the BPD's mission in order to enrich themselves through their illegitimate and illegal conduct," (E. 277 ¶ 28); and

- "conceal[ed] their illegitimate and illegal conduct from City officials and their superiors," (E. 278 ¶ 29).

Even if the Court were to entirely disregard the Co-Conspirators' RICO conspiracy, Potts has not pointed to a single fact in the record that would support even an inference that the Co-Conspirators' crimes against Potts were authorized by BPD or the City, furthered an interest of BPD or the City, or were motivated by a desire to serve BPD or the City.

I. Neither the City nor BPD authorized the Co-Conspirators' crimes against Potts.

Potts wrongly asserts that, because the Co-Conspirators used the tools of the trade to commit crimes against Potts, they were necessarily acting within the scope of their employment with BPD. Potts also improperly alleges that the BPD authorized the Co-Conspirators' conduct because "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[,]" and that "the officers could not have committed any of their tortious acts against Mr. Potts without the authority that BPD entrusted to them." Appellee Br. 9 (citation and emphasis omitted). This argument fails for several reasons.

First, Potts's interpretation of "scope of employment" renders this term of art nugatory and conflates "scope of employment" with "color of law." If the General Assembly (and the parties to the memorandum of understanding) had intended to impose liability whenever an employee committed a tort while on duty, this could have easily been accomplished. The inclusion of the scope of employment language shows that more is required besides simply acting under "color of law" (which includes being on-duty and using the tools of the trade). Under color of law means under pretense of law. *Brown v. Mayor of Balt.*, 167 Md. App. 306, 322 (2006), *citing Screws v. United States*, 325 U.S. 91, 111 (1945). The color of law concept is broader than scope of employment. *Brown*, 167 Md. App. at 321. Therefore, an employee's actions may be performed "under color of law" but nevertheless fall outside the scope of employment.

Second, relevant case law forecloses Potts's interpretation. To be sure, whether an employee was on duty and using the tools of the trade at the time of an incident are indeed factors that courts consider in the scope-of-employment analysis. But they are not dispositive. Treating them as such would force the outcome-determinative result for which Potts has continuously advocated throughout this suit. In *Sawyer v. Humphries*, the Court rejected the interpretation Potts proposes: "The simple test is whether they were acts within the scope of his employment; **not whether they were done while prosecuting the master's**

business, but whether they were done by the servant in furtherance thereof, and were such as may be fairly said to have been authorized by him." 322 Md. 247, 254 (1991) (emphasis added) (citations and internal quotation marks omitted). As explained more fully below, the stipulation flatly forecloses a finding that the Co-Conspirators' crimes against Potts were in any way authorized or committed in furtherance of BPD or City business. In fact, the stipulation states the exact opposite. (E. 277 ¶ 24). There is nothing in the stipulation to suggest that the Co-Conspirators were trained or authorized to plant guns on innocent people and commit perjury. There are simply no facts in the record to support such a finding.

Third, the assertion that the Co-Conspirators were using the tools of the trade makes a mockery of police work. Such an argument would necessarily mean that the officer in *Wolfe v. Anne Arundel County*, 374 Md. 20 (2003), who was on-duty, driving a police vehicle, wearing a police uniform, and equipped with a departmental weapon when he raped a citizen was acting within the scope of employment during this heinous act. Here, even if the Co-Conspirators were on duty at the time of the incident, the BPD certainly did not equip them with extra firearms to plant on citizens. Potts argues that the Co-Conspirators' crimes against Potts constitute "core police duties," Appellee Br. 9, but in reality, the inverse is true: planting guns and committing perjury is the exact *opposite* of core police duties. The Co-Conspirators used their badges and equipment as disguises to

terrorize Potts and other citizens, and to further a vast RICO conspiracy. Under Potts's logic, officers would be acting within the scope of their employment if they indiscriminately murdered people while on-duty; or more aptly, if they raped citizens while on-duty, as noted above. Of course, this has been foreclosed by *Wolfe*. In other words, if the crimes against Potts are within the scope of employment, it follows that everything an officer does while on duty is within the scope of employment.

Potts relies heavily on *Houghton v. Forrest*, 412 Md. 578 (2010), *see* Appellee Br. 10–12, but *Houghton* is of limited utility. First, the facts are not remotely comparable. In *Houghton*, an officer observed a drug sale through a security camera feed and misidentified Forrest as the purchaser. *Id*. at 583. No contraband was found on Forrest, but the officer ordered Forrest's arrest anyway. *Id*. at 584. Forrest testified that she overheard the officers discussing that they "may have arrested the wrong person[.]" *Id.*

In the case at bar, the Co-Conspirators stopped Potts *knowing* that they did not have reasonable suspicion or probable cause to do so at the outset. They beat him, planted a gun on him, and committed perjury to assure his conviction. While "[o]rdinarily when stopping a motorist or making or attempting to make an arrest, a police officer is acting within the scope of his employment," *Sawyer*, 322 Md. at

260, the case before the Court is far from ordinary.[1] This is not a case where the Co-Conspirators were doing legitimate police work and "may" have made a mistake or overstepped their legitimate authority in the course of a stop, arrest or use of force. In sharp contrast, "[t]he actions of the co-conspirators were performed during and in furtherance of their outrageous criminal conspiracy." (E. 277). The logic of cases like *Houghton* evaporates when confronted with the stipulated facts.

Second, *Houghton* did not undertake a robust analysis of the scope of employment factors. In *Johnson v. Francis*, the Court of Special Appeals noted that "scope-of-employment was not really in dispute in *Houghton*." 239 Md. App. at 547. In *Houghton*, the sole mention of scope of employment was in the context of Forrest's cross-appeal regarding whether there was sufficient evidence of malice in the record. *Id*. at 591. The *Houghton* Court stated that "[a]s Houghton's arrest of Forrest was incident to his general authority as a police officer" his actions would be within the scope of employment." *Id*. at 592. The Court then explained that a malice determination would not be relevant unless and until the BPD seeks

[1] Potts cites two other cases with "ordinary" facts in ostensible support of his position: *Prince George's County v. Morales*, 230 Md. App. 699 (2016) and *Cox v. Prince George's County*, 211 Md. App. 548 (2013). *Morales* involved an officer working as a private security guard who used excessive force at a fraternity party. 230 Md. App. at 727. *Cox* involved an officer ordering his canine to bite a person "without justification." 296 Md. App. at 164. The facts of *Morales* and *Cox* case are so dissimilar from the outrageous criminal conduct at issue here that there can be no useful comparison.

indemnification from Houghton. *Id.* In this case, both the City and Potts agree that the actions of the Co-Conspirators were "contrary to the customary and normal duties of legitimate law enforcement, including officers of the BPD." (E. 275).

Quite simply, there are no facts to suggest that the crimes against Potts were authorized by BPD or the City, whether viewed independently or as part of the broader criminal conspiracy. Potts has failed to meet his burden.

II. The Co-Conspirators were motivated solely by personal gain and were not acting in furtherance of any interest of the City or BPD.

It bears repeating: the scope of employment test is "not whether [the acts] were done while prosecuting the master's business, but whether they were done by the servant in **furtherance** thereof . . ." *Sawyer*, 322 Md. at 255 (emphasis added). The stipulation states that the Co-Conspirators did not act in furtherance of any City or BPD purpose or business. (E. 277 ¶ 24). Even if the Court were to ignore the RICO conspiracy, the fact remains that the record is devoid of information that would suggest that the Co-Conspirators' victimization of Potts was in furtherance of BPD or City business. Potts argues that the Co-Conspirators arrested Potts for gun possession because it "served to advance the officers' own standing within BPD" and "advance[d] BPD's public campaign to combat gun violence." Appellee Br. 15. There is nothing in the record to support these assumptions. There is nothing in the record that suggests the arrest and

victimization of Potts resulted in any advancement or benefit within the agency for the Co-Conspirators, or that it benefitted the BPD in any way. In actuality, it is undisputed that no gun was actually taken off the streets in this case, but rather that a gun was planted by the Co-Conspirators on Potts so that they could falsely arrest him. The Co-Conspirators' "purposes [] included violating the legitimate purposes of the BPD," and that the Co-Conspirators committed "time and attendance fraud." (E. 276, 279). Potts would argue that because the BPD has a general goal of "reducing crime," that any illegal, contemptable, and improper act done by BPD officers is within the scope of employment. To lend credence to this argument is to assume that in pursuing this goal, the ends will always justify the means, a terrifying mindset indeed. After all, this Court, in *Sawyer*, explicitly stated that, when the conduct at issue is "highly unusual" or "quite outrageous," that "in itself is sufficient to indicate that the motive was a purely personal one and the conduct outside the scope of employment." *Sawyer*, 322 Md. at 257 (internal quotation mark omitted).

Potts argues that the outrageous criminality of the conduct is not determinative because, in *Cox v. Prince George's County*, this Court stated that "a master **may** be held liable for the intentional torts of his servant where the servant's actions are within the scope and in furtherance of the master's business and the harm complained of was foreseeable." 296 Md. 162, 171 (1983) (emphasis

added); *Cf. Sawyer*, 322 Md. at 256 (citing the Restatement of Agency, which identified "whether or not the act is seriously criminal" as a factor weighing against scope of employment).

The cases Potts cites for this proposition, however, draw a sharp line between seriously criminal conduct and merely unauthorized conduct, and focus on the foreseeability of the crimes. For example, in *First Fidelity Home Mortgage Co. v. Williams*, which involved a foreclosure rescue scheme, the court emphasized that "foreclosure rescue schemes are not *per se* illegal" [and that] "[t]he facts of this case are quite dissimilar to the types of intentional, criminal acts that the Court of Appeals has held fall outside the scope of employment." 208 Md. App. 180, 207 (2017) (emphasis in original), *citing Sawyer*, 322 Md. at 247; *Wolfe*, 374 Md. at 20; *Henley v. Prince George's County*, 305 Md. 320, 330 n.2 (1986). The Court also noted that "[t]here was evidence from which the jurors could infer that [the employer] had knowledge of, tolerated, and even participated in forgery so long as the end result was that the loans closed, thereby generating fees for the company." *First Fidelity*, 208 Md. App. at 205–06.

In *Sage Title Group, LLC v. Roman*, a title company allegedly disbursed escrow funds without authorization. 455 Md. 188, 195–96 (2017). The Court noted the title company's assertion that depositing personal checks into escrow is not illegal, *id*. at 210, and stated that acts done in a criminal manner may be within

the scope if "the harm complained of was foreseeable." *Id*. at 213. Importantly, there was evidence that the employer authorized the employee to put deposits in the escrow account, *id.*, and knew that the employee had in fact deposited such checks. *Id*. at 214.[2]

Since *Sawyer*, this Court has reaffirmed that intentional, seriously criminal, willful acts are the kind of unprovoked, highly unusual, and quite outrageous

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[2] The out-of-state cases that Potts cites are similarly unavailing. *Sharonville v. American Employers Ins. Co.*, cited on page 11 of Appellee's Brief, involved the duty to defend, not the duty to indemnify. 846 N.E.2d 833, 837–38 (Ohio 2006) (noting that "[a]n insurer's duty to defend is broader than its duty to indemnify," and holding that an insurer was required to defend officers accused of covering evidence because the insurer had "promised to defend claims . . . based on personal injuries and wrongful acts – including allegations that are groundless, false, or fraudulent").

In *McGhee v. Volusia County*, also cited on page 11 of Appellee's Brief, the Florida Supreme Court did not, as Potts asserts, hold that an officer was acting within the scope of his employment when he lunged at a handcuffed suspect and kicked him; the court concluded that it was a question for the jury. 679 So. 2d 729, 730, 733 (Fla. 1996) (citations omitted). The court observed, however, that a law enforcement agency "is immune as a matter of law" when the torts in question "are so extreme as to constitute a clearly unlawful usurpation of authority the [officer] does not rightfully possess, or if there is not even a pretense of lawful right in the performance of the acts." *Id.* at 733 (citations omitted). Such is the case here.

Finally, although the court in *Graham v. Sauk Prairie Police Commission* concluded that an on-duty officer was acting within the scope of his employment when he shot a man with his service revolver, the court also noted that, had the evidence established that the officer shot the victim "solely for his personal benefit," he would have been acting outside the scope of his employment. 915 F.2d 1085, 1095–96 (7th Cir. 1990). For the reasons articulated above, in the body of the brief, the Co-Conspirators here acted solely for their personal benefit when they committed the outrageous, seriously criminal torts against Potts.

conduct that falls squarely outside a police officer's scope of employment. The *Wolfe* Court noted that a police officer's intentional, seriously criminal and willful conduct (raping a motorist that he had stopped for suspected intoxication) was **not** within the scope of his duties as a police officer, a conclusion that even the tort victim conceded. 374 Md. at 34–37. In contrast, in *Larsen v. Chinwuba*, 377 Md. 92 (2003), an insurance commissioner who made allegedly defamatory disclosures about a healthcare organization, possibly in violation of a statute, acted within the scope of his employment because the allegations were not of "**seriously** criminal" acts that were "the type of **intentional** criminal acts that this Court has held fall outside the scope of employment." *Id.* at 107–08 (emphasis added, citing both *Wolfe* and *Sawyer*). Thus, the bright line that these cases establish is that **intentional, seriously criminal willful** conduct – which is unprovoked, highly unusual, and outrageous – is **never** within the scope of employment.

In contrast to the cases Potts cited, the crimes in this case are serious, and there is no evidence in the record that the Co-Conspirators' crimes were foreseeable. In fact, they actively concealed their crimes from their superiors. (E. 278). Even when viewed independently of the RICO conspiracy, there are no facts in the stipulation to suggest that planting a gun, committing perjury, and framing an innocent man was foreseeable such that these acts would fall within the scope of employment.

Likewise, the record does not support an inference that the Co-Conspirators committed their crimes against Potts for anything other than purely personal gain. Potts argues that "[i]f the motive for the conduct is mixed, defendants still lose." Appellee Br. 19. It is Potts's burden, however, to put forth evidence that the motive is mixed, and he has not done so.

Even so, the stipulation states that the Co-Conspirators' actions were in direct opposition to the mission of BPD. (E. 276). The acts against Potts, as outlined in Paragraphs 32 through 38 of the stipulation (E. 278–80), consisted of conduct that is indisputably outrageous and criminal. The *Sawyer* Court stated that "'[w]here the conduct of the servant is **unprovoked, highly unusual and quite outrageous**,' courts tend to hold 'that **this in itself is sufficient to indicate that the motive was a purely personal one' and the conduct outside the scope of employment**." 322 Md. at 257 (emphasis added) (some citations omitted), *quoting* Prosser and Keeton on the Law of Torts § 70, 560 (5th ed. 1984). Whether viewed in light of the overarching RICO conspiracy or independently, there is no question that the crimes against Potts were "unprovoked, highly unusual and quite outrageous." *Sawyer*, 322 Md. at 257. This is enough to find the conduct outside the scope of employment.

Potts attempts to distance the crimes against him from the larger RICO conspiracy. He argues that the lack of immediate pecuniary benefit means that the

Co-Conspirators' crimes against Potts were not part of the conspiracy, and thus must have been partially motivated by a desire to serve the BPD. This is not logically sound. Just because the Co-Conspirators did not actually get money from Potts does not mean that they were not **motivated** by a desire to steal money. In fact, this is the only inference that can be drawn from the record.

As stipulated, the Co-Conspirators stole money from dozens of citizens. This was their modus operandi, and their crimes against Potts were consistent with it. A reading of the indictments and plea agreements, which were incorporated into the stipulation, reveal that the nature of the conspiracy required the participants to be police officers, and to **appear** to be engaging in actual police work. *E.g.*, (E. 329–83). As Potts admits, the Co-Conspirators' actions against him had all the "hallmarks" of authorized police activity. Appellee Br. 9. But both the Co-Conspirators and Potts knew that Potts had done nothing illegal. In order for the conspiracy to continue, the Co-Conspirators had to **appear** to make legitimate arrests in order to keep their jobs, which were the means through which they perpetuated their conspiracy. Arresting innocent people, like Potts, did nothing to make Baltimore's streets any safer, but such baseless arrests furthered the conspiracy by maintaining the Co-Conspirators' cover. Finding people who were actually guilty (or even suspected) of a crime to arrest in order to preserve their cover would have taken the Co-Conspirators more time (leaving less time for

racketeering) and eliminated through arrest some of the conspiracy's best potential sources of illicit income (through either shakedown or theft).

Potts' argument that his own admittedly baseless arrest somehow advanced the BPD's interests is further undercut by the fact that knowingly committing any false arrest instantly eliminates an officer's credibility, thereby bringing into question all the cases (even legitimate cases) that the officer ever touched. That is why the Office of the State's Attorney is reviewing nearly a thousand convictions potentially tainted by the Co-Conspirators. *See* WBAL, "Mosby seeks to have 790 'tainted' convictions thrown out" (Oct. 4, 2019), *available at* https://www.wbaltv.com/article/baltimore-marilyn-mosby-tainted-convictions-thrown-out-gttf/29366742# (last visited January 10, 2020). Far from helping the BPD, the Co-Conspirators' illegal acts have destroyed innumerable years' worth of legitimate police work and grievously wounded the community trust essential to the BPD performing its necessary legitimate work.

In sum, although Potts's ordeal was not specifically part of the indictment or plea agreements, it falls neatly within their confines, and in any case, whether viewed in light of the conspiracy or not, Potts has not pointed to any record facts to show that the crimes against him were not personally motivated, nor to any facts that show they were meant to serve the BPD. Application of legal precedent to the

uncontested facts in this case can lead to only one conclusion: the Co-Conspirators acted outside the scope of their employment.

III. Public policy considerations support the conclusion that the Co-Conspirators were acting outside the scope of their employment.

The City and BPD are not, as Potts asserts, making an "effort to avoid responsibility for the officers' actions in this case." Appellee Br. 32. Quite the contrary. The City and BPD have a responsibility to the taxpayers and, neither the LGTCA nor the MOU requires the use of taxpayer funds to indemnify the criminal Co-Conspirators on this factual record.

Potts misleadingly overstates the law when he asserts that "the LGTCA makes clear that malicious conduct still falls within the scope of local-government indemnification." Appellee Br. 18. *See also id.* at 34 (more accurately hedging, noting that "the LGTCA expressly contemplates that an employee's conduct **may** fall within the scope of employment even if the employee 'acted with actual malice'") (emphasis added), *quoting* Md. Code, Cts. & Jud. Proc. § 5-302(b)(2)(i). Potts conflates a local government's duty to **defend** with its duty to **indemnify**. *Compare* Md. Code, Cts. & Jud. Proc. § 5-302 (addressing the duty to defend), *with id.* at § 5-303 (addressing the duty to indemnify). Although the LGTCA requires a local government to provide a defense in every case, Md. Code, Cts. & Jud. Proc. § 5-302(a), the statute expressly provides that a local government "**may**

not be liable for punitive damages," Md. Code, Cts. & Jud. Proc. § 5-303(c)(1), which are available only in cases involving actual malice, *see, e.g.*, *Beall v. Holloway-Johnson*, 446 Md. 48, 74 (2016) (recognizing that a plaintiff must produce clear and convincing evidence of actual malice to be entitled to punitive damages). The statute further provides that the "**employee shall be fully liable** for all damages awarded in an action in which it is found that the employee acted with actual malice," Md. Code, Cts. & Jud. Proc. § 5-302(b)(2) (emphasis added), which shows that the General Assembly intended to make individuals fully responsible for their own malicious actions. Moreover, while not dispositive, the presence of malice is surely a further indication that an employee "stepped aside from [the scope of employment] in order to gratify his spleen" when committing intentional, seriously criminal acts. *See Sawyer* 322 Md. at 260, *quoting Central Railway Co. v. Peacock*, 69 Md. 257, 14 A. 709, 712 (1888).

Potts and *amici*[3] complain that the BPD should be liable for the actions of its officers. It still could be. This Court's decision on the scope of employment would not foreclose other forms of relief. If the BPD bears direct responsibility for the criminal actions of GTTF members, the proper avenue for relief is *Monell v.*

[3] Appellants filed a letter with the Court dated January 8, 2020, stating that the *amici* of "Victims of the Baltimore Police Department," apparently dissatisfied with the Stipulated Statement of Undisputed Material Facts, have sought to expand the factual and legal issues on the basis of which this Court is mandated to decide the certified question.

Department of Social Services of New York, 436 U.S. 658 (1978). Under *Monell*, a local government is liable, not on a theory of vicarious liability or respondeat superior, but when the government "under color of some official policy, causes an employee to violate another's constitutional rights." *Id*. at 692 (citation and internal quotation marks omitted). In other words, "a municipality is liable for its **own** illegal acts." *Owens v. Balt. State's Attorney's Office*, 767 F.3d 379, 402 (4th Cir. 2014) (emphasis in original). *See also id*. ("Only if a municipality subscribes to a custom, policy, or practice can it be said to have committed an independent act, the *sine qua non* of *Monell* liability.").

The suggestion that a decision against Potts means that the BPD and the City will escape accountability for actions of police officers is simply wrong. More importantly, it ignores the simple fact that Potts was free to choose the causes of action he brought and judgments he received. Here, he received a judgment against the officers, and now seeks indemnification. There is no *Monell* claim here, and Potts is foreclosed from attempting to bring one now.

CONCLUSION

For the foregoing reasons, the City and the BPD respectfully request that the Court hold on the undisputed facts in the record that, as a matter of law, the Co-Conspirators were not acting within the scope of their employment when they committed their torts against Potts, and so answer the certified question.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

I hereby certify that:

1. This brief contains 4,436 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

_____
Kara K. Lynch

PERTINENT AUTHORITY

Maryland Code
Courts and Judicial Proceedings

§ 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.

Maryland Code
Courts and Judicial Proceedings

§ 5-303. Local government liability and defenses

Limits on liability

(a)(1) Subject to paragraph (2) of this subsection, the liability of a local government may not exceed $400,000 per an individual claim, and $800,000 per total claims that arise from the same occurrence for damages resulting from tortious acts or omissions, or liability arising under subsection (b) of this section and indemnification under subsection (c) of this section.

(2) The limits on liability provided under paragraph (1) of this subsection do not include interest accrued on a judgment.

Governmental or sovereign immunity claims

(b)(1) Except as provided in subsection (c) of this section, a local government shall be liable for any judgment against its employee for damages resulting from tortious acts or omissions committed by the employee within the scope of employment with the local government.

(2) A local government may not assert governmental or sovereign immunity to avoid the duty to defend or indemnify an employee established in this subsection.

Punitive damages

(c)(1) A local government may not be liable for punitive damages.

(2)(i) Subject to subsection (a) of this section and except as provided in subparagraph (ii) of this paragraph, a local government may indemnify an employee for a judgment for punitive damages entered against the employee.

(ii) A local government may not indemnify a law enforcement officer for a judgment for punitive damages if the law enforcement officer has been found guilty under § 3-108 of the Public Safety Article as a result of the act or omission giving rise to the judgment, if the act or omission would constitute a felony under the laws of this State.

(3) A local government may not enter into an agreement that requires indemnification for an act or omission of an employee that may result in liability for punitive damages.

Subtitle not a waiver of common law or statutory defense or immunity

(d) Notwithstanding the provisions of subsection (b) of this section, this subtitle does not waive any common law or statutory defense or immunity in existence as of June 30, 1987, and possessed by an employee of a local government.

Common law or statutory defense or immunity in existence on June 30, 1987

(e) A local government may assert on its own behalf any common law or statutory defense or immunity in existence as of June 30, 1987, and possessed by its employee for whose tortious act or omission the claim against the local government is premised and a local government may only be held liable to the extent that a judgment could have been rendered against such an employee under this subtitle.

Lexington Market, Inc., and Baltimore Public Markets Corporation

(f)(1) Lexington Market, Inc., in Baltimore City, and its employees, may not raise as a defense a limitation on liability described under § 5-406 of this title.

(2) Baltimore Public Markets Corporation, in Baltimore City, and its employees, may not raise as a defense a limitation on liability described under § 5-406 of this title.