UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0285

September Term, 2014

JUSTIN CLOUDE

v.

JAMES CARDARELLA

Nazarian,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: July 29, 2015

On May 30, 2012, Justin Cloude ("Cloude") filed a seven-count complaint in the Circuit Court for Baltimore City, in which he named James Cardarella, who was, at all times here pertinent, a member of the Baltimore City Police Department, as the sole defendant.[1] The complaint alleged that on July 1, 2011, at about 10:00 p.m., Cloude thought he was about to be robbed because he heard someone yell "hey, hey." When Cloude heard those words, he ran until he arrived at his home; he then put his hand on the handle of the front door of his residence, at which point, without warning, Officer Cardarella "tased" him. According to the complaint, the blow from the taser caused Cloude's head to strike the pavement and to render him unconscious. Cloude was then taken to a hospital where he received treatment.

The complaint further alleged that while Cloude was in the hospital, Officer Cardarella presented Cloude with documents that charged him with "resisting/interfer[ing] with arrest, failure to obey a reasonable order of a [p]olice [o]fficer, and wear[ing] and carry[ing] a dangerous weapon." The charges were later "dismissed" according to the complaint.

The causes of action alleged in the complaint were: assault (Count I), battery (Count II), false arrest (Count III), false imprisonment (Count IV), violation of Article 24 of the Maryland Declaration of Rights (Count V), violation of Article 26 of the Maryland Declaration of Rights (Count VI), and malicious prosecution (Count VII).

[1]Officer Cardarella is no longer a member of the Baltimore City Police Department.

A jury trial commenced on the afternoon of March 28, 2013. Cloude was the only witness who testified. The only exhibit introduced was a four-page document from the records of the Baltimore City District Court showing that on July 2, 2011, a summons was issued charging Cloude with "resisting/interfering with arrest," failure to obey a lawful order, and carrying a concealed dangerous weapon. That document, which was marked as Plaintiff's Exhibit 1, also showed that the crimes for which Cloude was charged occurred on July 1, 2011 and were later *nol prossed*.

At the end of the evidentiary phase of his case, Cloude's counsel voluntarily dismissed Count III (False Arrest) and Count IV (False Imprisonment). Counsel for Officer Cardarella then made a motion for judgment as to the five remaining counts on the basis that the evidence that was introduced failed to show that Officer Cardarella had any interaction with Cloude whatsoever. After hearing the reasons for the motion for judgment, counsel for Cloude asked the court for leave to reopen the case so that plaintiff could introduce into evidence defendant's answers to interrogatories. Counsel for Cloude said:

> [CLOUDE'S ATTORNEY]: Your Honor, in light of the argument, I would make a request to reopen my case and introduce [d]efendant's answers to interrogatories. I'm not prepared at this moment, but over the weekend, I've had this issue and the case law suggests that we be allowed liberally to do that.[2]

[2]In context, it is clear that counsel wanted additional time to find a case that would say that requests to reopen should be liberally granted; counsel was not asking for additional time to locate the defendant's interrogatory answers.

> And if I introduce the [d]efendant's answer to interrogatories, which also incorporates the Statement of Probable Cause, which the [d]efendant wrote in this case, that should overcome any issue on the motions. So I'd ask permission to reopen and introduce his answers to interrogatories and Statement of Probable Cause referenced in here.

The motion to reopen was denied, without explanation, by the trial judge. Counsel for Cloude then proceeded to argue that the motion for judgment should be denied. During that argument, plaintiff's counsel once again asked for permission to reopen his case, which was once again immediately denied. After both sides concluded their arguments, the trial judge granted the motion for judgment in favor of Officer Cardarella as to all counts because plaintiff had failed to prove that Officer Cardarella had acted wrongfully. Among other things, the trial judge pointed out that there was no evidence that plaintiff "was tased" by anyone. Nor was there testimony as to who chased Cloude or who assaulted him or charged him with any crime. In the words of the trial judge "[w]e don't know what happened." After a judgment was entered in favor of Officer Cardarella, Cloude filed a timely appeal to this Court in which he raises one question: "Did the trial court abuse its discretion in not allowing [a]ppellant to reopen his case?"

I.
FACTS PROVEN AT TRIAL

A. Testimony of Justin Cloude

Cloude, on July 1, 2011, was 18 years old, had just graduated from high school, and was living with his mother at 1317 Patterson Park Avenue in Baltimore City. On July 1,

2011, while at home, he smoked marijuana three times. During the afternoon he played video games with a friend, Tyrone Tinder. Sometime on the evening of July 1, 2011, Cloude left his home to go to a nearby store. He entered the store and bought candy. After he left the store, he heard a siren and also heard someone say "hey, hey." Because of the type of neighborhood he was in (presumably a higher crime area), he assumed that the person who had said "hey, hey" wanted to rob him. Therefore, without even looking at the person who had uttered the aforementioned words, Cloude took off running toward his home. Although he never looked back, he sensed that someone was pursuing him and that his pursuer was about one-half of a block to his rear. When he arrived at his home, he grabbed, with his left hand, the metal railing (near the front of his house) and with his right hand, grabbed the handle to the front door of his residence. At that point, he "turned around" and saw a "blue light shoot out" at him. He did not know what the blue light was. The next thing he remembered was waking up at Johns Hopkins Hospital, where he stayed for "three to seven days."

In his testimony, Cloude admitted that he never saw who was chasing him and that during the entire incident he did not ever see a police officer or a police vehicle in the vicinity. Cloude added that when he ran from his pursuer he never threw a baggie to the ground, nor did he discard a knife.

While at Johns Hopkins Hospital, Cloude received "legal papers," that charged him with several crimes. When asked what the legal paper charged him with, Cloude replied:

"failure to obey, a weapon and what - - I forgot the last charge." He did not say who gave him those papers and the charging documents were not introduced into evidence.

Cloude's testimony as to what, if any, injuries he received as a result of this incident was murky. He testified that while he was at Johns Hopkins Hospital he was given medication that he still takes. No evidence was introduced showing the name or type of medicine he was given or why he was still taking medication.

Cloude testified that prior to the July 1, 2011 incident, he had never been employed. In 2012, he did have a full-time job for an unspecified period. He was "let go" from that job. Cloude testified that the reason he was "let go" from his job in 2012 was because "I wasn't to my old self. I didn't have that much energy as I used to have. I couldn't move around how I used to move around." [3]

Since he lost his job, Cloude made only one application for employment. The reason he had not made other job applications was ambiguous. In this regard he said: "[i]t's hard concentrating. Everybody at my house go to school or work."

B. Exhibit One

Plaintiff's Exhibit no. 1 was a printout of a record from the District Court for Maryland, sitting in Baltimore City, showing that Cloude, on July 2, 2011, was charged with "resisting/interfering with arrest, failure to obey a lawful order, and carrying a concealed

[3]During discovery, Cloude's attorney advised defense counsel that plaintiff was not making a lost wages claim.

dangerous weapon." The record also showed that the crimes with which Cloude was charged, all occurred on July 1, 2011 and were *nol prossed* by the State on November 10, 2011.

II.
PROFFER

When Cloude's counsel asked for permission to reopen the case, he proffered that the interrogatory answers that defendant had signed incorporated by reference a statement of probable cause that Officer Cardarella signed. Counsel further proffered that if he were allowed to re-open plaintiff's case and introduce the interrogatory answers and the statement of probable cause, that evidence would "overcome any issue" raised by defense counsel's motion for judgment.

It is undisputed that, prior to trial, Officer Cardarella answered twenty-five interrogatories propounded by the plaintiff. The second interrogatory asked Officer Cardarella to: "[d]escribe in detail what occurred on July 1, 2011 regarding the incident described in the [p]laintiff's complaint including what drew your attention to the [p]laintiff." Officer Cardarella's answer to that interrogatory was: "Please see the documents produced in response to [p]laintiff's request for production of [d]ocuments, which include the [p]olice [i]ncident [r]eport prepared in this matter." In subsequent answers to Cloude's interrogatories, Officer Cardarella repeatedly answered the questions propounded by referring to the aforementioned police incident report, and incorporating that report by

reference into his interrogatory answers. The record is clear that when Cloude's attorney referred in the proffer to the "statement of probable cause" he was referring to the "police incident report."

In Officer Cardarella's brief, his counsel gives an accurate summary of what Officer Cardarella said in the aforementioned police incident report. Appellee's summary reads as follows:

> [On the evening of July 1, 2011], the Baltimore City Police Department received a report that someone was selling controlled dangerous substances in the area of 1200 Patterson Park Avenue. The report described the suspect as a black male with dreadlocks, wearing a white shirt and white shorts. Officer Cardarella responded to that block and saw Mr. Cloude, who matched the suspect's description. Officer Cardarella approached him, joined by Police Officer Phillip Dixon, who had arrived at the same time. When Mr. Cloude saw the two officers and their marked patrol cars, he turned and fled, with Officer Cardarella in pursuit on foot, and Officer Dixon following in his vehicle.
>
> As Mr. Cloude fled, Officer Cardarella saw him discard a plastic baggie full of drugs and a metal folding knife.* Officer Cardarella ordered Mr. Cloude to stop running and told him that he was under arrest, but Mr. Cloude ignored Officer Cardarella and ran to the next block. Officer Cardarella caught up with Mr. Cloude as he was attempting to enter a residence, again told Mr. Cloude that he was under arrest, and ordered him to get down on the ground. Mr. Cloude continued to ignore Officer Cardarella and attempted to force his way into the locked residence, so Officer Cardarella advised Mr. Cloude that he would "taser" him if he did not get down on the ground. Mr. Cloude refused to comply, and as he continued to force his way into the residence, he turned towards Officer Cardarella, who used his Taser X26 to deliver one shock to Mr. Cloude. Mr. Cloude fell to the ground, and Officer Cardarella immediately called for an ambulance to provide medical assistance for Mr. Cloude.

*Officer Cardarella called for officers to respond to the area where Mr. Cloude discarded the drugs and knife. Officers recovered the knife, but according to a witness, an unknown person picked up the drugs and ran in the opposite direction of the foot chase.

(References to record extract omitted.) (Emphasis added.)

Also in the incident report, was a description of the knife recovered ("folding metal knife [with] 3.4 inch double sided blade") and the following statement made by Officer Cardarella concerning service of the charging documents: "On 07/03/11 at approximately [1:45 a.m.] Justin Cloude was served with a criminal summons at University of Maryland Hospital.[4] Mr. Cloude signed for the criminal summons and was provided with a copy."[5]

Additional facts will be added in order to answer the question Cloude presents.

III.
ANALYSIS

We use an abuse of discretion standard when reviewing a trial judge's decision to deny a motion to reopen.

When the trial judge granted Officer Cardarella's motion for judgment, her reason for doing so was because there was no proof that Officer Cardarella was the person who

[4]The police incident report shows that immediately after Cloude was arrested, he was transported to Johns Hopkins Hospital. Medical records produced during discovery show that Cloude was treated at both the University of Maryland Hospital and at Johns Hopkins Hospital.

[5]In the above excerpt, Officer Cardarella used, in some instances, abbreviations, for some words. In the above quote, we have spelled out the words that were abbreviated.

chased Cloude or assaulted him or charged him with committing crimes. This is shown in the following exchange between the trial judge and counsel for Cloude:

> [Cloude's Attorney]: He [Cloude] testified that he was tased.
>
> THE COURT: No, he didn't. He testified he saw a blue light and he woke up in the hospital. He didn't testify that he was tased - - hit over the head, lost his step and fell off the steps, somebody jumped him. None of it. He - - and he testified that there were - - well, what he testified to was that he didn't see any indicia of law enforcement. That he didn't see any police officers, police cars, or any of that.
>
> So what the [c]ourt has to determine is whether or not there's any - - there's evidence sufficient to go to the jury on any of the elements of the counts. And [Officer Cardarella's] argument is that there - - there isn't. I mean, what we have in evidence at this point is that the young man went to the store, when he left the store, he didn't actually see anyone, but he certainly heard a voice say, "Hey, hey." And where he's from, "Hey, hey" means two things. The person saying, "Hey, hey" means come here and the person who hear[s], "Hey, hey" means I've got to get out of here.
>
> * * *
>
> I mean, there's - - there's absolutely no - - and I don't - - and I don't necessarily mean evidence to specifically identify this officer because, obviously, your client did not see who chased him and he also did not see who assaulted him, if he was assaulted. Because there's not evidence of that either.
>
> But at the same time, I mean, there's just no - - there's no evidence we don't - - nobody knows. This - - this is it. We don't know what happened. All we know is he left the store, he ran home, and he woke up in the hospital.

The seminal case in Maryland concerning the issue of whether a trial judge abused his or her discretion in denying a motion to reopen is *Cooper v. Sacco*, 357 Md. 622 (2000). Sophia Cooper, on May 29, 1996, was involved in a automobile accident; the vehicle that

struck her vehicle was operated by one Robert Sacco. *Id*. at 626. She filed suit in the District Court for Maryland, sitting in Baltimore County, against Sacco and alleged that at the time of the accident Sacco was driving a vehicle owned by Gregory Vlachos and was "the agent, servant and/or employee of Gregory Vlachos," or in the alternative, Sacco was operating the vehicle with Vlachos's permission. *Id*. She also sued Gregory Vlachos.

At trial, Ms. Cooper testified that she attempted to make a left-hand turn from Eastern Avenue onto Marlyn Avenue but, while her car was stationary and while she was waiting for oncoming traffic to clear, her vehicle was struck in the rear. Although Ms. Cooper described how the accident occurred and also described her injuries, she introduced no evidence as to who operated the vehicle that struck her or who owned it. *Id*. Defense counsel, at the conclusion of Ms. Cooper's case, made a motion for judgment on the grounds that the plaintiff had not "identified any individual in this courtroom as being the person who may have caused any injury . . . ." *Id*. at 626-27. Ms. Cooper's attorney asked permission to reopen the case and proffered that he had available "the [d]efendant's Answers to Interrogatories and I can read from them into evidence." Ms. Cooper's counsel also said that "There was no genuine dispute prior to trial that . . . [Sacco] was the driver. That's the only reason why I didn't bother to do that. I mean if I thought it was going to be an issue I would have certainly presented it." *Id*. at 627. The district court judge denied the motion to reopen and granted the motion for judgment in favor of the defendants. *Id*.

Ms. Cooper filed an appeal to the Circuit Court for Baltimore County. *Id*. The circuit court affirmed the decision of the district court and held, *inter alia*, that it was within the district court judge's discretion to not allow Ms. Cooper to reopen her case. *Id*. The Court of Appeals reversed and held that it was an abuse of discretion for the trial judge to deny Ms. Cooper's attorney the opportunity to reopen his client's case to prove who was driving the vehicle that struck her vehicle and who owned the striking vehicle. *Id*. at 644-45.

The *Cooper* Court said:

> The cases concerning the reopening of a trial appear to distinguish between cases in which a party has made a glaring error or omission of material evidence and those in which the party seeking to reopen the case wishes to bring in trivial or supplemental evidence. This Court has rarely addressed a case in which a party moved to reopen a trial to prove an essential, but omitted, fact, and was denied the opportunity to reopen by the trial court. We have held, however, that trial judges who grant a motion to reopen in such circumstances generally act within their discretion. For instance, in *East Baltimore Transfer Co.* [*v. Goeb*], 140 Md. 534, 118 A. 74 [(1922)], which, as petitioner points out, is factually similar to the case *sub judice*, the plaintiff failed to prove who the driver of the truck that had caused the accident was, as well as who owned the truck. Noting that those facts were "necessary evidence for a proper consideration of the case," the Court held that it was a proper exercise of discretion for the trial judge to reopen the case. *Id*. at 537, 118 A. at 75. In 1876, we noted in *Trustees of the German Lutheran Evangelical St. Matthew's Congregation v. Heise*, 44 Md. 453, 465 (1876), that "[a]s to the power of the court to allow additional evidence to be taken, even after the cause has been submitted, that would seem to be clear, though the power is not generally exercised except in cases where, *from accident or inadvertence, omissions or defects of proof have occurred, which the party could have readily supplied.*" (Emphasis added.) *See also Baltimore & Ohio R.R. Co. v. Plews*, 262 Md. 442, 467-68, 278 A.2d 287, 299 (1971) (holding, *inter alia*, that when the plaintiff failed to lay a proper foundation for an expert's testimony, it was proper for the trial judge to reopen the case to allow counsel to lay that foundation); *Bradford* [*v. Eutaw Savings Bank*], 186 Md.

> [127] at 131, 46 A.2d at 286 [(1946)] ("When, in the judgment of the chancellor, the ends of justice will be subserved, this court has said that it is his plain duty to allow further proof to come in."); *Guyer* [*v. Snyder*], 133 Md. [19] at 22, 104 A. at 117 [(1918)] ("In 2 *Poe's Pleading and Practice*, Vol. 2, it is said that cases may arise when the purposes of justice may seem to require that the application ought not to be denied, and accordingly, it is not a reversible error to permit the case to be re-opened for such purpose.").
>
> The Court of Special Appeals has held that it is an abuse of discretion not to reopen a trial when circumstances make the evidence sought to be admitted material to the party's case.

Id. at 638-40.

The *Cooper* Court then segued into a discussion of how courts in other states have treated motions to reopen. *Id*. at 640-42. In this regard, the Court summarized holdings from our sister states by saying that those states had generally held "that trial courts abuse their discretion when they refuse to allow a party to reopen a case and submit additional essential or material evidence, particularly when that evidence is omitted inadvertently." *Id*. at 640.

The *Cooper* Court cited with approval a four-factor test utilized by the Illinois Appellate Court in *Polk v. Cao*, 664 N.E. 2d. 276, 279 (Ill. App. Ct. 1996) when determining whether there has been an abuse of discretion when a trial court denies a motion to reopen. 357 Md. at 640. The four factors listed in *Polk v. Cao* were as follows:

> (1) whether the failure to introduce the evidence occurred because of inadvertence or calculated risk; (2) whether the adverse party will be surprised or unfairly prejudiced by the new evidence; (3) whether the new evidence is

> of the utmost importance to the movant's case; and (4) whether any cogent reason exists to justify denying the request.

664 N.E. 2d. at 279 (citation omitted).

We turn now to an analysis of the four factors listed by the Illinois Appellate Court in *Polk*, *supra*, and cited with approval by the Court in *Cooper*. 357 Md. at 640. The first *Polk* factor clearly favors Cloude, just as it favored the plaintiff in the *Cooper* case. It is clear that Cloude's counsel's failure to introduce the interrogatory answers with the police incident report attached was an inadvertent error as opposed to a calculated omission on counsel's part. After all, without the additional evidence, Cloude could not have possibly prevailed inasmuch as at that stage of the proceedings no evidence had been introduced showing that Officer Cardarella had committed any act whatsoever that concerned Cloude.

The second *Polk* factor (whether the defendant would be prejudiced or taken by surprise) also favors Cloude. Defense counsel could not possibly have been taken by surprise or unfairly prejudiced by the introduction of the proffered material. What plaintiff's counsel sought to introduce was what defendant himself had sworn to under oath. This is the same type of evidence (sworn interrogatory answers) that were at issue in *Polk*, *supra*. What the *Polk* Court said in that regard, which was quoted with approval by the *Cooper* Court, was:

> [T]he trial court abused its discretion in denying plaintiff's request to reopen his case to introduce plaintiff's medical bills. It appears that plaintiff's counsel failed to introduce these bills . . . through inadvertence. . . . Defendant was clearly not surprised or unfairly prejudiced by plaintiff's

> request to place the medical bills into evidence. Plaintiff not only testified at trial regarding his medical treatment, but also disclosed in interrogatory answers, filed more than two years before the trial, that he would be seeking medical expenses at trial.

Cooper, 357 Md. at 641 quoting *Polk*, 664 N.E.2d at 279.

Additionally, in regard to the lack of prejudice factor, Officer Cardarella's counsel explained in his opening statement how his client claimed Cloude was injured. That opening statement closely tracked what was said in the incident report.

We have already touched upon the third *Polk* factor, i.e., whether the new evidence was of the utmost importance to the movant's case. As previously stated, without the additional evidence, Cloude could not possibly prevail because he had not proven that the defendant had interacted with him in any fashion.

In regard to the fourth *Polk* factor, (existence, *vel non*, of any cogent reason to justify denial of the request to reopen) it is important to point out that the trial judge gave no reason as to why she was denying the request. In fact, she denied the request (on three occasions) without even hearing from defense counsel. Moreover, in his brief, Officer Cardarella provides us with no cogent reason as to why the denial was justified. Similar to the situation presented in *Cooper*, it would have been a very simple matter to allow plaintiff's attorney to read into evidence the relevant interrogatory answer and to admit into evidence the incident report signed by Officer Cardarella that was incorporated by reference into those answers.

At the time the request to reopen was denied, it was late on a Friday afternoon, but very little time had been expended at trial and reopening the case would have allowed the plaintiff to have his day in court and thereby "serve the interest of justice and cause no undo disruption of the proceedings or unfairness to the party not seeking to have it reopened." *Sugarloaf Development Co. v. Heber Springs Sewer Improvement District, et al.*,805 S.W.2d 88, 92 (Ark.App.1991).

All the *Polk* factors strongly support Cloude's argument that the trial judge abused her discretion in this matter. And, as the Court pointed out in *Cooper*, under situations similar to those presented in this case, it is an abuse of discretion to deny a motion to reopen. In reaching that conclusion, the *Cooper* Court cited with approval several out-of-state cases, *viz.*:

> *Antley v. Brantly*, 669 So.2d 685, 688-89 (La.Ct.App.1996) (holding that the refusal of the trial judge to allow new evidence that the plaintiff would need more extensive surgery, and thus suffer more damages, was an abuse of discretion); *Wakefield v. Puckett*, 584 So.2d 1266, 1268 (Miss.1991) ("As a general rule . . . the reopening of a case for the purpose of showing facts vital to the issue involved, *is liberally allowed . . . and a failure to do so may be considered an abuse of judicial discretion.*" (Quoting *Wells-Lamont Corp. v. Watkins*, 247 Miss. 379, 387-88, 151 So.2d 600, 604 (1963))); *Page v. Lewis*, 902 S.W.2d 359, 361 (Mo.Ct.App.1995) ("[T]here is an abuse of discretion and a new trial will be directed upon a refusal to reopen a case and permit the introduction of material evidence, that is evidence that would substantially affect the merits of the action . . . ." (quoting *Pride v. Lamberg*, 366 S.W.2d 441, 445 (Mo.1963))); *Metro Ins. Agency v. Mannino*, 856 S.W.2d 81, 83 (Mo.Ct.App.1993) (holding that the trial court abused its discretion by denying plaintiff the chance to introduce additional evidence, then dismissing the case "based on the lack of that very evidence."); *Ford v. Ford*, 105 Nev. 672, 676, 782 P.2d 1304, 1307 (Nev.1989) ("When an essential element of a

> party's case can be easily and readily established by reopening the case, refusal to reopen will most often constitute an abuse of discretion."); *Rosen's Inc. v. Juhnke*, 513 N.W.2d 575, 576 (S.D.1994) (noting that whether to reopen a case is left to the trial judge except when "necessary to the due administration of justice." (quoting 75 Am.Jur.2d *Trial* § 379 (1991))).

357 Md. at 642.

In his brief, Officer Cardarella asserts that the trial judge did not abuse her discretion in denying the motion to reopen, even though he acknowledges that generally the rule is that it is an abuse of discretion not to allow the reopening of a trial when circumstances make the evidence sought to be admitted material to the party's case. In support of that last mentioned legal principle, appellee cites *Cooper*, 357 Md. at 639-40, which, in turn, cited *Valerino v. Little*, 62 Md. App. 588 (1985). Appellee, nevertheless, asserts that both *Cooper* and *Valerino* are here inapposite because in those cases, purportedly, "the circumstances warranting additional evidence . . . came about due to particular actions by the trial courts, rather than the parties seeking to reopen their cases." That was true in *Valerino* but appellee is mistaken in that regard as to *Cooper*.[6] Plaintiff's attorney in *Cooper* failed to prove, *inter*

[6]In *Cooper*, defense counsel made a motion for judgment in the district court on behalf of the defendant owner of the car involved in the motor vehicle accident and on behalf of the driver of that vehicle. *Cooper*, 357 Md. at 637, n.3. The *Cooper* Court held that, as to the owner of the vehicle sued by plaintiff, it was unnecessary to offer proof that the defendant actually owned the vehicle because the owner failed to deny his ownership in his notice of intent to defend as he was required to do by Md. Rule 3-308. *Cooper*, 357 Md. at 627-37. The discussion in *Cooper* regarding the issue of whether the district court erred in denying the motion to reopen was nevertheless necessary because no rule required the driver of the striking vehicle (Robert Sacco) to affirmatively deny in his notice of intent to (continued...)

alia, who was driving the automobile that struck her. *Id*. at 626-37. This failure of proof did not come about as a result of an error on the part of the trial judge. Cooper's counsel asked permission to reopen the plaintiff's case in order to read from the defendant's interrogatory answers in order to show that Mr. Sacco was the operator. *Id*. at 627. The *Cooper* Court said that the trial court abused its discretion in failing to allow the plaintiff to introduce Sacco's interrogatory answers in order to identify the "allegedly negligent driver." *Id*. at 644-45. Contrary to appellant's argument, the *Cooper* case is on point.

Appellee also argues that the trial judge did not abuse her discretion because the proffered evidence was not either "trivial" or "supplemental." It is true that the proffered evidence was neither "trivial" nor "supplemental." But, contrary to appellee's implied argument, this is a factor that favors Cloude and not the appellee. *Cooper* makes this point crystalline when it cited with approval the out-of-state cases that we have listed, *supra*, at pages 16 and 17.

Appellee also argues that it would have required "significant further proceedings" if the plaintiff had been allowed to reopen his case. This, arguably at least, would be a relevant factor in deciding whether to allow a case to be re-opened, but only if the proffered evidence was in fact complicated or time-consuming. But in this case to introduce the evidence

[6](...continued)
defend that he drove that vehicle, and plaintiff, prior to asking for permission to reopen, had not presented proof that Mr. Sacco was driving the vehicle that struck plaintiff's car. *See Cooper*, 357 Md. at 637, n.3.

proffered, would have been a simple matter and clearly would not have consumed much time.

Appellee's argument that "significant further proceedings" would have been required, appears to be based on the assumption that plaintiff's attorney would have sought to redact some unspecified portion of the incident report. But neither at trial nor on appeal did Cloude's attorney indicate that he wanted to redact anything, nor was there any reason for him to have done so. The incident report in its entirety was admissible as a statement of a party opponent (*see* Md. Rule 5-803(a)(2) (the rule against hearsay does not apply to a statement that is offered against a party and is [a] statement of which the party has manifested an adoptation or belief in its truth)). There were, of course, many statements in the police incident report that contradicted Cloude's trial testimony. But, if the jury had been allowed to consider the interrogatory answers and the incident report, Cloude would have been entitled to a jury instruction that provided: "In determining whether a party has met the burden of proof, you should consider the quality of all of the evidence regardless of who called the witness or introduced the exhibit and regardless of the number of witnesses which one party or the other may have produced." *See* Maryland Civil Pattern Jury Instructions (MPJI-Cv) 1:12 (emphasis added). In other words, to the extent that either the interrogatory answers or the incident report contradicted Cloude's version of events, it would have been the duty of the jury to resolve the conflicts.

"Significant further proceedings," of course, may have followed if the proffered evidence had been allowed – but only if Officer Cardarella decided that he wanted to introduce exhibits or call witnesses. The fact that reopening the plaintiff's case might lead the defendant to introducing evidence is quite obviously not a valid reason for denying plaintiff's motion to re-open.

Officer Cardarella argues that allowing the case to be reopened would have been "unduly prejudicial" to him and thus the court was justified in denying the motion. The only reason appellant puts forth as to why this is so is because, at the time the motion to reopen was argued, Officer Cardarella's counsel had just laid out "all of the deficiencies in Mr. Cloude's case." This is true, but the deficiencies that were "laid out" were obvious ones, i.e., plaintiff had failed to prove that Officer Cardarella had any interaction with Mr. Cloude on July 1, 2011 or on any other date. This is similar to the deficiency discussed in *Cooper* where plaintiff's attorney had inadvertently failed to prove the identity of the operator of the vehicle that rear-ended the car Ms. Cooper was driving. In fact, in any case where a party asks to reopen his or her case, the movant, at the time the motion is made, would likely be aware of the opponent's exact argument regarding evidentiary insufficiency.

Lastly, the appellee argues that the proffered evidence "was not readily available and making it so would have delayed trial." There is nothing in the record to support that argument. Counsel for Cloude proffered that the evidence could be produced and we have no reason to doubt him.

For the above reasons, we hold that the trial judge abused her discretion when she denied plaintiff's motion to reopen the case in order for Cloude's counsel to read into evidence the proffered materials.

III.
OTHER MATTERS

Appellee contends that "even if the trial court erred by denying Mr. Cloude's motion to reopen, the error was harmless because the proffered evidence did not establish essential elements of Mr. Cloude's claims that were missing from the case." In support of this argument, appellee first argues:

> [A]s a plaintiff claiming assault, battery, and constitutional torts against Officer Cardarella, Mr. Cloude had the burden of proving his case "as charged, such as by the use of excessive or unreasonable force, by abuse of authority, or with willfulness and wantonness[.]" 6A C.J.S. Assault § 48; . . . Compl. ¶¶ 7, 12, 17, 21, 24, 27-28, 29-30 (alleging that Officer Cardarella acted unlawfully and without justification). *See also Hines v. French*, 157 Md. App. 536, 551 n.4, 852 A.2d 1047, 1055 [n.4] (2004) (citing *Ashton v. Brown*, 339 Md. 70, 119 n.24, 660 A.2d 447, 471 [n.24] (1995)). Nothing in Officer Cardarella's incident report indicates that he acted illegally or without justification, and nothing in Mr. Cloude's testimony indicates that he acted at all. Thus, even if the [t]rial [c]ourt had admitted the incident report as additional evidence–in whole or in part–Mr. Cloude still would have failed to prove essential elements of his assault, battery, and constitutional tort claims.

(Reference to record extract and footnote omitted).

It is certainly true that, if read in isolation, nothing in the incident report would indicate that Officer Cardarella "acted illegally or without justification." The trouble, however, with this argument is that it ignores Cloude's testimony and presumes that the jury would have taken everything said in the incident report at face value. But the jury was not

obligated to accept Officer Cardarella's version of events in its entirety. The importance of the incident report, from Cloude's perspective, was that it established: 1) who chased the plaintiff; 2) who shot plaintiff with a taser gun; and, 3) who charged Mr. Cloude with having committed three crimes. If the incident report had been admitted into evidence, the jurors, if they believed Cloude's testimony, could have concluded that Cloude, prior to the chase, had committed no crime; that the defendant never announced that he was a police officer; that appellant never resisted arrest; that Cloude, while he ran, did not discard drugs or a knife; and that Officer Cardarella shot plaintiff with a taser without warning and with no good reason for doing so. Therefore, taking the evidence in the light most favorable to Cloude, he would have proven all the essential elements of assault, battery and the constitutional torts.

In regard to the malicious prosecution claim, appellee argues:

> [I]n order to make out a *prima facie* case of malicious prosecution, Mr. Cloude had to introduce some evidence of (a) a criminal proceeding instituted or continued by the defendant against the plaintiff, (b) termination of the proceeding in favor of the accused, (c) absence of probable cause for the proceeding, and (d) "malice," or a primary purpose in instituting the proceeding other than that of bringing an offender to justice. *Montgomery Ward v. Wilson*, 339 Md. 701, 714, 664 A.2d 916, 922 (1995). Here, Mr. Cloude introduced evidence that he was charged with some crimes, and that a case against him was later dismissed. But as the [t]rial [c]ourt made painstakingly clear, Mr. Cloude introduced *no evidence* that these charges and proceedings were related to each other, or to the incident involving Officer Cardarella underlying this case. Finally, even if one were to entertain the speculation that Officer Cardarella had charged and prosecuted Mr. Cloude, there was no evidence in Mr. Cloude's testimony or in the incident report showing that Officer Cardarella either lacked probable cause or acted with malice.

It is of course true that Cloude "introduced no evidence that . . . [the charges that were *nol prossed*] were related to . . . the incident involving Officer Cardarella." But that fact has nothing whatsoever to do with the issue of whether the trial judge's decision not to allow Cloude to reopen his case was harmless. The appropriate question is: if the court had allowed the proffered evidence to be introduced, would Cloude have produced sufficient evidence to allow the malicious prosecution count to be decided by the jury? We answer "yes" to that question. If defendant's interrogatory answer no. 2 had been read to the jury, the jury would have known of course that what was in the incident report was Officer Cardarella's response to the allegation made against him by Cloude in Cloude's complaint. That incident report showed that Cloude was charged as a result of the July 1, 2011 incident and this was corroborated by Cloude's testimony. Cloude told the jury what happened when he left his residence on the evening of July 1, 2011. The three charges were obviously "related to each other" and to the incident involving Officer Cardarella because in the incident report Officer Cardarella admitted that as a result of the July 1, 2011 incident, he served Cloude with criminal charges and, according to plaintiff's Exhibit no. 1, the three charges all were based on events that took place on July 1, 2011. Therefore, the proffered evidence, coupled with the evidence actually introduced, clearly was sufficient to show that Cloude was charged with three crimes as a result of the "tasing incident" and not some unrelated July 1, 2011 incident.

We turn next to appellee's argument that if the proffered evidence had been introduced, there still would have been no evidence that "Officer Cardarella either lacked probable cause [to bring the charges] or acted with malice." If Cloude's testimony were believed, the appellee did not have probable cause to arrest him for "resisting/interfering with arrest." According to Cloude, he in no way resisted arrest; instead, he simply turned toward his pursuer whereupon he was knocked unconscious. Moreover, according to Cloude, no command was ever given to him prior to the point he became unconscious. If that testimony were believed, Officer Cardarella would not have had probable cause to arrest him for "failure to obey a lawful order" of a police officer.

In regard to the charge of "carrying a concealed dangerous weapon," the incident report states that Officer Cardarella saw Cloude discard a "metal folding knife." Officer Cardarella, according to the incident report, based that charge on the fact that he saw Cloude discard a knife, which he recovered. But Cloude testified that he did not discard a knife and, if the jury credited Cloude's testimony, Officer Cardarella did not have probable cause to arrest him on that charge, i.e., carrying or concealing a knife.[7]

[7]Under Maryland law, carrying a concealed folding knife with a locking blade is not illegal. *See Bacon v. State*, 322 Md. 140, 144-47 (1991). From plaintiff's exhibit 1, it appears (although the matter is not free from doubt) that Cloude was charged by Officer Cardarella with a crime under state law. *See* Md. Code (2002) Criminal Law Article § 4-101(c), which prohibits a person from carrying a concealed dangerous weapon. But under state law, the knife described in the incident report is not a "dangerous weapon" because it would fit within a statutory exception, which allows a person to carry a "penknife without (continued...)

Finally, we disagree with appellee's argument that even if the proffered evidence had been received, the evidence would have been insufficient to prove the "malice element" of a successful action for malicious prosecution of a criminal action. When an action of this type is brought, malice can be inferred from a lack of probable cause. *See Okwa v. Harper*, 360 Md. 161, 188 (2000), and, as already shown, taking the evidence actually introduced by Cloude, coupled with the proffered evidence, in the light most favorable to appellant, the jury could have found that Officer Cardarella brought each of the three charges without probable cause.

CONCLUSION

The trial judge abused her discretion when she denied appellant's request to reopen his case. That error was not harmless.

JUDGMENT REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR A NEW TRIAL; COSTS TO BE PAID BY APPELLEE.

[7](...continued)
a switchblade." *See* Criminal Law Article § 4-101(a)(5)(ii)(2). *See also Bacon*, *supra*, 322 Md. at 144-49 and *Mackall v. State*, 283 Md. 100, 113, n.13 (1978) ("[p]enknives today are commonly considered to encompass any knife with the blade folding into the handle, some very large."). It is possible that Cloude was charged pursuant to a Baltimore City Ordinance, which may have a definition of a concealed dangerous weapon, different from that set forth in Article 4-101(a). We need not decide that issue, however, because, according to Cloude's testimony, he did not discard a knife of any type.