Circuit Court for Baltimore City
Case No. 24-C-17-005327

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3067

September Term, 2018

TEAIRA SMALLWOOD, ET AL.

v.

JOSEPH KAMBERGER, ET AL.

Meredith,
Kehoe,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: July 20, 2020

A hit-and-run driver, who was being chased at high speed by police from Baltimore County into a commercial and residential area of Baltimore City, crashed into another car and caused it to jump the curb and strike 17-month-old Jeremiah Perry, who was waiting in a stroller at a bus stop with his mother and sister. A few hours later, Jeremiah died.

Teaira Smallwood, on her own behalf and as the personal representative of the estate of her deceased son, Jeremiah, and T.S., her underage daughter, (collectively, the "Smallwood Plaintiffs" or "Appellants") initiated two wrongful death suits against, among others, Baltimore County (the "County") and Baltimore County Police Officer Joseph Kamberger (collectively, the "Appellees"). The suits were brought in the Circuit Court for Baltimore City where they were consolidated. The underlying complaints allege negligence, gross negligence, assault and battery, wrongful death and a survival action against Officer Kamberger, and a violation of Article 24 of the Maryland Declaration of Rights ("Article 24") against both Officer Kamberger and the County.

Following discovery, Officer Kamberger and the County moved for summary judgment on all counts. The trial court granted Officer Kamberger and the County's motion. The Smallwood Plaintiffs filed a motion to amend the judgment, which the trial court denied.

The Smallwood Plaintiffs present four issues for our review,[1] which we have

[1] Appellants phrased their questions presented as follows:

"I. DID THE TRIAL COURT ERR WHEN IT FOUND THAT PROXIMATE CAUSE WAS LACKING AS A MATTER OF LAW WHERE A COUNTY POLICE OFFICER PURSUED A SUSPECT AT DANGEROUSLY HIGH SPEEDS

(Continued)

reordered and recast into the following five questions:

I. Did the circuit court err in granting summary judgment to Officer Kamberger and the County by finding, as a matter of law, that certain immunity provisions applied to shield Officer Kamberger and the County from liability?

II. Did the circuit court err in granting summary judgment to Officer Kamberger and the County on the counts asserting a survival action and wrongful death by finding, as a matter of law, that Officer Kamberger's pursuit was not a proximate cause of the Smallwood Plaintiffs' injuries?

III. Did the circuit court err in granting summary judgment to Officer Kamberger and the County, as a matter of law, for the alleged violation of Article 24 of the Maryland Declaration of Rights?

IV. Did the circuit court err in granting summary judgment to Officer Kamberger and the County, as a matter of law, for counts asserting assault and battery?

V. Did the circuit court abuse its discretion when it denied the Smallwood Plaintiff's motion to amend the judgment?

We reverse, in part, and affirm, in part, the circuit court's grant of summary judgment. Because disputes of material fact remain as to whether Officer Kamberger was

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THROUGH NUMEROUS INTERSECTIONS AND IN CONTRAVENTION WITH DEPARTMENTAL REGULATIONS, CAUSING THE SUSPECT TO RUN THROUGH THE FINAL INTERSECTION, WHO THEN HIT ANOTHER VEHICLE, WHICH KILLED A BABY?

II. DID THE TRIAL COURT IMPERMISSIBLY DECIDE MATERIAL AND DISPOSITIVE ISSUES OF INTENT, STATE OF MIND, AND MOTIVE THAT SHOULD HAVE BEEN SUBMITTED TO A JURY?

III. DID THE TRIAL COURT MISAPPLY THE RELEVANT IMMUNITY PROVISIONS, RESOLVING A GENUINE DISPUTE OF MATERIAL FACTS THAT WERE NECESSARY FOR THOSE IMMUNITIES TO APPLY?

IV. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANTS' MOTION TO AMEND, A DECISION CLEARLY AGAINST LOGIC AND THE EFFECTS OF FACTS AND INFERENCES BEFORE IT?"

grossly negligent, we reverse the court's grant of summary judgment on the gross negligence claims as well as the court's imposition of immunity barring the remaining negligence claims. In so doing, however, we agree with the court's determination that the evidence, viewed in a light most favorable to the Smallwood Plaintiffs, failed to support their allegation that Officer Kamberger acted with malice. We also reverse on the counts asserting wrongful death and survival actions because disputes of material fact remain concerning whether Officer Kamberger's conduct was a substantial factor in bringing about the Smallwood Plaintiffs' injuries.

We affirm the grant of summary judgment in favor of Officer Kamberger and the County on the claim of a violation under Article 24 of the Maryland Declaration of Rights because the evidence did not establish that Officer Kamberger had a "purpose to cause harm unrelated to the legitimate object of" apprehending Mr. Green. *County of Sacramento v. Lewis*, 523 U.S. 833, 839 (1998). We likewise affirm on the counts alleging assault and battery because there is nothing in the record to support an inference that Officer Kamberger intended to strike, or did strike, Jeremiah Perry, Mr. Green—or anyone else—with his vehicle. Having found partial error in the grant of summary judgment, we do not reach the remaining question regarding the denial of the Smallwood Plaintiff's motion to amend the judgment. Accordingly, we remand for further proceedings consistent with this opinion.

BACKGROUND

The parties present contradictory accounts of the pursuit and Officer Kamberger's conduct. Accordingly, we summarize the facts in the light most favorable to the Smallwood Plaintiffs.

The Pursuit and the Incident

In the evening of November 1, 2015, Ms. Smallwood was waiting at the bus stop near the intersection of Moravia Road and Sinclair Lane in Baltimore City with her daughter, T.S., a minor, and son, Jeremiah, who was almost 17-months old. Jeremiah was in his stroller.

Approximately three miles away, Officer Sherri Evelyn had stationed her patrol car in the left lane of eastbound Pulaski Highway at Krueger Avenue in Baltimore County. Officer Evelyn was out of her car and blocking through traffic to protect a crash team, which was investigating a fatal accident farther up the road. A Mercedes sedan, driven by Wayne Anthony Green but owned by Cheira Marisa Washington, struck the rear of Officer Evelyn's patrol car, but Officer Evelyn jumped Pulaski Highway's concrete median barrier and avoided impact and serious injury. The collision caused damage both to the Mercedes and the patrol car. Officer Evelyn radioed that her patrol car had been struck but that she did not need a medic.

Officer Evelyn then approached Mr. Green and requested his license and registration. Mr. Green exited the car and, according to Officer Evelyn, appeared to be looking for something. Officer Evelyn again requested Mr. Green's license and registration, whereupon Mr. Green responded that he needed to call his wife. It appeared

to Officer Evelyn that Mr. Green was walking to the passenger side of the Mercedes. She turned her attention to a witness to the accident to request his license and a witness statement. Officer Evelyn then heard someone yell "he's going -- he's driving off." She looked back at Mr. Green's vehicle and saw Mr. Green had re-entered the Mercedes and was driving away. After Mr. Green made a U-turn, he fled west towards Baltimore City on Pulaski Highway. Officer Evelyn immediately reported this to dispatch and her supervisor.

Meanwhile, Officer Kamberger was nearby completing another vehicle stop for a traffic violation when he heard over police radio that Officer Evelyn was involved in an accident. Baltimore County Police Dispatch requested additional units in the area to travel to the scene. Officer Kamberger finished his stop and drove westbound on Pulaski Highway, whereupon he passed the site of the accident on his left. Officer Kamberger made a U-turn at a median, and as he drove past Officer Evelyn, he was able to observe that, although disheveled, Officer Evelyn did not appear to be suffering from any visual injuries. He then activated his lights and sirens, made another U-turn, and began pursuit of Mr. Green, who, according to the earlier dispatch, had taken off towards the city on Pulaski Highway.

Because Mr. Green had already engaged in a hit-and-run and fled the scene at a high rate of speed, Officer Kamberger surmised that Mr. Green could become involved in another hit-and-run or strike a pedestrian. Officer Kamberger attested that the sole reason that he elected to pursue Mr. Green was due to the hit-and-run incident.

Officer Kamberger pursued Mr. Green heading westbound on Pulaski Highway toward Baltimore City. The pursuit continued into Baltimore City when Mr. Green exited Pulaski Highway onto Moravia Road into an area that was unfamiliar to Officer Kamberger. He followed close behind, and as the pursuit continued, the neighborhood became increasingly residential and commercial. Correspondingly, the speed limit shifted from 45 and 50 miles per hour on Pulaski Highway to 30 miles per hour at Moravia Park Drive where a school was located before the intersection at Moravia Road and Sinclair Lane.

Eyewitnesses to the incident stated that a helicopter was overhead chasing the Mercedes. Officer Kamberger stated during his deposition that he was already in the city before he heard that aviation was summoned.

At the oncoming intersection at Moravia Road and Sinclair Lane, Officer Kamberger deposed that pedestrians were standing at the bus stop and farther ahead in a shopping center. During her deposition, Ms. Smallwood described Mr. Green's Mercedes and Officer Kamberger's vehicle as "real close" like "kissing bumper-to-bumper" and traveling "freeway fast." A second witness deposed that Officer Kamberger was "right behind" Mr. Green's car. To the contrary, Officer Kamberger stated that, before the intersection, "when I was about 7, at minimum 7, 10 car lengths behind [Mr. Green]. . . . I started de-escalating on my end. I let go of the gas, started applying the brake as I saw him approach Sinclair and Moravia [Drive] . . . because I saw the traffic. . . . I was not going to proceed."

Officer Kamberger testified that Mr. Green proceeded through a red light and struck a Volvo, which was making a right-hand turn onto Moravia Road. The Volvo jumped the curb before reaching the bus stop where Ms. Smallwood was waiting with her children. It struck Jeremiah's stroller, critically injuring him.[2] Jeremiah was transported by the Baltimore City Fire Department to an area hospital, where he later succumbed to his injuries.

Mr. Green was apprehended and brought into custody. He pleaded guilty to vehicular manslaughter, fleeing and eluding police, and driving with a suspended license and was sentenced to ten years in prison.

During the pursuit, according to Charles Gregory Russell, an expert witness for Officer Kamberger, the officer's speed *averaged* 90 miles per hour.[3] The expert calculated the distance between Batavia Farm Road (where Officer Kamberger made the U-turn) and the intersection of Moravia and Sinclair to be approximately three miles. In order to travel this distance during the two minutes that the pursuit lasted, Officer Kamberger would have

[2] The Complaint avers that Jeremiah was trapped underneath the Volvo, owned by Mr. Nathan Orlando Joyner. However, the State of Maryland Motor Vehicle Crash Report provides that Jeremiah was propelled north, and the Baltimore Police Crash Team Report states that the stroller was "propell[ed] [] approximately 44 feet north over a chain link fence landing near a driveway to the Parkside Shopping Center."

[3] The expert based his determination on "the length of the radio transmissions," which is 120 seconds long, and by starting the pursuit at "Batavia Road and end[ing] it at Sinclair" Lane. Officer Kamberger, on the other hand, testified during his deposition that: "I didn't go over 80. When I was behind [Mr. Green], I never went over 60. And that was the highest speed that I went with him."

had to maintain an average speed of 90 miles per hour.[4] However, the BCPD's Motor Vehicle Pursuit Report and Unusual Occurrence Summary stated that the distance of the pursuit was 2.2 miles. Correspondingly, the BCPD's Unusual Occurrence Summary calculated the average speed during the pursuit as 65.45 miles per hour. Officer Kamberger admitted, in general, that police pursuits induce individuals who are already fleeing to "drive faster and attempt to—flee[] and [e]lud[e]."

Officer Kamberger agreed that he and Mr. Green passed through at least thirteen intersections and approximately nine signals. The investigating officer determined that there were approximately sixteen intersections. Of the nine signals, Officer Kamberger deposed that Mr. Green ran through "three, maybe four" red light signals. He also affirmed that Mr. Green "bl[e]w through the intersections" and that it never "seem[ed] like he was going to stop[.]" While Officer Kamberger was able to come as close as two car lengths from Mr. Green's Mercedes, he was unable to retrieve the license plate number, in part, because Mr. Green continued to speed through the intersections.

Baltimore County Department Field Manual

The Baltimore County Police Department Field Manual ("Field Manual") establishes factors that all officers must take into consideration when determining whether to initiate or maintain a police pursuit. Importantly, it regulates police pursuits to ensure that safety is prominent: "The policy of this Department is to operate police vehicles

[4] Given Officer Kamberger's testimony that he had to slow down to clear various intersections and signals, a jury could infer that Officer Kamberger would have had to travel at significantly greater speeds for at least part of the pursuit.

primarily with regard for the safety of others by regulating the engagement and performance of motor vehicle pursuits. The identification/apprehension of a violator is a secondary concern."

The Field Manual contains a Motor Vehicle Pursuit Guideline Matrix ("Matrix") that "will be used as a guideline prior to engaging in a pursuit and to evaluate continuing a pursuit." The Matrix identifies low, medium, and high-risk factors:

LOW RISK FACTORS

- Clear weather.
- Dry roads.
- Light traffic density.

MEDIUM RISK FACTORS

- Medium traffic density.
- Reduced visibility/illumination.
- Additional traffic violations.
- Suspect identity known.

HIGH RISK FACTORS

- Other jurisdiction pursuit.
- Pursuit entering another jurisdiction.
- Residential/school/commercial areas.
- Traveling against the flow of traffic.
- Poor visibility/illumination.
- Reckless/wanton vehicle operation.
- Heavy traffic density.
- Curves in roadway.
- Hit and run accident by pursued vehicle.
- Pedestrian traffic.
- Frequent intersections.
- Narrow roadways.
- Excessive speed.
- Inclement weather.

According to the Matrix, an officer is only allowed to engage in a high-risk pursuit in two instances:

1. After the commission of "[a]ny felony where an officer has knowledge that serious harm or death has been or will be inflicted if an apprehension is not made," an officer "[m]ay pursue but, discontinue when risks exceed the known threat to public safety by the perpetrator if capture is delayed."

2. After "[a]ny other incident where an officer has knowledge that serious harm or death may be or has been inflicted if an apprehension is not made," an officer "[m]ay pursue but discontinue if risks exceed seriousness of offense."

In addition to outlining various factors that the primary pursuit officer should consider in determining whether to engage in a pursuit, the Field Manual also instructs how the officer should conduct a pursuit once undertaken:

- Use[] the siren and emergency light(s) throughout the entire pursuit.
- Notif[y] a supervisor immediately.

* * * * *

- Continually update[] location, speed, and violations committed by fleeing vehicle.

* * * * *

- Reduce[] active role in pursuing motor vehicle when:
    1. Employing alternative strategies and/or;
    2. After entering another jurisdiction, another agency's units assume pursuit of the fleeing motor vehicle and/or;
    3. Risk factors increase beyond the immediate need for apprehension.
- Terminate[] a pursuit if:
    1. A supervisor is unavailable.
    2. Risk factors increase beyond the immediate need for apprehension.
    3. Instructed to do so by a supervisor.

The Field Manual states that the officer "[m]ay discontinue a pursuit at any time" and instructs that "[t]he decision to pursue a motor vehicle is a process of weighing risk factors of the pursuit against the primary responsibility of preserving life."

Officer Kamberger admitted during his deposition that at least eight or nine of the high risk factors were present during the pursuit: he had entered another jurisdiction; the

area was a mix of residential, school, and commercial areas; Mr. Green was operating his vehicle in a reckless and wanton manner; there was heavy traffic density; there was a curve in the roadway; Mr. Green's vehicle was involved in a hit and run; there was pedestrian traffic; and there were frequent intersections.

The officer who investigated this incident identified the pursuit as "high risk." Officer Kamberger admitted that, according to the Matrix, he was required to "not pursue" or "to discontinue" his pursuit of Mr. Green.

Contrary to the reporting requirements specified in the Field Manual, Officer Kamberger did not provide traffic condition updates when the pursuit started because "traffic conditions were light and [he] did not think to give them." Further into the pursuit, he claimed to have called out "speed, direction, and traffic conditions," but "radio conditions were so congested that [his] transmissions did not make it to be transmitted over the radio." As recorded on the TAC channel transcript, Officer Kamberger only advised of the speed of Mr. Green's Mercedes and his police car once when he was reportedly traveling at 60 miles per hour. His supervising officer, Lieutenant Marcy Chemelli, testified that "[i]f Officer Kamberger were telling me that he was consistently running red lights and driving in a reckless manner, then that would have swayed my decision more towards cancelling [the pursuit.]" Further, given the conditions during the pursuit, Lieutenant Chemelli "would consider [speed] excessive perhaps at 90 miles an hour." Had Officer Kamberger reported that he was traveling 90 miles per hour, his supervising officer would have "[p]robably" cancelled the pursuit "[b]ecause traveling at that rate of speed is dangerous."

An Unusual "Unusual Occurrence" Investigation

The Baltimore County Police Department ("BCPD") enlisted Lieutenant David J. Naimaster to investigate the incident in "one of the [s]ummer months of 2016." Lieutenant Naimaster started his investigation "towards the end of the [s]ummer going into September." He admitted during his deposition that the more-than-seven-month delay between the incident and the start of his investigation was uncommon for an "unusual occurrence." Lieutenant Naimaster attributed this delay to the possibility that Baltimore City would charge Officer Kamberger or another officer involved.

The record discloses that in May of 2016, Sergeant Michael Mertz, an officer who was not involved in the incident, was instructed to fill out forms for the BCPD, although the report should have been prepared by Officer Kamberger or his supervisor within 30 days of the incident. The Unusual Occurrence Investigation was not completed until almost a year after the incident, which was, according to the Smallwood Plaintiffs' expert, "unheard of."

The Unusual Occurrence Summary also may have contained certain inconsistencies. First, the distance of Officer Kamberger's pursuit measured in the report is 2.2 miles, while Officer Kamberger and the County's own traffic reconstructionist determined the distance was actually about 3 miles. The reconstructionist could not provide a basis for this discrepancy. Second, in light of the determination that the measured distance was 2.2 miles, the Baltimore County Police Department calculated the average speed as 65.45 miles per hour. The County's own expert admitted during his deposition that if "the distance [of the pursuit] was 3 miles instead of 2.2 . . . and [if] the misreporting was intentional, it would

be an egregious act, and would not comport with law enforcement standards of professionalism and integrity." He further stated that even if negligent, the calculation "would still be a violation of the standards of professionalism[.]"

Procedural History

Ms. Smallwood, on her own behalf and as the personal representative of the estate of her deceased son, and use plaintiff Darrin Perry II,[5] Jeremiah's father, filed a complaint in the Circuit Court for Baltimore City on October 12, 2016 against Officer Kamberger, the BCPD, Ms. Washington, and Mr. Joyner. An amended complaint was filed on December 19, 2016 to substitute the County, as the proper local government entity, for the BCPD and to assert that the defendants were jointly and severally liable. The plaintiffs asserted the following causes of action in the amended complaint:

> Count I: Maryland Declaration of Rights Article 24: Deprivation of Life (Officer Kamberger and the County)
>
> Count II: Negligence (Officer Kamberger and Mr. Joyner)
>
> Count III: Gross Negligence (Office Kamberger and Mr. Joyner)
>
> Count IV: Battery (Officer Kamberger)
>
> Count VI: Negligent Entrustment (Ms. Washington)
>
> Count VI: Wrongful Death (All defendants)
>
> Count VII: Survival Action (All defendants)

[5] The complaint accompanied a notice to use plaintiff, Darrin Perry II, in compliance with the form contained in Maryland Rule 15-1001(d). In turn, Mr. Perry moved to intervene as a party plaintiff pursuant to Md. Rule 15-1001(d)-(e), and the circuit court granted his motion.

On November 3, 2017, Ms. Smallwood and T.S., Ms. Smallwood's minor child, filed a separate complaint in the Circuit Court for Baltimore City against the same defendants named in the amended complaint.[6] Ms. Smallwood and T.S., in their individual capacities, alleged the following causes of action in the complaint related to the injuries they suffered as a result of the incident:

> Count I: Negligence (Officer Kamberger and Mr. Joyner)
>
> Count III [*sic*]: Gross Negligence (Officer Kamberger and Mr. Joyner)
>
> Count IV: Assault and Battery (Office Kamberger, Mr. Joyner, and Ms. Washington)
>
> Count V: Negligent Entrustment (Ms. Washington)

On December 18, 2017, the circuit court entered an order consolidating the two cases and designating the second case as the lead case.

The Smallwood Plaintiffs and Mr. Perry entered into two settlement agreements with Ms. Washington. Ms. Washington was dismissed with prejudice from the first case on February 23, 2018 and the second case on August 23, 2018. On December 21, 2018, the clerk entered a settlement order between the Smallwood Plaintiffs, Mr. Perry, and Mr. Joyner, leaving the County and Officer Kamberger as the remaining defendants.

Summary Judgment Motion

On September 28, 2018, Officer Kamberger and the County moved for summary judgment on all counts based on six grounds.

[6] While the County is listed as a defendant in the complaint, the complaint does not allege any causes of actions against the County.

First, they argued that there was no evidence of a violation under Article 24 because "Jeremiah Perry was not the subject of an arrest or seizure" and "[t]he proximate cause of the death of Jeremiah Perry was not any action on the part of Officer Kamberger but the sole and wilful and wanton actions of Mr. Green."

Second, they argued that Officer Kamberger was not negligent because he "followed Baltimore County policy" while pursuing Mr. Green, who was a "threat to public safety." Moreover, Officer Kamberger "began to terminate the pursuit when he determined that it had become a high-risk pursuit."

Third, the defendants contended that even if negligent, Officer Kamberger was entitled to public official immunity pursuant to Maryland Code (1977, 2012 Repl. Vol.), Transportation Article ("TA"), § 19-103 and Maryland Code (1973, 2013 Repl. Vol), Courts and Judicial Proceedings Article ("CJP"), § 5-639.

Fourth, they asserted that Officer Kamberger did not act with gross negligence because he "did not act with wanton or reckless disregard for human life as a matter of law." Comparing Officer Kamberger's conduct to that of the officers in *Boyer v. State*, 323 Md. 558 (1991), and *Khawaja v. Mayor and City Council, City of Rockville*, 89 Md. App. 314 (1992), the defendants averred that Officer Kamberger's conduct did not amount to gross negligence. Specifically, the defendants contended that Officer Kamberger's speed (60 miles per hour), activation of emergency lights, and de-escalation of his pursuit did not amount to gross negligence.

Fifth, the defendants argued that Officer Kamberger did not commit assault and battery because Officer Kamberger "was not involved in the collision" and "had no intent to harm Jeremiah Perry or anyone else."

Finally, the defendants stated that Officer Kamberger was not liable for wrongful death because "there was no wrongful act on the part of Officer Kamberger. The individual directly responsible for the death of Jeremiah Perry is Mr. Green."

The Smallwood Plaintiffs and Mr. Perry filed separate oppositions to Officer Kamberger and the County's motion for summary judgment. The Smallwood Plaintiffs assailed the defendants' contention that there were no genuine facts in dispute:

> The facts that are in genuine dispute are those that support Plaintiffs[']
> allegations that Officer Kamberger engaged in a high risk pursuit, contrary to BCPD departmental regulations, and because he engaged in the high risk pursuit, caus[ed] Jeremiah Perry's death and injuries to Ms. Smallwood and T.S. Numerous depositions have been taken in this matter, and they are largely centered around the factors that place this pursuit in the high risk category to determine whether Officer Kamberger and BCPD's actions were reasonable under the circumstances. They were not.

According to the Smallwood Plaintiffs, the pursuit was "high risk," and Officer Kamberger never should have engaged in the pursuit the first instance.

The Smallwood Plaintiffs addressed whether the facts, viewed in a light most favorable to them, supported each claim. First, they averred that there was "sufficient evidence to present the question of a constitutional violation" under Article 24. Specifically,

> Officer Kamberger violated departmental policies when he engaged in a high risk pursuit without justification, traveled at dangerously high speeds, and failed to properly report the details of the pursuit to his supervising officer omitting key facts with the hopes of continuing his pursuit in direct

> contravention of departmental regulations. . . . He then conjured up facts to support his suspect version of events and lied about the speed at which he was traveling. A reasonable juror could find that his behavior shocked the conscience, and that he intended to cause harm that was unrelated to the legitimate object of the arrest.

Second, citing CJP § 5-639, the Smallwood Plaintiffs contended that Officer Kamberger was not immune from suit for his tortious conduct because a jury could find that Officer Kamberger acted with malice, determined to "catch Mr. Green at all costs, even at the cost of another innocent life."

Third, relying primarily on *Beall v. Holloway-Johnson*, 446 Md. 48 (2016), the Smallwood Plaintiffs maintained that a jury should determine whether "Officer Kamberger intentionally failed to perform a manifest duty—to never engage in the high risk pursuit of Mr. Green—and recklessly disregarded the consequences of his actions that ultimately led to Jeremiah Perry's death."

Fourth, the Smallwood Plaintiffs insisted that "Officer Kamberger committed assault [and] battery against Plaintiffs Smallwood, Jeremiah Perry, and T.S." The officer's "conduct—following too closely and at a dangerous rate of speed—was volitional and he intended to unlawfully invade the well-being of the pedestrians . . . when he sped through the busy intersection."

In his opposition, Mr. Perry raised similar objections, asserting that summary judgment was improper because "genuine disputes of material fact eat at the very foundation of Defendants' assertions of qualified immunity[.]"

A hearing on the motion was held in the circuit court on November 2, 2018. Defense counsel maintained that there was no evidence of gross negligence, arguing that "exceeding

the speed limit is not actionable negligence unless it is the proximate cause of the injury." The judge inquired if the United States Supreme Court had opined on this issue, specifically. The judge postulated that, pursuant to *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), "a police officer does not . . . even violate the 14th Amendment guarantees when he deliberately, or recklessly, [shows] indifference to life, in a high speed automobile chase." The judge and counsel then proceeded to discuss certain aspects of the incident:

> THE COURT: So did his vehicle hit the child?
>
> [DEFENDANTS' COUNSEL]: His vehicle did not hit the child.
>
> THE COURT: Hum. Did his vehicle hit the car that hit the child?
>
> [DEFENDANTS' COUNSEL]: No, Your Honor, his vehicle did not hit the car that hit the child.
>
> THE COURT: Hum. So he brought his vehicle to a stop, even if he were speeding, and even if he were chasing into Baltimore City, but he didn't cause the accident.
>
> [DEFENDANTS' COUNSEL]: No, there's no proximate cause to say if the cops or Kamberger caused the accident. *He was stopping his vehicle and terminating the pursuit when the accident occurred at Moravia and Sinclair Lane. Therefore there's no gross negligence on his part*.
>
> * * * * *
>
> THE COURT: And what was Officer Kamberger doing at the time he was proceeding after this vehicle [driven by Mr. Green]?
>
> [DEFENDANTS' COUNSEL]: He was watching the road, he was watching what was happening, he was calling back to dispatch keeping them apprized of his speed, his direction, and where he was going.
>
> THE COURT: And operating in the scope of his employment.
>
> [DEFENDANTS' COUNSEL]: And operating within the scope of his employment[.]

(Emphasis added.)

The judge questioned what the "proximate cause [was] as it relates to the accident itself and the death of the child between the Defendant officer's conduct and the ultimate result[?]" Mr. Perry's counsel responded: "the proximate cause from Darrin Perry's standpoint is this officer caused the high speed chase in the jurisdiction where high speed chases are outlawed. And the officer testified in deposition that he knew that was the policy in Baltimore City, not to engage in high speed chases." The court inquired whether the plaintiffs' facts would "be better if [Officer Kamberger] was the one that hit the child." While counsel for Mr. Perry conceded that this fact would yield an easier case, he averred that Officer Kamberger "ha[d] a reckless disregard for the safety of everyone on the streets of Baltimore, including that child at the bus stop" because of the pursuit.

Counsel for Ms. Smallwood argued that the "intents and motives" of Officer Kamberger were at issue and that the substantial factor test applied to the proximate cause analysis. The judge retorted: "But you've got to do better than to wave your magic wand and say that the vehicle not striking another vehicle or another thing caused the death of that child." Ms. Smallwood's counsel responded:

> So we have Officer Kamberger's multiple acts; when he chased continuously without alerting his supervisors, running through red lights, exceeding the speed limit by over 35 miles an hour, curves in the roadway, bad elimination [sic], residential area, pedestrian traffic. Which he saw and he was aware of and he continued to do.
>
> Then you go to the factor, whether the adverse conduct has created a force or series of forces which are in continuous and active operation. There's no evidence here that Officer Kamberger stopped, pulled back, did anything to stop the break or break the chain of causation. He pursued [Mr. Green] knowing that the man would flee, despite the fact that the high risk

> factors were present. And then you have a lapse of time. Fewer than three minutes elapsed from the state of the pursuit to the end. . . . And then you have the exacerbating factors of the Baltimore County Police Department realized what had happen[ed] and then tried to go back and sanitize the facts.

The judge then commenced her ruling from the bench:

> . . . . I actually read very closely the pleadings in this case. And I was looking for the causal connection between the actions[,] activity[, and] statements of Officer Kamberger . . . as well as the County, and the relationship to the injury and ultimate death of the child. It was those facts that I was looking for, looking actually to find and compare what I thought I was going to find, and compare ministerial versus discretionary actions on behalf of the Officer.
>
> Clearly he was a Baltimore County officer going into Baltimore City, was fully aware of the high speed pursuit and the high speeds, and the failure to report the details of the pursuit to his supervisor, a number of what I perceive to be violations of the General Orders, or in the alternative, some negligent behavior on the part of Officer Kamberger. But in the balance of that, there is the idea that Maryland Courts and Judicial Proceedings Article 5-639(b), discusses whether or not there is absolute immunity for the officer and whether it provides immunity in individual capacity. But it does not provide immunity from suits for malicious acts or gross negligence.
>
> It is the examination of his behavior, his duty, his responsibility, that really is the heart of the argument[.]

The judge concluded, "[t]here's clearly no facts provided by the Plaintiff[s] in this case for which a reasonable person could differ." The judge then granted summary judgment for Officer Kamberger and the County on each count in both complaints.

The judge memorialized her ruling in a "Memorandum and Order" issued on November 8, 2018. The court found that Officer Kamberger qualified for public official immunity, which was not defeated by evidence of malice and, therefore, he was entitled to summary judgment on the negligence count. The court further held that he was entitled to summary judgment on the gross negligence count because plaintiffs had not presented any facts to indicate "wanton or reckless disregard for the safety of others." The court stated

that the "mere fact that Officer Kamberger violated the departmental policies outlined in the General Order, and continued a pursuit in an area with which he was unfamiliar" was insufficient. Regardless, the court found that the negligence counts against Officer Kamberger could not "stand because he is immune from suit for negligence, as a matter of law" and because "[f]actually there is no basis . . . as Officer Kamberger's vehicle never struck any other vehicle. Officer Kamberger's vehicle was never involved in a collision and there is []no causal connection, factually or legally, between the collision and the death of the child in this case. None." Accordingly, the court also granted the defendants' motion on the wrongful death and survival action because "Mr. Green's actions alone caused the unfortunate events of November 1, 2015[.] The alleged causal connection between Officer Kamberger's conduct and the injury to Plaintiffs . . . is simply too attenuated."

Officer Kamberger was entitled to summary judgment on the assault and battery counts, the judge found, because "[a]t no time did Officer Kamberger or his vehicle come in contact with Mr. Green's Mercedes, Mr. Joyner's Volvo, or the Plaintiffs." Finally, the court held that the County and Officer Kamberger were entitled to summary judgment on the count alleging a violation of Article 24 because Officer Kamberger did not have a "purpose to cause harm unrelated to the legitimate object of arrest" necessary to "satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation."

The judge concluded her opinion by observing that Officer Kamberger did not have a purpose to cause harm unrelated to his objective of apprehending Mr. Green:

> Maryland Rule 2-501 requires the Court to consider[] the facts in the light most favorable to the non-moving party. The Plaintiffs have presented no facts or evidence to show that Officer Kamberger had a purpose to cause harm unrelated to the legitimate object of the arrest, apprehending Mr. Green. Nothing. Similarly, no facts presented to this Court indicate that Officer Kamberger's objective was to cause injury to Plaintiff Jeremiah Perry or anyone else. He did not collide with another vehicle or strike any pedestrian. There simply are no facts, evidence or exhibits that support the allegation in favor of the Plaintiff in this [Article 24 violation] Count. Officer Kamberger is a law enforcement official charged with ensuring public safety. Plaintiff would [] hold him legal[ly] liable for every unfortunate event that occurs during the performance of his law enforcement duties. This is not an appropriate application of the law—quite the contrary. Consequently, Officer Kamberger and Baltimore Court are entitled to summary judgment on all Counts asserted against them, as a matter of law.

Motion to Amend the Judgment

Following the grant of summary judgment, on November 9, 2018, the Smallwood Plaintiffs moved to amend the judgment and allow the matter to proceed to trial against Officer Kamberger and the County. In making their motion, the Smallwood Plaintiffs argued that they had presented sufficient facts for a "reasonable jury [to] conclude that it was foreseeable that Jeremiah Perry could be harmed by Defendant Kamberger's unwarranted, impermissible, unsafe police chase" and outlined the relevant facts that precluded summary judgment.

The defendants countered that there was no reason for the court to amend its judgment because they were entitled to summary judgment "[b]ased on the undisputed facts and controlling law set forth in Defendants' Memorandum in support of the Motion for Summary Judgment" and the Smallwood Plaintiffs' motion did not raise any new material facts.

The circuit court summarily denied the Smallwood Plaintiffs' motion to amend the judgment without a hearing on December 7, 2018. The Smallwood Plaintiffs filed a notice of appeal to this Court on December 7, 2018.[7]

DISCUSSION

The Smallwood Plaintiffs' primary contention on appeal is that disputes of material fact precluded the grant of summary judgment by the circuit court. They aver that, "[i]n granting summary judgment, the trial court impermissibly resolved questions of intent, state of mind, and improper motive that should have been submitted to the jury." They claim, for example, that a jury should have determined whether Officer Kamberger committed an assault or battery by intentionally "invad[ing] the well-being" of Jeremiah, his mother, and his sister when he sped through the intersection. Moreover, they contend, the trial court "misapplied the relevant immunity provisions . . . by impermissibly resolving disputed facts against [the Smallwood Plaintiffs]." They also assert that the court misapplied the causation analysis by applying but-for causation, rather than the substantial factor test.

Officer Kamberger and the County respond that "there is no genuine dispute of the materials facts in this case" and ask us to uphold the court's determination that the

[7] The Smallwood Plaintiffs filed their notice of appeal before a final judgment was entered. However, on their motion, the circuit court signed and filed an order entering final judgment on December 20, 2018, finding "no just reason for the delay of an entry of final judgment in the above-captioned action as the rights of Plaintiffs have been adjudicated as to all Defendants over which this [c]ourt has jurisdiction, either by way of settlement or by grant of a motion for summary judgment[.]" Consequently, pursuant to Maryland Rule 8-602(g)(1)(D), we utilize our discretion to "treat the notice of appeal as if filed on the same day as, but after, the entry on the docket."

Smallwood Plaintiffs failed to present sufficient facts to show that Officer Kamberger was the proximate cause of the harm; or that, even if he was negligent, he had acted with malice or wanton or reckless disregard for the safety of others. As a result, Officer Kamberger and the County argue, the trial court correctly held that Officer Kamberger was entitled to immunity. Additionally, Officer Kamberger and the County assert that because "[t]here simply is no evidence that Officer Kamberger, and consequently[,] Baltimore County, had any purpose to injure or cause injury to Jeremiah Perry[,]" the circuit court properly held that Officer Kamberger and the County did not violate Article 24 and that Officer Kamberger could not be held liable for assault and battery as a matter of law.

Standard of Review

Summary judgment is proper where the trial court determines that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Md. Rule 2-501. Accordingly, "a summary judgment motion is not a substitute for trial. Rather it is used to dispose of cases when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." *Okwa v. Harper*, 360 Md. 161, 178 (2000).

The trial court determines issues and makes rulings as a matter of law, resolving no disputed issues of fact. *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737 (1993). We review whether the trial judge was legally correct in her rulings. *Okwa,* 360 Md. at 178. In so doing, we review the record independently, in the light most favorable to the non-moving party, to determine whether the parties generated a dispute of material fact and, if not, whether the moving party was entitled to judgment as a matter of law. *Charles Cty.*

Comm'rs v. Johnson, 393 Md. 248, 263 (2006). We bear in mind that in granting a motion for summary judgment, the trial judge must construe any inferences to be drawn from the well-plead facts in the light most favorable to that non-moving party. *Okwa,* 360 Md. at 178.

I.

Immunity

The Smallwood Plaintiffs aver that the circuit court erred in determining "the application and extent of the immunity's protections" because they depend on material facts that should be resolved by a jury. Officer Kamberger and the County counter that "there is no genuine dispute of material facts" and that the circuit court properly granted summary judgment based on immunity.

The circuit court judge considered Officer Kamberger's immunity claim under two separate immunity doctrines: (a) emergency vehicle immunity and (b) public official immunity. We also address a third—the Local Government Tort Claims Act ("LGTCA")—raised by the Smallwood Plaintiffs below and the parties on appeal but not expressly addressed by the circuit court. Although we ordinarily will review a grant of summary judgment only upon the grounds relied upon by the trial court, *Hamilton v. Kirson*, 439 Md. 501, 523 (2014), we review this issue to provide direction on remand, and because governmental immunity may only be waived by the General Assembly. *Holloway-*

Johnson v. Beall, 220 Md. App. 195, 217 (2014), *aff'd in part, rev'd in part on other grounds*, 446 Md. 48 (2016).[8] We analyze each immunity doctrine in turn.

A. Emergency Vehicle Immunity

Emergency vehicle immunity is governed by two statutes that operate in conjunction: TA § 19-103 and CJP § 5-639. The statutory scheme renders an authorized operator of an emergency vehicle immune for damages resulting from a negligent act or omission while operating the emergency vehicle. *Holloway-Johnson*, 220 Md. App. at 235. The statute contained in the Transportation Article provides, in relevant part:

> (a) (1) In this section the following words have the meanings indicated.
>
> (2) "Emergency service" means:
>
> (i) Responding to an emergency call;
>
> (ii) Pursuing a violator or a suspected violator of the law; or
>
> (iii) Responding to, but not while returning from, a fire alarm.
>
> (3) "Emergency vehicle" has the same meaning as in § 11-118 of this article.

[8] In *Holloway-Johnson*, this Court analyzed the authority of an individual to waive immunity under the LGTCA. We explained that "[i]t is settled law that sovereign immunity may be waived only by the legislature, and such waivers are strictly construed." 220 Md. App. at 217. We cited to *Board of Education of Charles County v. Alcrymat Corp. of America*, 258 Md. 508, 516 (1970), and further explained:

> the law is well established that counsel for the State or one of its agencies *may not either by affirmative action or by failure to plead the defense, waive the defense of governmental immunity* in the absence of express statutory authorization or by necessary implication from a statute[.]

Id. (emphasis in original).

> (b) An operator of an emergency vehicle, who is authorized to operate the emergency vehicle by its owner or lessee while operating the emergency vehicle **in the performance of emergency service** as defined in subsection (a) of this section shall have the immunity from liability described under § 5-639(b) of the Courts and Judicial Proceedings Article.

TA § 19-103(a)-(b) (emphasis added). The statute contained in the Courts and Judicial Proceedings states:

> (a) (1) In this section the following words have the meanings indicated.
>
> (2) "Emergency service" has the meaning stated in § 19-103 of the Transportation Article.
>
> (3) "Emergency vehicle" has the meaning stated in § 11-118 of the Transportation Article.
>
> (b) (1) An operator of an emergency vehicle, who is authorized to operate the emergency vehicle by its owner or lessee, is immune from suit in the operator's individual capacity for damages resulting from a negligent act or omission while operating the emergency vehicle in the performance of emergency service.
>
> (2) This subsection does not provide immunity from suit to an operator for a malicious act or omission or for gross negligence of the operator.

CJP § 5-639(b). The term "emergency vehicle" includes "[v]ehicles of federal, State, or local law enforcement agencies." TA § 11-118(1).

The immunity afforded to operators of emergency vehicles under both statutes for negligent acts or omissions does not extend to owners or lessees of emergency vehicles. *See* CJP § 5-639(c)-(d); TA 19-103(c)-(d). As the Court of Appeals explained, the purpose of the statutes is to protect operators:

> The enactment of §§ 19-103 and 5-639 codified certain exceptions to the general rule that police officers must abide by the laws of the road, as would any lay citizen. The Legislature recognized, in so doing, that, in certain situations, police officers and other drivers of authorized emergency vehicles

> must have the ability to deviate from the norm to perform their duties, without the fear of personal liability.

Schreyer v. Chaplain, 416 Md. 94, 110-11 (2010). Consequently, CJP § 5-639(c) provides that owners and lessees of emergency vehicles, including a political subdivision, are "liable to the extent provided in subsection (d) [] for any damages caused by a negligent act or omission of an authorized operator while operating the emergency vehicle in the performance of emergency service." CJP § 5-639(c)(1). However, an owner or lessee is not liable "for the operator's malicious act or omission or for the operator's gross negligence." § 5-639(c)(2). In addition, "[a] political subdivision may not raise the defense of governmental immunity in an action against it under this section." CJP § 5-639(c)(3). Subsection (d), in turn, limits liability for "self-insured jurisdictions"

> to the amount of the minimum benefits that a vehicle liability insurance policy must provide under § 17-103 of the Transportation Article, except that an owner or lessee may be liable in an amount up to the maximum limit of any basic vehicle liability insurance policy it has in effect exclusive of excess liability coverage.

CJP § 5-639(d).

Further, as the statutes make clear, even when operators of emergency vehicles are immune from suit in their individual capacity for negligent acts or omissions "in the performance of emergency service," the owner of an emergency vehicle may still be liable for resulting damages. Specifically, a "self-insured jurisdiction,"[9] remains liable under the provisions of TA § 17-103.

[9] TA § 17-103 requires, among other obligations, minimum benefits in the amount of:

(Continued)

Applying the plain language of these statutes to the case on appeal, we hold that the circuit court erred as a matter of law in conferring immunity on Officer Kamberger and the County, to the extent it relied on TA § 19-103 and CJP § 5-639. First, as we explain further in Section II of our discussion, although we affirm the court's grant of summary judgment on the question of malice, legally sufficient evidence was adduced on the question of whether Officer Kamberger was grossly negligent. Consequently, the question of gross negligence was for the jury to resolve prior to any determination of whether Officer Kamberger or the County was entitled to immunity under CJP § 5-639(b)(2) ("This subsection does not provide immunity from suit to an operator for a malicious act or omission or for gross negligence of the operator") and TA § 19-103 (b) (providing that the operator shall have the immunity from liability described under CJP § 5-639(b)).

Second, a material dispute of fact also exists concerning whether Officer Kamberger was still engaged in "emergency service" to qualify for the immunity under TA § 19-103 and CJP § 5-639. Our decision in *Holloway-Johnson* illustrates this point. 220 Md. App. at 235-37. In that case, an officer collided with a motorcycle that he had earlier been pursuing. *Id.* at 206. The motorcyclist was ejected from the motorcycle, resulting in his

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> (1) The payment of claims for bodily injury or death arising from an accident of up to $30,000 for any one person and up to $60,000 for any two or more persons, in addition to interest and costs;
> (2) The payment of claims for property of others damaged or destroyed in an accident of up to $15,000, in addition to interest and costs[.]

TA § 17-103(b).

death. *Id.* The officer "acknowledged receiving his shift commander's order to break off the pursuit[,]" and testified that he turned off his lights and siren, ended his pursuit, and went toward the exit, where he ultimately collided with the motorcyclist. *Id.* at 236.We held that the immunity statutes did not apply to bar the officer's negligence claim from the jury, observing that "[b]y his own testimony, at the time he collided with [the motorcyclist] on the exit ramp, he was no longer pursuing [the motorcyclist] and, thus, was no longer operating his cruiser 'in the performance of emergency service.'" *Id.*

To be sure, as the Court of Appeals has instructed, "what the officer believes subjectively, may not accurately address, or tend to determine, whether there has been a 'pursuit;' such intent cannot always reflect or account for the action of all of the parties." *Schreyer*, 416 Md. at 115-16. The Court explained that intent is not the decisive factor because otherwise "the determination would not be subject to objective evaluation and verification." *Id.* at 116. In *Schreyer*, the Court further clarified that:

> Sections 19–103 and 5–639 were enacted by the General Assembly to provide immunity to police officers under certain clearly delineated emergency circumstances. One of those circumstances is when the officer is pursuing the perpetrator or suspected perpetrator of a crime. Under this exception, the "pursuit" must be underway. Section 19–103(a)(3)(ii) requires that the officer be engaged in trying to overtake or apprehend or pursue a suspect.

Id.

Here, there is no dispute that Officer Kamberger was operating an authorized emergency police vehicle. However, based on Officer Kamberger's own testimony, there is a material dispute of fact concerning whether Officer Kamberger was still engaged in "emergency service" to qualify for immunity under TA § 19-103 and CJP § 5-639.

According to Officer Kamberger, he had "started de-escalating" and "applying the brake," and was "not going to proceed" immediately prior to the collision. Alternatively, other witnesses stated that Officer Kamberger's vehicle was "right behind" Mr. Green's Mercedes and that the two vehicles were "real close" like "kissing bumper-to-bumper" and traveling "freeway fast." Consequently, there is a dispute of fact regarding whether Officer Kamberger was actually engaged in an "emergency service" immediately prior to the incident and whether the immunity provisions of TA § 19-103 and CJP § 5-639 apply. *See Holloway-Johnson*, 220 Md. App. at 237 ("Where the officer insists that he was not pursuing a suspect, he cannot at the same time ask the court (or the jury) to find that he was and thereby enjoy the benefit of immunity.")

Accordingly, we hold that the facts remaining in dispute in this case precluded the court from barring the Smallwood Plaintiffs' negligence claims from the jury.

B. Public Official Immunity

Common law public official immunity applies when (1) the actor is a public official; (2) the tortious conduct occurred in the course of the actor's performance of discretionary, rather than ministerial, acts, and (3) those acts were within the scope of the actor's official duties.[10] *See Houghton v. Forrest*, 412 Md. 578, 585 (2010). As to the performance of discretionary acts, the Court of Appeals has explained:

[10] Under CJP § 5-507, officials of municipal corporations are entitled to limited immunity "while acting in a discretionary capacity, without malice, and within the scope of the official's employment or authority[.]" CJP § 5-507(a)(1). Municipal corporations are cities, towns, or villages created under any general or special law of this State for (Continued)

> The term discretion denotes freedom to act according to one's judgment in the absence of a hard and fast rule. When applied to public officials, discretion is the power conferred upon them by law to act officially under certain circumstances according to the dictates of their own judgment and conscience and uncontrolled by the judgment or conscience of others.

Cooper v. Rodriguez, 443 Md. 680, 713 (2015) (citation omitted). Our precedent has long confirmed, however, that "a police officer does not enjoy [public official] immunity if he commits an intentional tort or acts with malice." *Cox v. Prince George's County*, 296 Md. 162, 169 (1983) (citing *Bradshaw v. Prince George's County*, 284 Md. 294, 303 (1979), *holding modified by James v. Prince George's County*, 288 Md. 315 (1980)). More recently, the Court of Appeals, in a matter of first impression, held that common law public official immunity does not extend to a public official's grossly negligent acts. *Cooper*, 443 Md. at 723. "To hold otherwise would effectively leave a void in liability, leaving plaintiffs . . . without a remedy for a public official's gross negligence." *Id.*

It is "clear that policemen are 'public officials,' and that when they are within the scope of their law enforcement function they are clearly acting in a discretionary capacity."

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general governmental purposes and are subject to the provisions of Article XI-E of the Constitution of Maryland. *See Houghton v. Forrest*, 183 Md. App. 15, 34-41 (2008) (reviewing legislative history of CJP § 5-507), *aff'd in part, vacated in part,* 412 Md. 578 (2010). Baltimore County, on the other hand, "is a charter county pursuant to Article XI-A of the Maryland Constitution, commonly known as the 'Home Rule Amendment.'" *Gunpowder Horse Stables, Inc. v. State Farm Auto. Ins. Co.*, 108 Md. App. 612, 618 (1996). Accordingly, this Court has held that "counties are not municipal corporations within the meaning of § 5-507," *Prince George's County v. Brent*, 185 Md. App. 42, 55 (2009), *aff'd,* 414 Md. 334 (2010), and neither Officer Kamberger nor the County may rely on statutory public immunity under CJP § 5-507.

Robinson v. Bd. of Cty. Comm'rs for Prince George's Cty., 262 Md. 342, 347 (1971) (citation omitted).

Here, there is no question, and no one disputes, that Officer Kamberger was a public official and that his pursuit of Mr. Green was a discretionary act within his official duties. However, a public official is not entitled to public official immunity where the official acted with malice or exhibited grossly negligent conduct. *Cooper*, 443 Md. at 713 n.14, 723. Again, as explained in Section II, although the Smallwood Plaintiffs failed to establish or even allege malice, enough evidence was adduced to allow a jury to consider whether Officer Kamberger was grossly negligent in his pursuit of Mr. Green.

C. LGTCA

In addition to the immunities identified above, police officers "enjoy an *indirect* statutory qualified immunity under LGTCA." *Smith v. Danielczyk*, 400 Md. 98, 129 (2007). As the Court of Appeals has explained:

> [T]he purpose of the LGTCA is to provide a remedy for those injured by local government officers and employees acting without malice and in the scope of employment. The Act affords a remedy to those injured by acts of 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.

Rios v. Montgomery County, 386 Md. 104, 125-26 (2005) (internal citations and quotation marks omitted). The LGTCA does not waive governmental immunity, but, instead transfers potential liability within the scope of employment from the employee to the local government. *Williams v. Prince George's County*, 112 Md. App. 526, 554 (1996); CJP § 5-303(b)(1) ("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").

We observed in *Holloway-Johnson* that the "LGTCA is unusual in terms of the modality the General Assembly employed to provide some limited relief to plaintiffs and to protect local government employees." 220 Md. App. at 210. In contrast to other immunity provisions, "the LGTCA grants employees immunity from damages, but not from suit." *Id.*

When a plaintiff sues the allegedly tortious employee directly, the plaintiff "may not execute against a local government employee on a judgment rendered for tortious acts or omissions committed by the employee within the scope of employment," unless the employee is found to have acted with "actual malice," CJP § 5-302(b), which the LGTCA defines as "ill will or improper motivation." CJP § 5-301(b). When an employee acts with actual malice, the employee is "fully liable" and the local government "may seek indemnification for any sums it is required to pay under § 5-303(b)(1) of this subtitle." CJP § 5-302(b)(2).

The LGTCA provides that local governments may assert any "common law or statutory defense or immunity in existence as of June 30, 1987" if "possessed by its employee for whose tortious act or omission the claim against the local government is premised" and that "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." CJP § 5-303(e). Because we agree with the trial court that the Smallwood Plaintiffs failed to present evidence that Officer Kamberger acted with malice, the County may not seek

indemnification from Officer Kamberger under the confines of the LGTCA. However, disputed material facts concerning whether Officer Kamberger was grossly negligent preclude our determination concerning liability under CJP § 5-303(e) and whether the County may be liable.

II.

Malice and Gross Negligence

Malice and gross negligence play several roles in this case. First, the Smallwood Plaintiffs alleged two counts of gross negligence (one in each complaint) on which the court granted summary judgment in favor of the Appellees. Second, the immunity statutes, as well as common law public official immunity, do not shield the Appellees from liability if Officer Kamberger or the County were grossly negligent or found to have exercised their official duties with malice. Having outlined the relevant immunity provisions at issue, we turn our examination to the "amorphous concepts" of malice and gross negligence, *Newell v. Runnels*, 407 Md. 578, 636 (2009), and whether a reasonable jury could find that Officer Kamberger acted with either.

A. Malice

The Smallwood Plaintiffs contend that the circuit court impermissibly resolved disputed facts which "would generate a jury question as to malice[.]" Specifically, at oral argument, counsel for the Smallwood Plaintiffs averred that malice could be inferred from Officer Kamberger's desire to catch Mr. Green, at all costs, for hitting a police vehicle. In response, Officer Kamberger and the County contend that Officer Kamberger did not

display ill-will or improper motive but, instead, his actions were "justified" to apprehend Mr. Green.

In the context of qualified immunity, "malice" denotes "actual malice." *Shoemaker v. Smith*, 353 Md. 143, 163-64 (1999). As such, actual malice refers to "conduct characterized by evil or wrongful motive, intent to injure, knowing or deliberate wrongdoing, ill will or fraud[.]" *Id.* at 163 (citation and internal quotations marks omitted). Indeed, "actual malice" has long been recognized as the appropriate test for purposes of public official immunity under common law or State and local tort claims laws. *Id.* The Court explained in *Shoemaker*: "For one thing, the fact that it is an alternative to gross negligence, which also will defeat the qualified immunity, indicates clearly that the Legislature conceived of malice as something beyond the merely reckless or wanton conduct that would be embodied within gross negligence." *Id.* at 164.

"Malice can be established by proof that the officer 'intentionally performed an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff.'" *Thacker v. City of Hyattsville*, 135 Md. App. 268, 300 (2000) (citing *Shoemaker*, 353 Md. at 163). A plaintiff's proof of malice "must point to specific evidence that raises an inference that the defendant's actions were improperly motivated in order to defeat the motion. That evidence must be sufficient to support a reasonable inference of ill will or improper motive." *Id.* at 301. More recently, in discussing malice in the context of punitive damages and comparing it to the intent required for proof of a battery claim, the Court of Appeals

clarified that actual malice "requires proof of a specific intent to injure the plaintiff." *Beall v. Holloway-Johnson*, 446 Md. 48, 73 (2016).

Here, the Smallwood Plaintiffs assert that the cumulative evidence, viewed in the light most favorable to them, supports malice because Officer Kamberger was committed to catching Mr. Green at all costs. Specifically, Officer Kamberger pursued Mr. Green in violation of departmental policy through multiple intersections and lights, into an area of Baltimore City with which the officer was unfamiliar, while averaging speeds of 90 miles per hour, without providing consistent updates to his supervisors.

The Smallwood Plaintiffs do not allege or point to any evidence that would show Officer Kamberger had an actual desire to hurt Mr. Green—or any other person. The complaints do not allege Officer Kamberger intended to harm the Smallwood Plaintiffs or Mr. Green. They also have not identified any evidence that Officer Kamberger's conduct was motivated by "ill will" or "evil or wrongful motive." *Barbre v. Pope*, 402 Md. 157, 182 (2007) (citations omitted); *Thacker*, 135 Md. App. at 301. The circuit court described the facts in the record on this point as follows:

> The [Smallwood] Plaintiffs have presented no facts or evidence to show that Officer Kamberger had a purpose to cause harm unrelated to the legitimate object of the arrest, apprehending Mr. Green. . . . Similarly, no facts presented to this Court indicate that Officer Kamberger's objective was to cause injury to Plaintiff Jeremiah Perry or anyone else. He did not collide with another vehicle or strike any pedestrian. There simply are no facts, evidence or exhibits that support the allegation in favor of the [Smallwood Plaintiffs.]

While we are cognizant that questions of motive and intent are often ill-suited for resolution on summary judgment, the plaintiff must point to "specific evidence" to support a reasonable inference of malice. *Thacker*, 135 Md. App. at 301. Malice requires more

than a failure to maintain strict compliance with departmental regulations during the performance of police activities. Without any evidence to support an inference of an intent to injure Mr. Green or any innocent bystander, we cannot discern error in the circuit court's finding that a jury could not find that Officer Kamberger displayed malice in his pursuit of Mr. Green.

B. Gross Negligence

The Smallwood Plaintiffs argue that the evidence is sufficient for a jury to conclude that Officer Kamberger was grossly negligent. Specifically, the Smallwood Plaintiffs argue that enough facts were adduced to permit a jury to find that Officer Kamberger was "grossly negligent by acting with reckless disregard for the consequences of his actions[.]" In contrast, Officer Kamberger and the County, relying primarily on *Boyer v. State*, 323 Md. 558 (1991), argue that Officer Kamberger did not engage in any extraordinary or outrageous conduct and, accordingly, could not be liable for gross negligence.

A gross negligence claim "sets the evidentiary hurdle at a higher elevation" than a claim for simple negligence. *Beall*, 446 Md. at 64. Gross negligence demands

> an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them. Stated conversely, a wrongdoer is guilty of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist.

Barbre, 402 Md. at 187 (citation omitted). Negligence, alternatively, is defined as "any conduct, except conduct recklessly disregardful of an interest of others, which falls below

the standard established by law for protection of others against unreasonable risk of harm." *Id.* (citation omitted).

Gross negligence depends on the facts and circumstances in each case and, consequently, is "usually a question for the jury and is a question of law only when reasonable men could not differ as to the rational conclusion to be reached." *Romanesk v. Rose*, 248 Md. 420, 423 (1968). More recently, in a matter involving the immunity of first responders, the Court, while discussing its holding in *Beall*, cautioned against "morph[ing] the distinctions between simple and gross negligence by holding that 'a legally sufficient case of ordinary negligence will frequently be enough to create a jury question of whether such negligence was or was not gross.'" *Stracke v. Estate of Butler*, 465 Md. 407, 421 (2019) (quoting *Beall*, 446 Md. at 64); *but see* 465 Md. at 447 (Wilner, J., dissenting) (opining that *Beall* and related cases correctly resolved that "ascertaining which side of the [negligence vs. gross negligence] line the facts fall on is often a factual one for the trier of fact, with proper instructions in a jury case, to resolve").

In *Beall*, the Court of Appeals, viewing the evidence in the light most favorable to the plaintiffs, held that sufficient evidence was present to create a factual dispute for a jury to determine gross negligence. 446 Md. at 65-66. As we explained above in Section I.A., the case arose out of a collision between a motorcycle and a police car driven by Officer Timothy Beall, resulting in the motorcyclist's death. *Id.* at 56. Officer Beall was on duty when he heard a call on the radio concerning a race between a convertible and motorcycle. *Id.* at 57. A second transmission relayed that officers were able to stop the car but not the motorcycle. *Id.* Officer Beall, who was near the intersection where the racing took place,

observed a motorcycle and attempted "to ascertain license plate information." *Id.* The motorcycle then sped-up, which aroused Officer Beall's suspicions that it was stolen. *Id.* After continuing to pursue the motorcycle at speeds of 75 miles per hour, Officer Beall "was advised indirectly . . . to disengage from the pursuit[.]" *Id.* at 58. The officer turned off his lights and sirens and followed the motorcycle onto an exit ramp. *Id.* On the exit ramp, the motorcyclist reduced his speed, and the "police cruiser made contact with the motorcycle[,]" and the "motorcyclist . . . was ejected from the bike. . . . He died upon hitting the pavement." *Id.* at 59. The motorcyclist's mother filed a complaint against Officer Beall and Baltimore City, alleging "negligence, gross negligence, battery, and a violation of Article 24 of the Maryland Declaration of Rights." *Id.* at 60.

The case proceeded to trial. *Id.* At the close of the plaintiffs' case, Officer Beall moved for judgment due to insufficient evidence on all counts, and the court granted the motion as to the battery, gross negligence, and Article 24 claims, and the prayer for punitive damages. *Id.* The negligence claim solely went to the jury, which returned a verdict in favor of the motorcyclist's mother and estate for $3,505,000. *Id.*

After the circuit court, on motion from Officer Beall, reduced the judgment to $200,000 in accordance with the LGTCA, the mother appealed, and this Court held that "there was sufficient evidence for each of [the mother's] claims to have been submitted to the jury[.]" *Id.* The Court granted certiorari and considered, among other things, whether there was sufficient evidence to support the gross negligence count. *Id.* at 61-62.

The motorcyclist's mother relied on "the actions of Officer Beall prior to the collision to show that he was acting recklessly." *Id.* at 65. Officer Beall "commenced

trailing the motorcycle surreptitiously" and was "acting without exigent circumstances in his pursuit of [the motorcyclist], who committed only traffic offenses and posed no articulated immediate harm to others." *Id.* at 65-66. While evidence showed that the motorcyclist "reduced his speed" upon entering a construction zone, the officer continued to pursue, in direct contravention of an order to discontinue. *Id.* at 66. The Court of Appeals summarized:

> [B]ased on the accident reconstruction that surmised the over-taking speed of the police cruiser on the ramp, the lack of exigent circumstances justifying Officer Beall's pursuit, and Officer Beall's testimony (as an adverse witness called by [the mother]) that he saw [the motorcyclist] apply his brakes on the exit ramp, a jury could have inferred reasonably that Officer Beall knew or should have known a collision between the vehicles was likely.

Id.

Alternatively, in *Boyer v. State*, the Court of Appeals determined that gross negligence was not present in a case involving a state trooper's high-speed pursuit of an allegedly drunk driver, which resulted in fatalities of other motorists. 323 Md. 558, 564, 580 (1991). An officer was driving his police car when he observed a vehicle being driven "in an unsafe and erratic manner" and suspected that the driver was intoxicated. *Id.* at 562. At a red light, the officer instructed the vehicle to pull over to the shoulder of road. *Id.* Instead, when the light turned green, the driver took off, and the officer began pursuit. *Id.* at 563. As alleged by the plaintiffs, the pursuit continued for "approximately seven miles . . . through heavy traffic and numerous intersections at high speeds[,]" "in excess of 100 miles per hour." *Id.* The plaintiffs further claimed that he officer continued the pursuit "[d]espite the presence of numerous other slow moving vehicles" and "failed to 'activate

immediately all of the emergency equipment on his police car' and [] to 'adhere to the acceptable police procedures and policies in attempting to apprehend [the driver].'" *Id.* The pursuit ended when the driver hit another vehicle, resulting in the death of its occupants. *Id.*

The surviving sons of the deceased occupants filed a complaint against the State, the county, the officer, the sheriff's department, and the driver for a variety of survival and wrongful death claims. *Id.* at 563-64. The parties, with the exception of the driver, moved for summary judgment. *Id.* at 564. The circuit court granted summary judgment on behalf of the moving defendants and held that the police officer was entitled to immunity pursuant to TA § 19-103(b), because he had not exhibited malice or gross negligence, and certified the order as final pursuant to Md. Rule 2-602(b). *Id.* at 570-71. This Court affirmed, holding that the officer "was immune from suit under the doctrine of public official immunity." *Id.* at 571. Before the Court of Appeals, the plaintiffs contended that "their allegations were sufficient to charge [the officer] with gross negligence." *Id.* at 578.

The allegations supporting plaintiffs' contention of gross negligence included that the trooper recklessly pursued the suspect "at an excessively high rate of speed through a heavy traffic area," "did not 'immediately' activate his emergency equipment," and "violated police procedures." *Id.* at 579-80. The Court of Appeals held that the allegations advanced by the plaintiffs were too vague to demonstrate adequately that the state trooper acted in a grossly negligent manner. *Id.* at 580-81. Instead, in order to charge the trooper with gross negligence, the plaintiffs needed to present "*facts* showing that [the trooper] acted with a wanton and reckless disregard for others in pursuing [the driver]." *Id.* at 579.

Accordingly, the Court held that the "allegations were insufficient to charge gross negligence." *Id.*

Officer Kamberger and the County, in addition to relying heavily on *Boyer*, also direct us to *Khawaja v. Mayor and City Council, City of Rockville*, 89 Md. App. 314 (1991), in support of their contention that Officer Kamberger was not grossly negligent as a matter of law. In *Khawaja*, the plaintiffs were seriously injured while driving home when a police car collided with their vehicle. 89 Md. App. at 316. The plaintiffs sustained injuries and filed a complaint against the City of Rockville and the officer. *Id.* at 317. "The focus of the complaint was [the officer's] alleged gross negligence for not having sounded the police cruiser's siren while responding to [an] emergency call[.]" *Id.* at 317. The complaint further asserted that the officer sped through a red light at the intersection where she crashed into the plaintiff's car. *Id.* Based solely on these allegations, our predecessors held that the complaint failed to set forth a cause of action for gross negligence. *Id.* at 318.

Applying the principles articulated in the foregoing cases and comparing the facts in those cases to the matter before us compels the conclusion that the trial court erred in granting summary judgment as a matter of law. The evidence presented was sufficient to allow a fact finder to determine that Officer Kamberger's conduct represented an intentional failure to perform his duty, as specified in the Field Manual, and was in reckless disregard for human life and the consequences that might result. *See Beall*, 446 Md. at 64. Unlike the record deemed "conclusory" in *Boyer*, the evidence presented here, viewed in the light most favorable to the Smallwood Plaintiffs, offers sufficient support upon which a jury could reasonably find that Officer Kamberger was grossly negligent.

A jury reasonably could infer that Officer Kamberger was prohibited by applicable policies from pursuing Mr. Green in the first instance or, given an increased risk to public safety as the pursuit continued, required to stand down. According to Officer Kamberger's own testimony, at least eight or nine of the high-risk factors identified on the Matrix were present during the pursuit. Officer Kamberger's understanding of the accident between Officer Evelyn and Mr. Green was that a hit and run had taken place which resulted in property damage without further bodily injury. Accordingly, a fact finder could conclude that, as per the Matrix, because no felony or other incident presented Officer Kamberger with knowledge that serious harm or death had been or could be inflicted, he should not have engaged in such a high-risk pursuit.

Further, viewing the evidence in the Smallwood Plaintiffs' favor, Officer Kamberger continued his pursuit at speeds *averaging* 90 miles per hour, on roads where the speed limit ranged between 30 and 50 miles per hour, into an increasingly residential and commercial area. He entered a region outside his jurisdiction and admitted that he was not familiar with the area. The pursuit continued through approximately sixteen intersections and nine signals, and Officer Kamberger witnessed Mr. Green run three to four red lights. Officer Kamberger's supervising officer testified she would probably have terminated the pursuit if he had reported his speed or Mr. Green's violations of traffic rules.

Weighing all inferences in favor of the non-moving party below, we hold that a reasonable jury could conclude that Officer Kamberger, in his effort to apprehend Mr. Green, failed to follow applicable police policies in "reckless disregard of the consequences as affecting the life or property of another." *See Beall*, 446 Md. at 64 (citation omitted).

Accordingly, the circuit court erred as a matter of law in granting summary judgment on the counts relating to negligence, and in determining that Officer Kamberger and the County were entitled to immunity, because a material dispute of fact remained as to whether Officer Kamberger was grossly negligent.

III.

Proximate Cause

Although proximate cause is a threshold issue for all the negligence claims in this case, the circuit court only attributed proximate cause as the ground for granting summary judgment on the counts asserting wrongful death and survival actions. The court found that Mr. Green's negligence was the "direct and sole cause of Jeremiah Perry's death," and that the "alleged causal connection" between Officer Kamberger's conduct and the injury was "too attenuated."

The Smallwood Plaintiffs argue that the trial court misapplied the causation analysis, utilizing "but-for" causation rather than the appropriate substantial factors test to determine proximate cause. The trial found dispositive that Officer Kamberger's car "never struck any other vehicle" severing any potential "casual connection, factually or legally, between the collision and the death of the child in this case."

Officer Kamberger and the County rely primarily on their argument that Officer Kamberger could not have proximately caused Jeremiah's death because the immunity provisions referenced above relieve Officer Kamberger from liability and sever causation under section 431(b) of the Restatement (Second) of Torts. As we held above, however,

disputes of material fact precluded the circuit court from making a determination of the officer's entitlement to immunity as a matter of law.

Officer Kamberger and the County also contend, without further analysis, that there was no causal relationship between Officer Kamberger's conduct and the incident because Officer Kamberger terminated his pursuit, and his vehicle never struck any of the vehicles involved in the collision.

Proximate cause requires both (1) causation-in-fact and (2) a legally cognizable cause. *Kiriakos v. Phillips*, 448 Md. 440, 465 (2016). The Court of Appeals, in *Pittway Corp. v. Collins*, instructed that causation-in-fact requires an examination "to determine who or what caused an action," and when two or more independent negligent acts bring about an injury, we apply the substantial factor test. 409 Md. 218, 244 (2009). Causation-in-fact "may be found if it is 'more likely than not' that the defendant's conduct was a substantial factor in producing the plaintiff's injuries." *Id.* In making this determination, we apply the substantial factor test set forth in the Restatement (Second) of Torts. *Id.* Section 431 states:

> The actor's negligent conduct is a legal cause of harm to another if
> (a) his conduct is a substantial factor in bringing about the harm, and
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

Restatement (Second) of Torts § 431 (1965). Section 433 of the Restatement (Second) further provides factors to consider in making a substantial factor determination:

> The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
(b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces of which the actor is not responsible;
(c) lapse of time.

Restatement (Second) of Torts § 433.

Once causation-in-fact is established, we turn to the second step in the proximate cause inquiry and determine "whether the defendant's negligent actions constitute a legally cognizable cause of the complainant's injuries." *Pittway Corp.*, 409 Md. at 245. We "consider whether the actual harm to a litigant falls within a general field of danger that the actor should have anticipated or expected." *Id.* "In our consideration, we most often—but not exclusively—ask 'whether the injuries were a foreseeable result of the negligent conduct.'" *Kiriakos*, 448 Md. at 466 (quoting *Pittway Corp.*, 409 Md. at 246).

In cases where there are multiple allegedly negligent actors, we also consider "whether a negligent defendant is relieved from liability by intervening negligent acts or omissions." *Pittway Corp.*, 409 Md. at 247. If the intervening act is unusual and extraordinary such that a tortfeasor could not have anticipated the intervening act, it may be a superseding cause that relieves the tortfeasor of liability. *Id.* at 248-49. Liability remains, however, "if the intervening event is one which might, in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation." *Yonce v. SmithKline Beecham Clinical Labs., Inc.*, 111 Md. App. 124, 140 (1996) (quoting *State ex rel. Schiller v. Hecht Co*., 165 Md. 415, 421 (1933)). In performing this proximate cause analysis, we are mindful that "unless

the facts admit of but one inference . . . the determination of proximate cause . . . is for the jury." *Caroline v. Reicher*, 269 Md. 125, 133 (1973); *Lashley v. Dawson*, 162 Md. 549, 562 (1932) ("The true rule is that what is proximate cause of an injury is ordinarily a question for the jury.").

In *Boyer*, the Court of Appeals addressed in dicta proximate cause in pursuit cases. 323 Md. at 587 n.18. First, the Court explained:

> There are cases which hold that a police officer is not liable to a plaintiff who is injured by a suspect fleeing from the police officer in a high-speed chase. Many of these cases express the view that any negligence of the police officer is not the proximate cause of the plaintiff's injury, but that the fleeing suspect's conduct is the sole proximate cause.

Id. (collecting authorities). However, the Court asserted that those cases "overlook the fact that there can be more than one cause of an injury." *Id.* Instead, the Court of Appeals pronounced that "[i]t is entirely foreseeable under certain circumstances that a police officer's engagement in a high-speed chase could be a proximate cause of an injury to a third party struck by the pursued suspect." *Id.*

Returning to the present case, we hold that the court erred in determining as a matter of law that Officer Kamberger was not a proximate cause of the accident. First, we find that a jury could determine that Officer Kamberger's pursuit of Mr. Green was "more likely than not" a substantial factor in bringing about the harm. *Pittway Corp.*, 409 Md. at 244. Specifically, a jury could find that Office Kamberger's action to initially engage in pursuit of Mr. Green and to then continue the pursuit even though Mr. Green was fleeing at a high rate of speed into an increasingly dense commercial and residential area, with which Officer Kamberger was unfamiliar, "created a force or series of forces which [were] in

continuous and active operation up to the time of the harm[.]" Restatement (Second) of Torts § 433(b). Officer Kamberger admitted during his deposition that police pursuits induce individuals who are already fleeing to "drive faster" in an attempt to elude being caught. He also admitted that it seemed like Mr. Green was never going to stop. Moreover, Officer Kamberger surmised that, because he had already engaged in a hit-and-run with Officer Evelyn, Mr. Green would be willing to strike a pedestrian or become involved in a second hit-and-run. Indeed, given the risks inherent in police pursuits, the Field Manual expressly regulates their "engagement and performance" with a primary regard "for the safety of others." The Field Manual only allows high-risk pursuits in two instances—commission of a felony and knowledge of serious harm or death. Viewing these facts together, a jury could find that Officer Kamberger's actions reasonably and foreseeably contributed to the harm that occurred.

We agree with the Smallwood Plaintiffs that the court misapplied the causation analysis by utilizing "but-for" causation rather than the appropriate substantial factors test. We conclude that at the time the court decided the motion for summary judgment, the Smallwood Plaintiffs had produced sufficient evidence to permit a jury to consider whether or not Officer Kamberger's conduct was a substantial factor in bringing about the harm. Accordingly, we hold that the circuit court erred in granting summary judgment on the counts relating to wrongful death and the survival action.

IV.

Article 24 Violation

The Smallwood Plaintiffs aver that evidence supporting "egregious" misconduct by the BCPD after the incident as well as Officer Kamberger's failure to follow departmental regulations during the pursuit yielded a substantive cause of action under Article 24. Specifically, the Smallwood Plaintiffs contend that a "jury could . . . find that a police department that did not follow its own regulations and that misrepresented material facts to minimize the incredible risk of the officer'[s] conduct would be an 'egregious act' that could be conscience-shocking."

Article 24 of the Maryland Declaration of Rights provides a substantive due process right that protects persons from unreasonable or arbitrary actions. Article 24 provides:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Md. Const. Decl. of Rts. art. 24. Article 24 has "the same meaning and effect in reference to an exaction of property," rendering the decisions of the United States Supreme Court on the Fourteenth Amendment as "practically direct authorities." *Beall*, 446 Md. at 68 (quoting *Bureau of Mines of Md. v. George's Creek Coal & Land Co.*, 272 Md. 143, 156 (1974)). Accordingly, an Article 24 violation analysis follows the analysis used for claims under the Fourteenth Amendment to the United States Constitution and, as a result, "all claims that law enforcement officers have used excessive force—deadly or not—in the

course of an arrest, . . . should be analyzed under the Fourth Amendment['s] 'reasonableness' standard." *Id.* at 68 (quoting *Okwa v. Harper*, 360 Md. 161, 204 (2000)).

In *County of Sacramento v. Lewis*, the United States Supreme Court was asked to "resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." 523 U.S. 833, 839 (1998). The Court found that a police officer did not violate substantive due process "by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." *Id.* at 836. Instead, "in such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Id.*

The Smallwood Plaintiffs contend that, when viewing the facts in the light most favorable to them, the evidence would support a claim for a violation under Article 24. Quoting *Beall v. Holloway-Johnson*, 446 Md. 48, 69 (2016), they assert that "if there is any evidence adduced, *however slight*, from which reasonable jurors [applying the appropriate standard of proof] could find in favor of the plaintiff on the claims presented," the claim should be submitted to the jury. (Emphasis in original.)

While we are cognizant of the standards enunciated by the Court of Appeals in *Beall* and raised by the Smallwood Plaintiffs, nothing in the record supports a finding that Officer Kamberger's alleged use of excessive force deprived Jeremiah Perry of his life without due process. As we explained in our analysis of malice above, the evidence does not support a finding that Officer Kamberger had any purpose other than to apprehend Mr. Green.

Although the evidence adduced by the Smallwood Plaintiffs was sufficient to allow a jury to consider whether Officer Kamberger's conduct during the pursuit was grossly negligent, and whether he proceeded with "deliberate or reckless indifference to life," viewing the record in a light most favorable to the Smallwood Plaintiffs, we agree with Appellees that Officer Kamberger had "no purpose to cause harm to Jeremiah Perry" or his mother and sister, but solely intended to "apprehend an offender."

In granting summary judgment, the circuit court did not squarely address the Smallwood Plaintiffs' allegations that the BCPD delayed the investigation by seven months and allegedly misreported the speed at which Officer Kamberger was driving during the chase. We note that Count I of the Amended Complaint against Officer Kamberger and the County, entitled "Maryland Declaration of Rights Article 24: Deprivation of Life," alleged, in pertinent part:

> Defendant Officer Kamberger acted **as Defendant Baltimore County's agent, servant, and/or employee when he engaged in intentional acts of misconduct, including using excessive force**, **which violated Jeremiah Perry's civil rights and due process such that Jeremiah Perry die[d]** as [a] result of the physical injuries resulting from Defendant Officer Kamberger's intentional acts.
>
> * * *
>
> The conduct of Defendant Officer Kamberger was without legal justification and **was improperly motivated by ill will and actual malice. Defendant Officer Kamberger intended to harm Jeremiah Perry when he recklessly, and intentionally, engaged in a high-speed chase and caused a vehicle to hit Jeremiah Perry, thereby killing him**.
>
> **As a result of these acts**, Jeremiah Perry sustained severe physical injuries, including death. Plaintiffs [sic] sustained emotional, mental, and financial injuries, including but not limited to, pain and suffering, mental anguish, costs and expenses of medical and legal proceedings, lost wages, and other expenses.

(Emphasis added). On appeal, as before the circuit court, the Smallwood Plaintiffs have failed to explain or provide any legal argument linking the County's alleged acts during the underlying litigation—after the accident—to the unfortunate death of Jeremiah Perry. Citing *Widgeon v. Eastern Shore Hospital Center*, 300 Md. 520, 532 (1984), the Smallwood Plaintiffs state that "[d]amages are the ordinary remedy for a violation of life and liberty interests under Article 24." In *Widgeon,* the Court of Appeals, in response to a question from the federal district court under the Uniform Certification of Questions of Law Act, held that "where an individual is deprived of his liberty or property interests in violation of Articles 24 and 26, he may enforce those rights by bringing a common law action for damages." *Id.* at 537-38. It remains unclear, however, what liberty or property interest the Smallwood Plaintiffs were deprived of by, for example, the alleged delay in the investigation. In *Samuels v. Tschechtelin*, this Court considered an individual's claims under both Article 24 and the Due Process Clause of the Fourteenth Amendment, and instructed that "[t]o be successful in an action alleging denial of procedural due process in violation of a property interest, a plaintiff must demonstrate that he had a protected property interest, that he was deprived of that interest, and that he was afforded less process than was due." 135 Md. App. 483, 523 (2000). To the extent that the Smallwood Plaintiffs allege that the County violated Article 24 through its agent, Officer Kamberger, by his pursuit of Mr. Green, we have explained why that allegation fails under *County of Sacramento v. Lewis*, 523 U.S. at 839. Beyond that, the Smallwood Plaintiffs have failed to show how the County's actions, following the accident, deprived them of a liberty or

property interest under Article 24. Accordingly, we hold that the circuit court did not err in granting summary judgment on Count I under Article 24 against Officer Kamberger and the County.

V.

Assault and Battery

The Smallwood Plaintiffs contend that, viewed in the light most favorable to them, the evidence supports a claim for assault and battery:

> [Officer] Kamberger was following [Mr.] Green very closely despite actual knowledge that [Mr.] Green was driving recklessly and continuing to speed through intersections without stopping. [Officer] Kamberger's conduct was volitional and, [] when viewing the fa[c]ts in the light most favorable to [the Smallwood Plaintiffs], his state of mind and his intentions are for a jury to decide and whether he intended to unlawfully invade the well-being of the [Smallwood Plaintiffs] when he sped through the busy intersection.

Appellees counter that "[t]here is no material fact that Officer Kamberger had any specific or general intent to harm Jeremiah Perry or anyone else, nor did he ever [sic] contact with him, as the [c]ourt found." The Smallwood Plaintiffs rejoin that "[n]otwithstanding the principle that immunity does not apply to public officials who commit intentional torts, [Officer] Kamberger's intent, motive, and state of mind was not for the trial court to determine[.]"

"An assault is any unlawful attempt to cause a harmful or offensive contact with the person of another or to cause an apprehension of such a contact. A battery is its consummation." *Cont'l Cas. Co. v. Mirabile*, 52 Md. App. 387, 398 (1982). Consequently, "[a] battery occurs when one intends a harmful or offensive contact with another without that person's consent." *Nelson v. Carroll*, 355 Md. 593, 600 (1999) (citing

Restatement (Second) of Torts § 13 & cmt. d (1965)). The touching must be intentional, as "a purely accidental touching or one caused by mere inadvertence, is not enough to establish the intent requirement for battery. . . . The intent element of battery requires not a specific desire to bring about a certain result, but rather a general intent to unlawfully invade another's physical well-being through a harmful or offensive contact or an apprehension of such a contact." *Id.* at 602-03 (citation omitted).

In *Beall*, addressed at length above, the Court of Appeals found that the plaintiff had "presented legally sufficient evidence to permit a rational jury to conclude that a battery occurred on the exit ramp, which led to the collision, and was intentional." 446 Md. at 67-68.

The United States Supreme Court has encapsulated that "[i]ntentional torts generally require that the actor intend 'the *consequences* of an act,' not simply 'the act itself.'" *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998) (quoting Restatement (Second) of Torts § 8A, cmt. a (1964) (emphasis added)). As we recently stated: "perhaps two of the most quintessential of intentional torts at common law are the torts of assault and battery." *White Pine Ins. Co. v. Taylor*, 233 Md. App. 479, 502 (2017). This Court and the Court of Appeals have quoted with approval comment f to section 500 of the Restatement (Second) of Torts, which contrasts intentional and reckless conduct:

> While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.

See Hendrix v. Burns, 205 Md. App. 1, 20-21 (2012); *Johnson v. Mountaire Farms of Delmarva, Inc.*, 305 Md. 246, 254 (1986). Likewise, in *Ghassemieh v. Schafer*, this Court found helpful Professor Prosser's "explication of the distinction between intended and unintended acts":

> In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great to lead a reasonable man in his position to anticipate them, and to guard against them. **If an automobile driver runs down a man in the street before him, with the desire to hit him, or with the belief that he is certain to do so, it is an intentional battery; but if he has no such desire or belief, but merely acts unreasonably in failing to guard against a risk which he should appreciate, it is negligence.** As the probability of injury to another, apparent from the facts within his knowledge, becomes greater, his conduct takes on more of the attributes of intent, until it reaches that substantial certainty of harm which juries, and sometimes courts, may find inseparable from intent itself. Such intermediate mental states, based upon a recognizable great probability of harm, may still properly be classed as 'negligence,' but are commonly called 'reckless,' 'wanton,' or even 'willful.' They are dealt with, in many respects, as if the harm were intended, so that they become in effect a hybrid between intent and negligence, occupying a sort of penumbra between the two.

52 Md. App. 31, 40-41 (1982) (quoting Prosser, Law of Torts, § 31 at 145 (4th ed. 1971) (emphasis added)).

Returning to the case at bar, we hold that the circuit court properly granted summary judgment in favor of Officer Kamberger on the Smallwood Plaintiffs' counts for assault and battery. As we addressed above in our analysis of Article 24, we have not found anything in the record to support an inference that Officer Kamberger intended any purpose other than to apprehend Mr. Green. Officer Kamberger's vehicle was not directly involved in the accident in this case, and there is nothing in the record to suggest that he formed an

intent to injure the Smallwood Plaintiffs directly or indirectly. Whereas the officer in *Beall* made contact with the motorcyclist and disregarded a verbal directive, nothing in the record supports a finding that Officer Kamberger intended to or did strike Jeremiah Perry—or anyone else—with his vehicle.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED, IN PART, AND REVERSED, IN PART; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID 50% BY APPELLANTS AND 50% BY APPELLEES.