



1996

Notes: Malicious Prosecution — False Imprisonment — Punitive Damages — Court Requires Clear and Convincing Evidence of Actual Malice to Support an Award of Punitive Damages in Both Malicious Prosecution and False Imprisonment Actions; False Imprisonment Does Not Lie against an Individual Who Wrongfully Procures The Arrest of Another, Where Arrest Is Made by a Police Officer Executing a Facially Valid Warrant. *Montgomery Ward v. Wilson*, 339 Md. 701, 664 A.2d 916 (1995)

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Recommended Citation

Salko, Joseph R. (1996) "Notes: Malicious Prosecution — False Imprisonment — Punitive Damages — Court Requires Clear and Convincing Evidence of Actual Malice to Support an Award of Punitive Damages in Both Malicious Prosecution and False Imprisonment Actions; False Imprisonment Does Not Lie against an Individual Who Wrongfully Procures The Arrest of Another, Where Arrest Is Made by a Police Officer Executing a Facially Valid Warrant. *Montgomery Ward v. Wilson*, 339 Md. 701, 664 A.2d 916 (1995)," *University of Baltimore Law Review*: Vol. 26: Iss. 2, Article 5.

Available at: <http://scholarworks.law.ubalt.edu/ubl/vol26/iss2/5>

MALICIOUS PROSECUTION—FALSE IMPRISONMENT—PUNITIVE DAMAGES—COURT REQUIRES CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE TO SUPPORT AN AWARD OF PUNITIVE DAMAGES IN BOTH MALICIOUS PROSECUTION AND FALSE IMPRISONMENT ACTIONS; FALSE IMPRISONMENT DOES NOT LIE AGAINST AN INDIVIDUAL WHO WRONGFULLY PROCURES THE ARREST OF ANOTHER, WHERE ARREST IS MADE BY A POLICE OFFICER EXECUTING A FACIALLY VALID WARRANT. *Montgomery Ward v. Wilson*, 339 Md. 701, 664 A.2d 916 (1995).

I. INTRODUCTION

In the early to mid 1970s, the Court of Appeals of Maryland rendered several decisions that changed the standards for the availability of punitive damages in tort actions.¹ In recent years, however, the court has attempted to restrict the availability of punitive damages to plaintiffs² by returning to previous standards that the Maryland courts had followed for over a century.³ Historically in Maryland, punitive damages, for any tort, were only recoverable with evidence of actual malice on behalf of the defendant.⁴ The sole exception to this rule was the tort of malicious prosecution.⁵ In mali-

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1. See *infra* notes 110-20 for a discussion of *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 297 A.2d 721 (1972), *overruled by Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992), and its progeny. In *Smith*, the court of appeals, relying on out-of-state authority, for the first time in a non-intentional tort action, allowed an award of punitive damages based upon implied malice. *Smith*, 267 Md. at 160-68, 297 A.2d at 729-32.
 2. See *infra* note 235 and accompanying text for discussion of recent court of appeals decisions limiting the availability of punitive damages.
 3. See, e.g., *Davis v. Gordon*, 183 Md. 129, 133, 36 A.2d 699, 701 (1944); *Heinze v. Murphy*, 180 Md. 423, 429, 24 A.2d 917, 920-21 (1942); *Knickerbocker Co. v. Gardiner Co.*, 107 Md. 556, 568-69, 69 A. 405, 410 (1908); *Baltimore and Ohio R.R. Co. v. Boyd*, 63 Md. 325 (1885).
 4. See *supra* note 3 for cases holding actual malice is required to support an award for punitive damages.
 5. See *infra* notes 127-38 for discussion of punitive damages in malicious prosecution actions in Maryland. See also *First Nat'l Bank v. Fidelity & Deposit Co.*, 283 Md. 228, 248, 389 A.2d 359, 370 (1978) (Levine, J., dissenting) (describing the

cious prosecution cases, courts have traditionally allowed an implied malice standard to support an award of punitive damages.⁶

With its decision in *Montgomery Ward v. Wilson*,⁷ however, the court of appeals changed this common-law principle with respect to the standard of malice required to support an award of punitive damages in a malicious prosecution action.⁸ Moreover, the court reaffirmed the actual malice standard required to support an award of punitive damages in false imprisonment actions.⁹

In addition to the issue of punitive damages, *Wilson* presented the court with an issue of first impression in Maryland: whether an individual who wrongfully procures another's arrest is liable for false imprisonment, where there was no detention prior to the arrest, and the arrest is made by a police officer pursuant to a facially valid arrest warrant.¹⁰ In holding there is no liability in such a situation,¹¹ the court has provided a substantial amount of insulation from liability to one who is attempting to effectuate an arrest of another through the formal requirements established by law.

II. HISTORICAL DEVELOPMENT

A. *Malicious Prosecution*

Although not favored by the law,¹² malicious prosecution is a viable cause of action in Maryland.¹³ In an action for malicious prosecution of a criminal charge in Maryland, the plaintiff must prove

tort of malicious prosecution "as an anomaly in the law of damages" with respect to the standard of implied malice to support an award of punitive damages).

6. See *infra* notes 127-38 for discussion of punitive damages in malicious prosecution actions in Maryland.
7. 339 Md. 701, 664 A.2d 916 (1995).
8. See *id.* at 735-36, 664 A.2d at 933.
9. See *id.* at 732, 664 A.2d at 931. Maryland courts had apparently, for some time, abandoned the actual malice standard in favor of an implied malice standard as a result of "unfortunate" dicta, *id.*, from the 1972 case, *Montgomery Ward & Co. v. Cliser*, 267 Md. 406, 298 A.2d 16 (1972).
10. See *Wilson*, 339 Md. at 726, 664 A.2d at 928.
11. See *id.* at 726-27, 664 A.2d at 928.
12. See *Durante v. Braun*, 263 Md. 685, 688, 284 A.2d 241, 242 (1971). Actions for malicious prosecution are generally not favored in the law because public policy encourages that criminals be brought to justice and citizens be allowed to aid the prosecution without fear of civil suits for damages. See, e.g., *Whittaker v. Duke*, 473 F. Supp. 908, 912 (S.D.N.Y. 1979); *Devlin v. Greiner*, 371 A.2d 380, 393 (N.J. Super. Ct. Law Div. 1977).
13. See, e.g., *Durante*, 263 Md. at 688, 284 A.2d at 242.

the following elements set forth in *Exxon Corp. v. Kelly*:¹⁴

(a) a criminal proceeding instituted or continued by the defendant against the plaintiff, (b) termination of the proceeding in favor of the accused, (c) absence of probable cause for the proceeding, and (d) "malice", or a primary purpose in instituting the proceeding other than that of bringing an offender to justice.¹⁵

1. Criminal Proceeding Instituted or Continued by the Defendant

A criminal proceeding includes any proceeding where the government prosecutes an individual for either a common-law or statutory offense and seeks to impose a criminal penalty.¹⁶ Generally, there must be some affirmative action taken by the defendant in the civil action to bring about a prosecution, such as preparing an application for a statement of charges against the accused or requesting that the person be prosecuted.¹⁷ However, the institution of criminal proceedings does not occur until formal action is taken by an official.¹⁸ A person may also incur liability for malicious prosecution by continuing criminal proceedings against an individual, whether initiated by himself or another.¹⁹

14. 281 Md. 689, 381 A.2d 1146 (1978).

15. *Id.* at 693, 381 A.2d at 1149 (quoting *Durante*, 263 Md. at 688, 284 A.2d at 243.)

16. See RESTATEMENT (SECOND) OF TORTS § 654 cmt. a (1977). This term includes proceedings where the individual is prosecuted for petty offenses such as parking violations. See *id.* The importance of the crime is not material, except that it may effect the damages the accused is entitled to recover in a malicious prosecution action. See *id.*

17. Alan R. Gilbert, Annotation, *Malicious Prosecution: Liability for Instigation or Continuation of Prosecution of Plaintiff Mistakenly Identified as Person Who Committed an Offense*, 66 A.L.R.3d 10, 15 (1975) (and cases cited therein). But see *Banks v. Nordstrom, Inc.*, 787 P.2d 953 (Wash. App. 1990) (holding that tortious conduct may arise from a failure to act when there is a duty to act affirmatively).

18. See RESTATEMENT (SECOND) OF TORTS § 654 cmt. d (1977).

19. See *id.* § 655. For example, in *Purvis v. Hamwi*, 828 F. Supp. 1479 (D. Colo. 1993), the plaintiff, Purvis, spent nine years in prison for the murder and sexual assault of a mother and the murder of her daughter, until the true killer confessed that he was hired by the victim's husband to commit the murders. See *id.* at 1480-81. Upon his release, Purvis filed a malicious prosecution action against Hamwi. See *id.* at 1481. The husband, who had not instituted the criminal proceedings against Purvis but who had participated in the investigation of the murders and had testified as a witness for the state, filed a motion to dismiss the malicious prosecution action. See *id.* at 1481. In denying the husband's motion to dismiss, the court stated that there was a duty not to actively

In *Nance v. Gall*,²⁰ the Court of Appeals of Maryland addressed the issue of what constitutes the institution of a criminal proceeding.²¹ An employee of Gall, while in the process of cutting down trees for Gall's sawmill and logging business, inadvertently knocked down a telephone pole located adjacent to a railroad track.²² Nance, employed by the Maryland and Pennsylvania Railroad Company, met with a magistrate to express his concern about trees obstructing the railroad tracks.²³ Led to believe from his conversation with Nance that Gall was continuing to cut trees near the track, a magistrate issued a warrant for Gall's arrest for violating a statute prohibiting the placement of trees on railroad tracks.²⁴ In fact, it was discovered from testimony given at a preliminary hearing that Gall had immediately stopped the cutting of all trees close to the railroad tracks after learning that the telephone pole was knocked down.²⁵ The charges against Gall were dismissed, and he subsequently filed a malicious prosecution action against Nance and the Maryland and Pennsylvania Railroad Company.²⁶ Although Nance himself did not swear out a warrant for Gall's arrest, the court concluded that he "aided and abetted" in the institution of the prosecution and would

assist in the prosecution of an innocent man and a duty not to lie under oath. *See id.* at 1485.

20. 187 Md. 656, 50 A.2d 120 (1946), *modified on other grounds*, 187 Md. 674, 51 A.2d 535 (1947). The modification of this case did not alter the court's ruling concerning what constitutes the institution of a criminal proceeding. At trial, Nance and a corporate defendant were found jointly liable for malicious prosecution and the jury awarded punitive damages to the plaintiff. *See id.* at 659, 50 A.2d at 121. On appeal, however, Nance was held solely liable for the institution of malicious prosecution while the jury's finding of corporate liability was reversed. *See id.* at 674, 50 A.2d at 128. Nance filed a motion for modification of the opinion, arguing that the jury's punitive award for joint liability was being imposed solely on him. *See Nance*, 187 Md. at 674, 51 A.2d at 535. The Court of Appeals of Maryland agreed with this claim, stating, "[w]e do not think that a judgment rendered against two defendants should be imposed alone upon one of those defendants." *Id.* at 677, 51 A.2d at 536. The court noted that to do this would undermine Nance's right under the Joint Tortfeasor Act to force the co-defendant railroad to pay one half of the judgment. *See id.* Thus, Nance's motion for modification was granted, and he was awarded a new trial. *See id.*

21. *See id.*

22. *See id.* at 660-61, 50 A.2d at 121-22.

23. *See id.* at 664, 50 A.2d at 123.

24. *See id.* at 664-65, 50 A.2d at 124.

25. *See id.* at 666, 50 A.2d at 124.

26. *See id.* at 669, 50 A.2d at 126.

be liable if the other elements of a malicious prosecution action were established.²⁷

2. Termination of the Proceeding in Favor of the Accused

In order to incur liability for malicious prosecution, the criminal proceedings must have terminated in favor of the accused.²⁸ A termination in favor of the accused ordinarily occurs when the final disposition of the criminal case indicates the innocence of the accused.²⁹ Although clearly a not guilty verdict is considered a termination in favor of the accused, and a guilty verdict is not, there are other dispositions of criminal cases that are not so clear. For example, in *Haefner v. Burkey*,³⁰ the Supreme Court of Pennsylvania held that the quashing of an indictment and the entry of *nolle prosequi*³¹ satisfied the requisite element of prior favorable termination.³² Whether an entry of *nolle prosequi* is evidence of a lack of probable cause for the initiation of criminal proceedings depends upon the circumstances of each case.³³ In *Rubin v. Nowak*,³⁴ an administrative dismissal was held to be a favorable termination of a criminal proceeding for purposes of a malicious prosecution action.³⁵

27. *See id.*

28. *See supra* note 15 and accompanying text.

29. *See* RESTATEMENT (SECOND) OF TORTS § 660 cmt. a (1977). However, if the criminal proceedings are adversely terminated, subsequent proof that the accused is innocent will not support an action for malicious prosecution, even if it is shown that the conviction was unjust or obtained by fraud or perjury. *See id.* § 658 cmt. c. *But see* *Purvis v. Hamwi*, 828 F. Supp. 1479 (D. Colo. 1993) (sustaining malicious prosecution action where the accused was exonerated nine years after a murder conviction, where the conviction was obtained through fraud and perjury).

30. 626 A.2d 519 (Pa. 1993).

31. *Nolle prosequi* is defined as “[t]he voluntary withdrawal by the prosecuting attorney of present proceedings on a criminal charge.” BLACK’S LAW DICTIONARY 1048 (6th ed. 1990).

32. *See Haefner*, 626 A.2d at 521. In *Haefner*, the criminal trial resulted in a mistrial, and the appellate court quashed the state’s attempt to try him again. *See id.* at 520. The state then *nolle prossed* the remaining charges based on insufficient evidence. *See id.*

33. *See Exxon Corp. v. Kelly*, 281 Md. 689, 695, 381 A.2d 1146, 1150 (1978). *See also infra* notes 41-65 and accompanying text for discussion of probable cause.

34. 590 A.2d 249 (N.J. Super. 1991).

35. *See id.* at 251. *Rubin* involved criminal complaints filed by one business partner against another because of disagreements arising out of the dissolution of their partnership. *See id.* at 250. The criminal complaints were administratively dismissed by the county prosecutor without presentation to the grand jury. *See id.*

On the other hand, the stet³⁶ of a criminal charge is not considered a disposition of the criminal case in favor of the accused.³⁷ Presumably, this is because when a criminal case is "stetted," the defendant "remains liable to be proceeded against under the same indictment," if the prosecuting attorney wishes to remove the case from the stet docket.³⁸ In addition, a plea for *nolo contendere*³⁹ by the criminal defendant does not qualify as a termination in favor of the accused.⁴⁰

3. Absence of Probable Cause for the Proceeding

In *Exxon Corp. v. Kelly*,⁴¹ the Court of Appeals of Maryland defined probable cause as "a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused is guilty."⁴² Probable

36. *Stet processus* is defined as "[a]n entry on the roll in the nature of a judgment of a direction that all further proceedings shall be stayed." BLACK'S LAW DICTIONARY 1414 (6th ed. 1990). In Maryland, "[t]he stet . . . is simply an indication by the prosecutor, acquiesced in by the court, that he does not choose *at that time* on that indictment to proceed further with the prosecution." *State v. Jones*, 18 Md. App. 11, 34, 305 A.2d 177, 190 (1973) (citations omitted).

37. See RICHARD J. GILBERT & PAUL T. GILBERT, MARYLAND TORT LAW HANDBOOK § 4.7, at 45 (2d ed. 1992).

38. See, e.g., *Jones*, 18 Md. App. at 33, 305 A.2d at 190.

39. *Nolo contendere* means "I will not contest it"; a plea in a criminal case which has a similar legal effect as pleading guilty. BLACK'S LAW DICTIONARY 1048 (6th ed. 1990). "The principal difference between a plea of guilty and a plea of *nolo contendere* is that the latter may not be used against the defendant in a civil action based upon the same acts." *Id.*

40. See *Pete v. Metcalfe*, 8 F.3d 214 (5th Cir. 1993). In *Pete*, the plaintiff sued the Texas Department of Corrections and others involved in his arrest and prosecution for charges of sexual assault. See *id.* at 214-16. In holding that the plaintiff was barred from pursuing an action for malicious prosecution, the court determined that the criminal prosecution resulted in a conviction with the enter of a plea of *nolo contendere*, and not a termination in favor of the accused. See *id.* at 219.

41. 281 Md. 689, 381 A.2d 1146 (1978).

42. *Id.* at 697, 381 A.2d at 1151 (quoting *Banks v. Montgomery Ward & Co.*, 212 Md. 31, 39, 128 A.2d 600, 604 (1957)). Section 662 of the RESTATEMENT (SECOND) OF TORTS expresses the rule as to whether probable cause exists:

One who initiates or continues criminal proceedings against another has probable cause for doing so if he correctly or reasonably believes (a) that the person whom he accuses has acted or failed to act in a particular manner, and (b) that those acts or omissions constitute the offense that he charges against the accused, and (c) that he is sufficiently informed as to the law and the facts to justify him in initiating or continuing the prosecution.

cause is measured by the circumstances as they reasonably appeared to the defendant at the time he initiated the proceedings.⁴³ The mere suspicion or belief that the accused has committed the offense is not sufficient to constitute probable cause.⁴⁴

During the course of a criminal proceeding, certain events may have an evidentiary effect on whether probable cause exists. The dismissal of criminal charges against the accused at a preliminary hearing by a magistrate⁴⁵ is *prima facie*⁴⁶ evidence of a lack of probable cause, because it is the function of a magistrate to determine the sufficiency of the evidence against the accused to justify prosecution of the case.⁴⁷ A *nolle prosequi* may be evidence of lack of probable cause, depending on the circumstances of its entry.⁴⁸ In discussing the effect of a *nolle prosequi* on a subsequent malicious prosecu-

RESTATEMENT (SECOND) OF TORTS § 662 (1977).

43. See *Brewer v. Mele*, 267 Md. 437, 451, 298 A.2d 156, 165 (1972).

44. See *Pessagno v. Keyes*, 143 Md. 437, 442, 122 A. 651, 653 (1923) (citing *Johns v. Marsh*, 52 Md. 323 (1879)).

45. According to comment c of section 659 of the Restatement, "[t]he term 'magistrate' is used to include not only a person who bears that title but also any other person who, like a magistrate, has the power to bind over for further hearing." RESTATEMENT (SECOND) OF TORTS § 659 cmt. c (1977).

46. "At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary." BLACK'S LAW DICTIONARY 1189 (6th ed. 1990).

47. See *Banks v. Montgomery Ward & Co.*, 212 Md. 31, 40, 128 A.2d 600, 605 (1957). However, the defendant may rebut the inference of lack of probable cause. See *id.* Other cases in Maryland have discussed the consequences of a dismissal of the criminal charges by a magistrate. In *Straus v. Young*, 36 Md. 246 (1872), the court of appeals stated that the discharge of the charges by a magistrate is "[p]rima facie evidence of the want of probable cause, sufficient to throw upon the defendant the burden of proving the contrary." *Id.* at 255. In *Nance v. Gall*, 187 Md. 656, 50 A.2d 120 (1946), *modified on other grounds*, 187 Md. 674, 51 A.2d 535 (1947), the court explained the consequence as follows:

[The] result of the hearing before the magistrate establishes the falsity of the charge, and supports an inference that the prosecution was motivated by malice and want of probable cause. This inference could have been rebutted by proof that facts and circumstances, sufficiently strong in themselves, were known to defendants . . . such as to induce a cautious and careful man to believe [the plaintiff] guilty of [the] charge. . . .

Id. at 669, 50 A.2d at 126. The court in *Norvell v. Safeway Stores, Inc.*, 212 Md. 14, 128 A.2d 591 (1957), explained that "[d]ischarge by a magistrate on [a] preliminary hearing may furnish some evidence of a want of probable cause, whereas acquittal after trial does not." *Id.* at 20-21, 128 A.2d at 594.

48. See *Exxon Corp. v. Kelly*, 281 Md. 689, 695, 381 A.2d 1146, 1150 (1978).

tion action, the *Exxon* court stated that "in order to be evidence of want of probable cause, the public prosecutor's dismissal must be 'at the instance of the private prosecutor or conditioned upon his consent.'"⁴⁹

In *Gladding Chevrolet, Inc. v. Fowler*,⁵⁰ the Court of Appeals of Maryland stated, in dicta, that a grand jury indictment is "[p]rima facie evidence of probable cause."⁵¹ The court favorably cited the Restatement view, noting that it reflected the majority rule.⁵² In addition, the *Gladding* court held that there is no liability for malicious prosecution when the defendant fully discloses the facts to his counsel and acts upon the advice of counsel to initiate criminal proceedings against the accused.⁵³

The conviction of the criminal defendant at trial, although later reversed by an appellate court, conclusively establishes the existence of probable cause.⁵⁴ The verdict of the trier of fact, expressed in terms of guilt beyond a reasonable doubt, is regarded as conclusive evidence that the person who initiated the criminal pro-

49. *Id.* at 697, 381 A.2d at 1151 (quoting RESTATEMENT (SECOND) OF TORTS § 665(2) cmt. b (1977)). In reversing the court of special appeals, the *Exxon* court emphasized that "mere knowledge and consent" of the private prosecutor in the public prosecutor's dismissal of the charges will not be sufficient to constitute evidence of lack of probable cause. *Id.*

50. 264 Md. 499, 287 A.2d 280 (1972).

51. *Id.* at 508, 287 A.2d at 285.

52. *See id.* Section 664(2) of the Restatement states that "[t]he indictment of the accused by a grand jury . . . is evidence that the person who initiated the proceedings had probable cause for" initiating them. RESTATEMENT (SECOND) OF TORTS § 664(2) (1977).

53. *See Gladding Chevrolet*, 264 Md. at 509-10, 287 A.2d at 286.

54. *See* RESTATEMENT (SECOND) OF TORTS § 667(1) (1977). In *Roundtree v. City of New York*, 778 F. Supp. 614 (E.D.N.Y. 1991), the accused sued the city and its police department, alleging a violation of his civil rights by arresting him for possession of cocaine without probable cause. *See id.* at 616-17. In dismissing the malicious prosecution claim, the court held that the plaintiff's guilty plea to a lesser charge of disorderly conduct and his failure to claim that his conviction was obtained by fraud, perjury, or other corrupt means were a complete defense to his claim of arrest without probable cause. *See id.* at 619-20. The same result was reached in *Hanson v. City of Snohomish*, 852 P.2d 295 (Wash. 1993). In *Hanson*, a criminal defendant was convicted of first degree assault. *See id.* at 296. When the conviction was overturned on appeal, the criminal defendant sued the city for various torts, including malicious prosecution. *See id.* at 296-97. In reinstating the trial court's dismissal of the malicious prosecution claim, the court held that a conviction, even if reversed, conclusively established the existence of probable cause as a defense to a malicious prosecution claim. *See id.* at 297.

ceedings had reasonable grounds to do so.⁵⁵ However, this rule does not apply if it is shown that the conviction was obtained by fraud, perjury, or other corrupt means.⁵⁶ An acquittal, on the other hand, is not evidence of a lack of probable cause.⁵⁷ An acquittal merely shows that the prosecution was not able to meet its burden of proving guilt beyond a reasonable doubt, and, therefore, an acquittal is considered immaterial in determining the existence of probable cause.⁵⁸

Whether the absence of probable cause is a question of fact for the jury or a question of law for the court depends upon the circumstances of each case. In *Palmer Ford, Inc. v. Wood*,⁵⁹ the Court of Appeals of Maryland thoroughly analyzed the respective functions of the judge and jury in determining whether a lack of probable cause exists in a malicious prosecution case.⁶⁰ Noting that there were two contradictory lines of cases on this issue in Maryland, the court attempted to resolve the conflict.⁶¹ One line of cases holds that it is the judge's function to determine whether the facts, as found by the jury, constitute a want of probable cause.⁶² The other family of cases asserts that the jury ultimately determines whether or not the facts constitute probable cause.⁶³ In holding that this is a question of law for the judge, the court followed the language in *Boyd v. Cross*,⁶⁴ an early decision of the Court of Appeals of Maryland:

The want of probable cause is a mixed question of law and fact. As to the existence of the facts relied on to constitute the want of probable cause, that is a question for the jury;

55. RESTATEMENT (SECOND) OF TORTS § 667(1) cmt. b (1977).

56. *See id.* § 667(1). This exception was evidenced in *Purvis v. Hamwi*, 828 F. Supp. 1479 (D. Colo. 1993), where the accused, who was exonerated after serving nine years for a double murder conviction, was allowed to maintain an action for malicious prosecution, negligent infliction of emotional distress, and intentional infliction of emotional distress. *See id.* at 1485. While the plaintiff was serving out his sentence in prison, the killer who was hired by the husband of the murdered wife and child, confessed to the crime. *See id.* at 1480-81. *See supra* note 19 for a discussion of *Purvis*.

57. *See* RESTATEMENT (SECOND) OF TORTS § 667(2) (1977).

58. *See id.* § 667 cmt. d.

59. 298 Md. 484, 471 A.2d 297 (1984).

60. *See id.* at 497-501, 471 A.2d at 304-05.

61. *See id.* at 486, 471 A.2d at 298.

62. *See id.*

63. *See id.*

64. 35 Md. 194 (1872).

but what will amount to the want of probable cause in any case, is a question of law for the court. The jury, in our practice, are always instructed hypothetically as to what constitutes probable cause, or the want of it, leaving to them to find the facts embraced in the hypothesis.⁶⁵

4. Malice: A Primary Purpose in Instituting the Proceeding Other than Bringing an Offender to Justice

In Maryland, the "malice element" of malicious prosecution consists of a wrongful or improper motive in initiating or continuing criminal proceedings against the accused.⁶⁶ It is not necessary to show evidence of spite, hatred, or revenge to establish malice in the context of malicious prosecution.⁶⁷ Any purpose other than bringing an offender to justice, if primarily the cause for initiating the proceeding, is an improper purpose and thus constitutes malice.⁶⁸

Unlike probable cause, the question of whether the accuser acted with malice, or some purpose other than bringing an offender to justice, presents a question for the jury.⁶⁹ Moreover, malice can be inferred from a lack of probable cause in instituting the criminal proceeding.⁷⁰ In discussing both the elements of probable cause and malice, Maryland's highest court in *Owens v. Graetzel*⁷¹ stated, "of these two indispensable elements the want of probable cause is the more important, because if it be established by the proof, mal-

65. *Palmer Ford*, 298 Md. at 501, 471 A.2d at 306 (quoting *Boyd v. Cross*, 35 Md. 194, 197 (1872)).

66. See *Exxon Corp. v. Kelly*, 281 Md. 681, 689, 381 A.2d 1146, 1153 (1978); *Durante v. Braun*, 263 Md. 688, 691, 284 A.2d 241, 243 (1971); *Banks v. Montgomery Ward & Co.*, 212 Md. 31, 42, 128 A.2d 600, 606 (1957); *Torsch v. Dell*, 88 Md. 459, 468, 41 A. 903, 906 (1898).

67. See *Johns v. Marsh*, 52 Md. 323, 332-33 (1879) ("the term 'malice,' in this form of action, is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives" (citation omitted)); see also *Keys v. Chrysler Credit Corp.*, 303 Md. 397, 408 n.7, 494 A.2d 200, 205 n.7 (1985) (citing *Exxon Corp.*, 281 Md. at 700, 381 A.2d at 1153; *Johns*, 52 Md. at 332-33) (stating that "[m]alice in this context means that the party was actuated by an improper motive, and proof of malice does not require evidence of spite, hatred, personal enmity or a desire for revenge").

68. See *Johns*, 52 Md. at 332.

69. See *Exxon Corp.*, 281 Md. at 699, 381 A.2d at 1152-53 (citing *Jannenga v. Libernini*, 222 Md. 469, 474, 160 A.2d 795, 798 (1960); *Banks*, 212 Md. at 42, 128 A.2d at 606).

70. See *Exxon Corp.*, 281 Md. at 699-700, 381 A.2d at 1153.

71. 149 Md. 689, 132 A. 265 (1926).

ice may be inferred."⁷² Of course, the inference of malice from a finding of a lack of probable cause may be negated by evidence showing there was no actual malice on the part of the defendant.⁷³

Although malice may be inferred from a lack of probable cause, the converse is not true—a lack of probable cause cannot be inferred from malice.⁷⁴ Thus, evidence that probable cause existed is a valid defense to a malicious prosecution action, even if the accuser initiated the proceeding for an improper purpose and the proceeding was terminated in favor of the accused.⁷⁵

B. False Imprisonment

In *Great Atlantic & Pacific Tea Co. v. Paul*,⁷⁶ the Court of Appeals of Maryland set forth the elements of a false imprisonment action as follows: "The necessary elements of a case for false imprisonment are a deprivation of the liberty of another without his consent and without legal justification."⁷⁷ The term "legal justification" has created some confusion in its application to false imprisonment "because of the frequent statement that probable cause is not a defense to an action for false imprisonment but legal justification is."⁷⁸ In Maryland, the term "legal justification" is considered to be

72. *Id.* at 696, 132 A. at 267.

73. *Exxon*, 281 Md. at 699, 381 A.2d at 1152 (quoting *Wesko v. G.E.M., Inc.*, 272 Md. 192, 197-98, 321 A.2d 529, 532-33 (1974)) ("The inference is merely a permissible one, 'sometimes loosely characterized as prima facie evidence, subject to negation by proof that there was no actual malice on the defendant's part.'").

74. *Safeway Stores, Inc. v. Barrack*, 210 Md. 168, 175, 122 A.2d 457, 461 (1956). A lack of probable cause may give rise to an inference that the accuser did not believe in the guilt of the accused, and therefore did not act for a proper purpose. See RESTATEMENT (SECOND) OF TORTS § 669 (1977). However, the initiation of a criminal proceeding for an improper purpose, "such as to put pressure upon the accused and compel him to make payment of a private debt, is not in any way inconsistent with his reasonable belief in the guilt of the accused and the existence of grounds reasonably justifying that belief." *Id.* § 669A cmt. b.

75. *Safeway Stores*, 210 Md. at 175, 122 A.2d at 461.

76. 256 Md. 643, 261 A.2d 731 (1970).

77. *Id.* at 654, 261 A.2d at 738; see also *Fine v. Kolodny*, 263 Md. 647, 651, 284 A.2d 409, 411 (1971) (stating that "[i]n any action for false imprisonment it is necessary for the plaintiff to prove by a preponderance of evidence that he was deprived of his liberty by another without his consent and without legal justification").

78. *Great Atl. & Pac. Tea Co.*, 256 Md. at 654, 261 A.2d at 738.

equivalent to legal authority.⁷⁹ Whether legal justification exists for the detention of another is "judged by the principles applicable to the law of arrest."⁸⁰ In Maryland, there are different "laws of arrest" applicable to private individuals, police officers, and shopkeepers.

a. *Private Individuals*

In *Paul*, the authority of a private individual to arrest another in Maryland was stated as follows:

[A] private person has authority to arrest without a warrant only when a) there is a felony being committed in his presence or when a felony has in fact been committed whether or not in his presence, and the arrester has reasonable ground (probable cause) to believe the person he arrests has committed it; or b) a misdemeanor is being committed in the presence or view of the arrester which amounts to a breach of the peace.⁸¹

Thus, a private individual will incur liability for false imprisonment if he arrests or detains another for a misdemeanor that does not amount to a breach of the peace, even if there was probable cause to do so.⁸² In *Paul*, "breach of the peace" was defined as "disorderly, dangerous conduct disruptive of public peace."⁸³

There is one exception, however, to the general arrest rules for a private individual. Property owners may lawfully detain a person against his will if they believe that person has illegally taken their property, but only for the purpose of preventing theft or recapturing the property.⁸⁴ However, if the person detained does not unlawfully have any of the owner's property in his possession, the arrester is liable for false imprisonment.⁸⁵

A private individual will not ordinarily incur liability for false imprisonment by providing, in good faith, information to the proper authorities, even if the information is incorrect or mis-

79. *See id.* at 655, 261 A.2d at 738.

80. *Id.*

81. *Id.* at 655, 261 A.2d at 738-39 (citing Kauffman, *The Law of Arrest in Maryland*, 5 MD. L. REV. 125, 155 (1941); 49 Op. Att'y. Gen. 11 (1964)).

82. *See Great Atl. & Pac. Tea Co.*, 256 Md. at 656, 261 A.2d at 739.

83. *Id.* at 656, 261 A.2d at 739. The court commented that the crime of "shoplifting" would normally not constitute a breach of the peace. *See id.* at 655-56, 261 A.2d at 739.

84. *See id.* at 656, 261 A.2d at 739.

85. *See id.*

taken.⁸⁶ However, a person who knowingly gives false information to a police officer may become liable for the warrantless false arrest.⁸⁷ Additionally, a private person may incur liability for false imprisonment by wrongfully detaining another while waiting for the police to arrive and make a formal arrest.⁸⁸

b. Police Officers

A police officer has legal justification to make a warrantless arrest where he has probable cause⁸⁹ to believe that a felony has been committed or attempted, and that the person he arrested has committed or attempted to commit the felony.⁹⁰ This rule applies whether or not the felony was committed or attempted in the police officer's presence or view.⁹¹ With regard to misdemeanors, however, a police officer may only make a warrantless arrest if the misdemeanor was committed in his presence or view and he reasonably believes the person committed the offense.⁹²

86. See *Newton v. Spence*, 20 Md. App. 126, 135, 316 A.2d 837, 843 (1974), *overruled by* *Montgomery Ward v. Wilson*, 339 Md. 701, 664 A.2d 916 (1995).

87. See PROSSER, LAW OF TORTS § 11, at 47 n.97 (4th ed. 1971).

88. See *Safeway Stores, Inc. v. Barrack*, 210 Md. 168, 174, 122 A.2d 457, 460 (1956).

89. See *supra* notes 42-44 and accompanying text.

90. See MD. ANN. CODE art. 27, § 594B(c) (1996).

91. See *id.*

92. See *id.* § 594B(b). Prior to the enactment of section 594B, the common law in Maryland was that probable cause is not a defense to false imprisonment for a police officer's warrantless arrest in a non-felony offense. See *Ashton v. Brown*, 339 Md. 70, 121, 660 A.2d 447, 472 (1995). In *Ashton*, the court found unconstitutionally vague a juvenile curfew ordinance, that held parents and the operators of establishments liable for a misdemeanor offense if they knowingly permitted a juvenile to violate the curfew. See *id.* at 93, 660 A.2d at 458. In discussing the legislative extension of a police officer's authority to make warrantless arrests in non-felony offenses, the court, in dicta, explained:

[I]f a police officer inside the . . . [establishment] had probable cause to believe that the curfew ordinance was being violated, and that the operator of the . . . [establishment] was aware of the curfew violation, the police officer could have arrested the operator with lawful justification, even though the curfew ordinance was in fact invalid.

Id. at 122, 660 A.2d at 473. In *Ashton*, a problem arose when the police officers arrested the minors for violating the curfew but did not arrest the operator of the establishment. See *id.* at 123, 660 A.2d at 473. Although the curfew ordinance provided that a police officer should take a minor in violation of the ordinance into custody "as a child in need of supervision," it did not make it a misdemeanor for minors to violate the ordinance. *Id.* Because the minors who violated the curfew ordinance did not commit a misdemeanor, section

A police officer is legally justified to make an arrest under a warrant that appears to be legal on its face, even though the warrant is actually improper.⁹³ A police officer will also not be liable for false imprisonment where, acting on false information from a private person that he believes to be true, he arrests another individual without a warrant.⁹⁴

c. Shopkeepers/Merchants

Prior to the enactment of Section 5-307 of the Courts & Judicial Proceedings Article of the Annotated Code of Maryland,⁹⁵ a shopkeeper or merchant had no greater rights than a private person to arrest or detain an individual without a warrant.⁹⁶ Section 5-307 allows a merchant to detain or cause the arrest of any person whom the merchant has probable cause to believe has committed a

594B did not apply to the arrest of the minors and the "false imprisonment count would appear to be governed by traditional Maryland common law principles." *Id.*

93. See *Ashton*, 339 Md. at 120, 660 A.2d at 472 (citing *Brewer v. Mele*, 267 Md. 437, 440, 298 A.2d 156, 159 (1972); *Levin v. Uzubar*, 65 Md. 341, 4 A. 285, 289 (1886); *Campbell v. Webb*, 11 Md. 471, 482 (1857)).

94. See *Fowler V. Harper*, *Malicious Prosecution, False Imprisonment & Defamation*, 15 TEX. L. REV. 157, 163-64 (1937), quoted in *Montgomery Ward v. Wilson*, 339 Md. 701, 722, 664 A.2d 916, 926 (1995). A private person who knowingly gives false information to the police officer in this situation will incur liability for false imprisonment. See *supra* note 87 and accompanying text.

95. Section 5-307 provides:

A merchant or an agent or employee of the merchant who detains or causes the arrest of any person shall not be held civilly liable for detention, slander, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, whether the detention or arrest takes place by the merchant or by his agent or employee, if in detaining or in causing the arrest of the person, the merchant or the agent or employee of the merchant had, at the time of the detention or arrest, probable cause to believe that the person committed the crime of "theft," as prohibited by § 342 of Article 27 of the Code, of property of the merchant from the premises of the merchant.

MD. CODE ANN., CTS. & JUD. PROC. § 5-307 (1995).

96. See *Great Atl. & Pac. Tea Co. v. Paul*, 256 Md. 643, 655, 261 A.2d 731, 738 (1970). In discussing the appellant's argument that the court should adopt the rule expressed in section 120A of the Second Restatement of Torts, granting a shopkeeper the privilege to detain a person suspected of theft in order to conduct a reasonable investigation of the facts, Judge Digges commented: "Without being facetious we note that shoplifting may be regarded as the price merchants pay for the success of modern merchandising; goods alluringly displayed to stimulate 'impulse buying' inevitably also stimulate 'impulse taking.'" *Id.*

theft on the merchant's premises, without incurring liability for detention, slander, malicious prosecution, false imprisonment, or false arrest.⁹⁷ Probable cause is measured by the circumstances as they reasonably appeared to the merchant at the time of the arrest.⁹⁸ If, however, it is later determined that probable cause did not in fact exist, the arrested or detained individual may recover damages from the merchant.⁹⁹

A merchant's failure to investigate the circumstances surrounding an alleged shoplifting incident may destroy probable cause where a proper investigation would have cleared away suspicious circumstances.¹⁰⁰ In addition, if the suspected shoplifter provides an explanation for the occurrence prior to the arrest, the merchant has a duty to investigate the plausibility of the explanation before making an arrest.¹⁰¹

C. Punitive Damages

Punitive damages are generally recoverable in both non-intentional and intentional tort actions,¹⁰² with the exception of wrongful death.¹⁰³ In the seminal case of *Owens-Illinois, Inc. v. Zenobia*,¹⁰⁴ the Court of Appeals of Maryland explained that "punitive damages are

97. MD. CODE ANN., CTS. & JUD. PROC. § 5-307 (1996).

98. See *Brewer v. Mele*, 267 Md. 437, 451, 298 A.2d 156, 165 (1972).

99. See *id.*

100. See *K-Mart Corp. v. Salmon*, 76 Md. App. 568, 579, 547 A.2d 1069, 1074 (1988), *overruled by* *Montgomery Ward v. Wilson*, 339 Md. 701, 664 A.2d 916 (1995).

101. See *Montgomery Ward & Co. v. Keulemans*, 275 Md. 441, 448, 340 A.2d 705, 709 (1975). The court stated that a security guard, "[a]s a private prosecutor, did not have probable cause to arrest Keulemans until *after* he had investigated Keulemans's explanation, and had found it without any basis in fact." *Id.* (citations omitted).

102. See, e.g., *Adams v. Coates*, 331 Md. 1, 12, 626 A.2d 36, 41-42 (1993) (breach of fiduciary duty, action for accounting); *Palmer Ford, Inc. v. Wood*, 298 Md. 484, 514, 471 A.2d 297, 312 (1984) (abuse of process); *Wedeman v. City Chevrolet Co.*, 278 Md. 524, 529-31, 366 A.2d 7, 11-13 (1976) (fraudulent misrepresentation, torts arising out of contract); *Keulemans*, 275 Md. at 448, 340 A.2d at 709-10 (false arrest, malicious prosecution); *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 168-72, 297 A.2d 721, 731-34 (1972) (allowing punitive damages for negligent operation of motor vehicle and negligent entrustment actions), *overruled by*, *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992); *Great Atl. & Pac. Tea Co. v. Paul*, 256 Md. 643, 657, 261 A.2d 731, 739-40 (1970) (false imprisonment); *American Laundry Mach. Indus. v. Horan*, 45 Md. App. 97, 110-18, 412 A.2d 407, 416-20 (1980) (products liability).

103. See *Cohen v. Rubin*, 55 Md. App. 83, 99-102, 460 A.2d 1046, 1055 (1983).

104. 325 Md. 420, 601 A.2d 633 (1992).

awarded in an attempt to punish a defendant whose conduct is characterized by evil motive, intent to injure, or fraud, and to warn others contemplating similar conduct of the serious risk of monetary liability."¹⁰⁵

There are two requirements a plaintiff must satisfy in order to be entitled to an award of punitive damages.¹⁰⁶ First, there must be a compensatory award representing damages for the underlying claim.¹⁰⁷ Second, punitive damages may not be recovered without proof of malice.¹⁰⁸ There has been much debate in the Maryland appellate courts in the last twenty-five years over the standard of conduct required to support an award of punitive damages. Prior to 1972, "actual malice" was required to be proven by the plaintiff in order to be entitled to punitive damages.¹⁰⁹ In the 1972 case of *Smith v. Gray Concrete Pipe Co.*,¹¹⁰ the court of appeals for the first time allowed an award of punitive damages based on an implied malice standard, from a showing that the defendant was guilty of gross negligence.¹¹¹ Although the *Smith* court limited the application of the implied malice standard to motor vehicle torts, the standard was nonetheless applied judiciously to other non-intentional torts in later cases.¹¹²

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105. *Id.* at 454, 601 A.2d at 650. In addition to punishing the defendant and deterring others, several other purposes have been identified for imposing punitive damages: deterring the defendant from repeating the offense; preserving the peace; inducing private law enforcement; compensating victims for otherwise uncompensable losses; and paying the plaintiff's attorney's fees. See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982).
106. See *Rite Aid Corp. v. Lake Shore Investors*, 298 Md. 611, 626-27, 471 A.2d 735, 743 (1984).
107. See *id.* at 626, 471 A.2d at 743 (citing *Montgomery Wards & Co. v. Keulemans*, 275 Md. 441, 446, 340 A.2d 705, 708 (1975)). In addition to the requirement of an underlying compensatory damages award, in a case involving multiple claims, "[t]here must be a compensatory damages award foundation for each count of a complaint that provides a basis for punitive damages." *Caldor v. Bowden*, 330 Md. 632, 662, 625 A.2d 959, 973 (1993).
108. *Caldor*, 330 Md. at 661, 625 A.2d at 973.
109. See *supra* notes 3-4 and accompanying text.
110. 267 Md. 149, 297 A.2d 721 (1972), *overruled by*, *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992).
111. See *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 455, 601 A.2d 633, 650 (1992).
112. See, e.g., *Exxon Corp. v. Yarema*, 69 Md. App. 124, 516 A.2d 990 (1986); *Medina v. Meilhammer*, 62 Md. App. 239, 489 A.2d 35 (1985); *American Laundry Mach. Indus. v. Horan*, 45 Md. App. 97, 412 A.2d 407 (1980).

In addition to *Smith*, two other cases decided by the court of appeals changed the standard in assessing punitive damages. In 1975, the court decided *H & R Block, Inc. v. Testerman*,¹¹³ a case that was clarified one year later in *Wedeman v. City Chevrolet Co.*¹¹⁴ Both cases involved torts "arising out of a contractual relationship."¹¹⁵ In formulating the *Testerman-Wedeman* rule, as it became known,¹¹⁶ the court sought to distinguish torts that arise out of a contractual relationship from those that do not.¹¹⁷ The standard for assessing punitive damage liability under this rule depended on whether the tortious conduct took place before or after the contract's formation.¹¹⁸ If the tortious conduct occurred after the formation of the contract, then punitive damages could only be awarded with a showing of actual malice.¹¹⁹ However, if the tortious conduct occurred prior to the formation of the contract, and therefore did not "arise out of the contract," punitive damages were allowable upon a showing of implied malice.¹²⁰

Attempting to get a handle on a "proliferation of claims for punitive damages in tort cases"¹²¹ and to provide consistency in the application of a punitive damages standard,¹²² the court of appeals in 1992 returned to an actual malice standard in non-intentional torts in *Owens-Illinois, Inc. v. Zenobia*.¹²³ In addition to requiring proof of

113. 275 Md. 36, 338 A.2d 48 (1975).

114. 278 Md. 524, 366 A.2d 7 (1976).

115. *Wedeman*, 278 Md. at 528-29, 366 A.2d at 10-11; accord *Testerman*, 275 Md. at 44, 338 A.2d at 53.

116. See *Schaefer v. Miller*, 322 Md. 297, 311-12, 587 A.2d 491, 498-99 (1991) (Eldridge, J., concurring).

117. See *Wedeman*, 278 Md. at 529, 366 A.2d at 11.

118. See *id.*

119. See *Testerman*, 275 Md. at 44, 338 A.2d at 53.

120. *Wedeman*, 278 Md. at 532, 366 A.2d at 13; accord *Testerman*, 275 Md. at 46-47, 338 A.2d at 54.

121. *Owens-Illinois v. Zenobia, Inc.*, 325 Md. 420, 450, 601 A.2d 633, 648 (1992).

122. See *id.* at 450-60, 601 A.2d at 647-52. In discussing the effect of an inconsistent application of a punitive damages standard, the court explained, "[t]he irrational and inconsistent application of a punitive damages standard undermines the objective of deterrence because persons cannot predict, and thus choose to abstain from, the type of behavior that is sanctioned by a punitive damages award." *Id.* at 455, 601 A.2d at 650.

123. See *id.* at 460, 601 A.2d at 652.

Therefore, we overrule *Smith v. Gray Concrete Pipe Co.* and its progeny In a non-intentional tort action, the trier of facts may not award punitive damages unless the plaintiff has established that the defendant's conduct was characterized by evil motive, intent to injure, ill

actual malice in the defendant's conduct, *Zenobia* also requires that "in any tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages."¹²⁴ The *Zenobia* court also expressly abandoned the *Testerman-Wedeman* rule for the purposes of determining the appropriate standard to apply in allowing punitive damages.¹²⁵ Subsequent decisions of the court of appeals have further limited the availability of punitive damages, by applying the principles set forth in *Zenobia* to intentional torts as well.¹²⁶

1. Punitive Damages in Malicious Prosecution Actions

Prior to 1972, Maryland courts generally only awarded punitive damages with a showing of actual malice. However, with malicious prosecution, the courts traditionally allowed punitive damages to be awarded based on an inference of malice arising from a lack of

will, or fraud, *i.e.*, "actual malice."

Id.

124. *Id.* at 469, 601 A.2d at 657. In explaining the rationale for imposing a higher standard than mere preponderance of the evidence in assessing punitive damages, the court stated, "this heightened standard is appropriate in the assessment of punitive damages because of their penal nature and potential for debilitating harm." *Id.*

125. *See id.* at 451-55, 601 A.2d at 650. In addition to leading to irrational results and inconsistent applications, the court criticized the rationale behind the *Testerman-Wedeman* rule.

Because the *Testerman-Wedeman* distinction focuses on when the conduct occurred rather than on the nature of the conduct, it has no relationship to the purposes of punitive damages. Furthermore, the "arising out of contractual relations" rule formulated in *Testerman* and *Wedeman* had no support in the Maryland cases relied on in the *Testerman* and *Wedeman* opinions."

* * * *

Consequently we abandon the "arising out of a contract" distinction "and return to the principles relating to punitive damages which had prevailed in this State for many, many years before *Testerman*."

Id. (citations omitted).

The *Zenobia* court also established the standard for an award of punitive damages in a products liability case. In order to establish actual malice on the part of a defendant in a products liability case, "the plaintiff must prove (1) actual knowledge of the defect on the part of the defendant, and (2) the defendant's conscious or deliberate disregard of the foreseeable harm resulting from the defect." *Id.* at 462, 601 A.2d at 653.

126. *See, e.g.*, *Ellerin v. Fairfax Savings*, 337 Md. 216, 652 A.2d 1117 (1995); *Alexander & Alexander v. B. Dixon Evander & Assoc., Inc.*, 336 Md. 635, 650 A.2d 260 (1994); *Adams v. Coates*, 331 Md. 1, 626 A.2d 36 (1993).

probable cause. In an early malicious prosecution case, *Stansbury v. Fogle*,¹²⁷ the court upheld a punitive damages award based on a jury instruction directing the jury to infer malice on the part of the defendant from a lack of probable cause in instituting the proceedings against the plaintiff.¹²⁸ In allowing the punitive damages award to stand, the court reasoned that in order for the jury to find the defendant liable for malicious prosecution, it was necessary for the jury to determine “[t]hat the defendant in instituting or causing the institution of the prosecution was actuated by malice.”¹²⁹

Recent Maryland cases have followed the principle set forth in *Stansbury*. In *Safeway Stores, Inc. v. Barrack*,¹³⁰ the court distinguished the tort of false imprisonment from malicious prosecution in regards to the standard for allowing punitive damages.¹³¹ Although actual malice must be shown to support a punitive damages award in a false imprisonment action,¹³² in malicious prosecution actions, “such a finding would be implicit in a verdict for the plaintiff, which would necessarily include a finding of malice.”¹³³ Although not specifically addressing the issue of punitive damages, the court in *Exxon Corp. v. Kelly*¹³⁴ noted that in malicious prosecution actions, the element of malice need not be separately proved, but may be inferred from a lack of probable cause in instituting or continuing criminal proceedings against the accused.¹³⁵ Where malice is inferred from a lack of probable cause, the court in *Montgomery Ward*

127. 37 Md. 369 (1873).

128. *See id.* at 382.

129. *Id.* Similarly, in *McNamara v. Pabst*, 137 Md. 468, 112 A. 812 (1921), the court upheld a punitive damage award based on a finding of malice inferred from a lack of probable cause, because “in suits for malicious prosecution . . . ‘the gravamen of the action is malice.’ ” *Id.* at 473, 112 A. at 813 (quoting *Mertens v. Mueller*, 119 Md. 525, 536, 87 A. 501, 505 (1913)).

130. 210 Md. 168, 122 A.2d 457 (1955).

131. *See id.* at 176, 122 A.2d at 461.

132. *See id.* *See infra* notes 136-45 and accompanying text for discussion of punitive damages in a false imprisonment action.

133. *Safeway Stores*, 210 Md. at 176, 122 A.2d at 461. Judge Levine, in his dissenting opinion in *First National Bank of St. Mary's v. Fidelity & Deposit Co.*, 283 Md. 228, 389 A.2d 359 (1978), cited *Safeway Stores* for the proposition that “[p]unitive damages may *always* be awarded whenever the defendant is adjudged guilty of malicious prosecution, . . . on the theory that the malice necessary to support an exemplary damage award is an element of the tort itself.” *Id.* at 248, 389 A.2d at 369 (Levine, J., dissenting) (citations omitted) (emphasis added).

134. 281 Md. 689, 381 A.2d 1146 (1978).

135. *See id.* at 699-701, 381 A.2d at 1152-53.

*Co. v. Keulemans*¹³⁶ held that punitive damages may be recovered.¹³⁷

2. Punitive Damages in False Imprisonment Actions

Unlike malicious prosecution actions, punitive damages in false imprisonment cases have historically been allowed in Maryland only where actual malice has been shown. In *Bernheimer Bros. v. Becker*,¹³⁸ a false imprisonment and assault case, the court of appeals held that an award of punitive damages could be justified only with evidence showing that the wrong was inflicted maliciously or wantonly.¹³⁹ In *Heinze v. Murphy*,¹⁴⁰ the court of appeals explained that in order for punitive damages to be recovered for false imprisonment, "the evidence must show wanton, or malicious motive, and it must be actual and not constructive or implied."¹⁴¹

In 1972, however, the requirement of actual malice to support an award of punitive damages in false imprisonment actions was questioned in *Montgomery Ward & Co. v. Cliser*.¹⁴² Although not deciding the issue, the court in *Cliser* suggested that the standard for allowing punitive damages in false imprisonment cases may have been changed by Section 551A of Article 27 of the Annotated Code of Maryland¹⁴³ and that punitive damages may now be recoverable

136. 275 Md. 441, 340 A.2d 705 (1975).

137. *See id.* at 448, 340 A.2d at 709-10 (citing *Montgomery Ward & Co. v. Cliser*, 267 Md. 406, 421, 298 A.2d 16, 25 (1972)). Keulemans, an employee of Montgomery Ward & Co., was accused of shoplifting a pair of sunglasses. *See id.* at 444, 340 A.2d at 707. He explained to the store security officer, Johnson, that he had previously purchased the sunglasses at a People's Drug Store in the same shopping center, but was nonetheless placed under arrest. *See id.* Keulemans was subsequently acquitted of shoplifting charges, with the help of testimony from an employee of People's Drug Store who recalled selling Keulemans a pair of sunglasses similar to the one he was accused of stealing. *See id.* The fact that Keulemans had been employed by Montgomery Ward & Co. for over eight years, and that Keulemans had given Johnson a plausible explanation for his possession of the sunglasses prior to the arrest, led the court to conclude that Johnson did not have probable cause to arrest Keulemans. *See id.* at 448, 340 A.2d at 709 (citing *Banks v. Montgomery Ward & Co.*, 212 Md. 31, 41-42, 128 A.2d 600, 605-06 (1957)).

138. 102 Md. 250, 62 A. 526 (1905).

139. *See id.* at 256, 62 A. at 528 (citing *Loan v. Edwards*, 61 Md. 89, 100 (1883)).

140. 180 Md. 423, 24 A.2d 917 (1942).

141. *Id.* at 434, 24 A.2d at 923 (citations omitted).

142. 267 Md. 406, 298 A.2d 16 (1972).

143. MD. ANN. CODE, art. 27, § 551A (1970) (repealed 1971). Former section 551A is now codified at section 5-307 of the Courts & Judicial Proceedings Article of

without proof of actual malice.¹⁴⁴ Following *Cliser*, the *Keulemans* court concluded that "punitive damages may be recovered . . . where malice may be implied from wantonness, or from want of probable cause in a case of false arrest."¹⁴⁵

Thus, it appeared that in both malicious prosecution and false arrest actions in Maryland, the malice required to support an award of punitive damages can be inferred from the want of probable cause. However, this standard was changed by the court's decision in *Montgomery Ward v. Wilson*.¹⁴⁶

III. THE INSTANT CASE

From August through October of 1987, Frances Wilson was employed as a sales associate with the Montgomery Ward store in Temple Hills, Maryland.¹⁴⁷ The loss prevention department received several consumer complaints in August of 1987 concerning unauthorized credit charges that had appeared on their monthly statements.¹⁴⁸ As a result of an internal inquiry into the matter, Wilson became the focus of Montgomery Ward's investigation¹⁴⁹ and was subsequently arrested at the store, in front of customers and fellow employees.¹⁵⁰

Jeffrey Bresnahan, a Loss Prevention Manager, conducted the investigation for Montgomery Ward.¹⁵¹ The evidence relied on by Montgomery Ward in their decision to press charges against Wilson consisted mainly of the testimony of two other employees, Sandra

the Annotated Code of Maryland. See *supra* note 95.

144. See *Cliser*, 267 Md. at 421, 298 A.2d at 25. In discussing the effect of section 551A on the tort of false imprisonment, the court stated:

It may well be that [section] 551A has added a new dimension to the tort of false imprisonment in requiring that want of probable cause be established. Since malice may be implied from a want of probable cause, . . . it would now seem possible to recover punitive damages in a false arrest case without proof of actual malice.

Id. (citations omitted).

145. *Montgomery Ward & Co. v. Keulemans*, 275 Md. 441, 448, 340 A.2d 705, 709 (1975) (emphasis added) (citing *Montgomery Ward & Co. v. Cliser*, 267 Md. 406, 421, 298 A.2d 16, 25 (1972)).

146. 339 Md. 701, 664 A.2d 916 (1995).

147. See *Montgomery Ward Stores v. Wilson*, 101 Md. App. 535, 539, 647 A.2d 1218, 1220 (1994), *aff'd in part, rev'd in part*, *Montgomery Ward v. Wilson*, 339 Md. 701, 664 A.2d 916 (1995).

148. See *id.*

149. See *Montgomery Ward v. Wilson*, 339 Md. 701, 706, 664 A.2d 916, 918 (1995).

150. See *id.* at 708, 664 A.2d at 919.

151. See *id.* at 705-06, 664 A.2d at 918.

Fuller and Lisa Holmes.¹⁵² Fuller, who Bresnahan had established was operating the register in the women's clothing department when the unauthorized transactions were made, told Bresnahan that she had rung up credit charges for Wilson, even though Wilson had not produced a credit card.¹⁵³ Fuller had apparently on several occasions charged purchases for Wilson from an account number that was handwritten on a piece of paper.¹⁵⁴ Wilson told Fuller that the account numbers were either her sister's or her cousin's.¹⁵⁵ According to Fuller, Wilson told her that they could not get in trouble for the unauthorized transactions because the store would not be able to prove them.¹⁵⁶ The testimony from Lisa Holmes, who was interviewed by a security assistant, corroborated Fuller's testimony. Holmes told the security assistant that she had once seen Wilson purchase merchandise from Fuller using a credit card number that was handwritten on a piece of white paper.¹⁵⁷ Holmes also heard Wilson explain that the credit card number was her cousin's.¹⁵⁸ In addition, Holmes said that Wilson told her not to say anything about the transaction to anyone in the loss prevention department during the investigation.¹⁵⁹

In addition to the statements made by Fuller and Holmes, Bresnahan checked personnel records and verified that Wilson had been working in the women's clothing department when the unauthorized transactions occurred.¹⁶⁰ Bresnahan also interviewed Wilson, whom he felt was uncooperative in the investigation.¹⁶¹ Although Bresnahan testified at trial that he wanted to investigate further before concluding that Wilson was responsible for the unauthorized credit charges, the store management decided there was enough evidence to press charges.¹⁶² Bresnahan then presented an application for a statement of charges to a district court commissioner in Prince George's County, who issued a warrant for Wilson's

152. *See id.* at 706, 664 A.2d at 918.

153. *See id.*

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id.* at 707, 664 A.2d at 919.

158. *See id.*

159. *See id.*

160. *See id.* at 706, 664 A.2d at 919.

161. *See id.* at 706-07, 664 A.2d at 919.

162. *See id.* at 707, 664 A.2d at 919.

arrest.¹⁶³ In October of 1987, two Prince George's County police officers, accompanied by a store security guard, placed Wilson under arrest pursuant to a warrant.¹⁶⁴ The criminal case against Wilson was subsequently dismissed for reasons that are not reflected in the record.¹⁶⁵ Wilson then brought this action against Montgomery Ward and Bresnahan for false imprisonment and malicious prosecution in the Circuit Court for Prince George's County, seeking both compensatory and punitive damages.¹⁶⁶

Montgomery Ward moved for partial summary judgment with regard to the punitive damage request.¹⁶⁷ They relied on the recent decision in *Owens-Illinois, Inc. v. Zenobia*,¹⁶⁸ arguing that punitive damages could no longer be recovered in Maryland "absent clear and convincing evidence of tortious conduct characterized by actual malice."¹⁶⁹ Because the plaintiff's complaint failed to state any facts which would amount to actual malice,¹⁷⁰ Montgomery Ward argued that punitive damages were not recoverable as a matter of law.¹⁷¹ Following a hearing, the circuit court denied Montgomery Ward's motion.¹⁷²

Prior to the trial, Montgomery Ward filed a motion *in limine* to preclude Wilson from claiming she was found "not guilty" in the criminal proceedings.¹⁷³ Montgomery Ward contended that the criminal charges were dismissed because several witnesses had failed to appear for a trial that had already been rescheduled three times.¹⁷⁴ The circuit court then limited evidence of the disposition of the criminal charges against Wilson to a statement that the

163. *See id.* at 708, 664 A.2d at 919.

164. *See* Montgomery Ward Stores v. Wilson, 101 Md. App. 535, 540, 647 A.2d 1218, 1220 (1994), *aff'd in part, rev'd in part*, Montgomery Ward v. Wilson, 339 Md. 701, 664 A.2d 916 (1995).

165. *See id.* at 540, 647 A.2d at 1221.

166. *See Wilson*, 339 Md. at 705, 664 A.2d at 918.

167. *See id.*

168. 325 Md. 420, 601 A.2d 633 (1992).

169. *Wilson*, 339 Md. at 705, 664 A.2d at 918.

170. As explained in *Zenobia*, actual malice is "[c]haracterized by evil motive, intent to injure, fraud . . . coupled with a deliberate disregard of the consequences." *Owens-Illinois, Inc.*, 325 Md. at 480, 601 A.2d at 663 (Bell, J. concurring in part, dissenting in part).

171. *See Wilson*, 339 Md. at 705, 664 A.2d at 918.

172. *See id.* The opinion does not indicate the circuit court's reasoning for denying the defendant's motion for partial summary judgment. *See id.*

173. *See id.* at 708, 664 A.2d at 919.

174. *See id.* at 708, 664 A.2d at 919-20.

charges had been dropped, a ruling acquiesced to by all parties.¹⁷⁵

At the trial, the plaintiff attempted to show that Bresnahan's investigation into the unauthorized credit transactions was inadequate.¹⁷⁶ During cross-examination of Bresnahan, it was established that he had not compared Wilson's signature with the signatures on the unauthorized charge slips and that he failed to have the signatures analyzed by a handwriting expert.¹⁷⁷ In addition, Bresnahan continued to suspect that Wilson, who was of "slight build," was responsible for the unauthorized purchases despite the fact that some of these purchases were for "full-figure" sweaters and a "maternity bra."¹⁷⁸

Wilson's testimony at trial contradicted that of Fuller and Holmes. Wilson testified that she never made any credit purchases at the store, and specifically denied making any purchases while Fuller was at the register.¹⁷⁹ She also denied asking Fuller and Holmes not to cooperate with the investigation of the unauthorized transactions.¹⁸⁰

At the close of the plaintiff's case, Montgomery Ward moved for judgment as a matter of law on the ground that the evidence showed probable cause for Wilson's arrest.¹⁸¹ In addition, it argued that the plaintiff had failed to establish either a claim of false imprisonment or malicious prosecution.¹⁸² The motion was denied by the circuit court.¹⁸³ At the close of all the evidence, Montgomery Ward renewed its motions, including its contention that punitive damages could not be recovered absent a showing of actual malice.¹⁸⁴ The circuit court denied this motion as well.¹⁸⁵ The court then instructed the jury as to the issues of false imprisonment, malicious prosecution, and punitive damages.¹⁸⁶ The defendants only ob-

175. *See id.* at 708-09, 664 A.2d at 920.

176. *See id.* at 707, 664 A.2d at 919.

177. *See id.*

178. *See id.* at 708, 664 A.2d at 919.

179. *See id.*

180. *See id.*

181. *See id.* at 709, 664 A.2d at 920. A merchant cannot be held liable for malicious prosecution or false imprisonment if, at the time of the arrest, the merchant had probable cause to believe that the person had committed the theft. *See supra* notes 97-99 and accompanying text.

182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.*

186. *See id.* at 709-10, 664 A.2d at 920.

jected to the circuit court's instruction that punitive damages could be awarded in a malicious prosecution action on the basis of implied malice.¹⁸⁷

After finding the defendants liable for both false imprisonment and malicious prosecution, the jury awarded compensatory damages in the amount of \$15,000 and punitive damages in the amount of \$45,000.¹⁸⁸ The defendants then filed a motion for judgment notwithstanding the verdict,¹⁸⁹ for a new trial,¹⁹⁰ or for *remitter*,¹⁹¹ arguing the insufficiency of the evidence to support a finding of liability, and that the jury was improperly instructed on the issue of punitive damages.¹⁹² The circuit court denied the motion and the defendants appealed to the Court of Special Appeals of Maryland on the same grounds that were raised in the circuit court.¹⁹³ In affirming the judgment, the court of special appeals held that it was proper to submit the issue of lack of probable cause to the jury because of the conflicting testimony at trial.¹⁹⁴ The court also held that it was proper to submit the issue of malice to the jury, because it could be inferred from a lack of probable cause.¹⁹⁵ Finally, the court held that actual malice was not required for awarding punitive damages in an intentional tort case, and that "in a malicious prosecution or false arrest case, punitive damages may be recovered where malice may be implied from wantonness or from lack of probable cause."¹⁹⁶

The Court of Appeals of Maryland granted certiorari to "review the rulings by the courts below concerning the torts of malicious prosecution and false imprisonment, as well as the requirements for the allowability of punitive damages in malicious prosecution and

187. *See id.* at 711, 664 A.2d at 921.

188. *See id.* at 712, 664 A.2d at 921.

189. *See* MD. RULE 2-532.

190. *See id.* 2-533.

191. *See* *Turner v. Washington Suburban Sanitation Comm'n*, 221 Md. 494, 158 A.2d 125 (1960) (holding that the practice of granting a new trial, sought by the defendant, unless the plaintiff remits a portion of the verdict which the trial court deems excessive does not usurp the jury's function and is not, for that reason, unconstitutional).

192. *See* *Wilson*, 339 Md. at 712, 664 A.2d at 921.

193. *See id.*

194. *See* *Montgomery Ward Stores v. Wilson*, 101 Md. App. 535, 545, 647 A.2d 1218, 1223 (1994), *aff'd in part, rev'd in part*, *Montgomery Ward v. Wilson*, 339 Md. 701, 664 A.2d 916 (1995).

195. *See id.* at 546, 647 A.2d at 1223.

196. *Id.* at 549, 647 A.2d at 1225 (citing *Montgomery Ward & Co. v. Keulemans*, 275 Md. 441, 448-49, 340 A.2d 705 (1975)).

false imprisonment actions.”¹⁹⁷ The court, focusing on the jury instructions given by the trial court, first discussed whether there was sufficient evidence to allow the issue of malicious prosecution to be submitted to the jury.¹⁹⁸ The court noted that because the defendants acquiesced in the circuit court’s ruling on the disposition of the criminal charges against Wilson, it did not preserve for appellate review the issue of the plaintiff’s failure to establish a termination in her favor.¹⁹⁹

The court next addressed the defendants’ contention that the plaintiff’s evidence was insufficient to prove both the element of lack of probable cause and the element of malice.²⁰⁰ Although finding error in the trial court’s instructions to the jury on both issues,²⁰¹ the court ultimately affirmed the judgment of compensatory damages against the defendants for lack of an objection to the instructions.²⁰² The trial court gave the jury a general definition of probable cause as the instruction for determining lack of probable cause, and the jury was then instructed to determine whether probable cause existed to prosecute Wilson by applying the definition to the facts presented.²⁰³ The court concluded that the jury was “given too much authority to determine whether there had been probable cause.”²⁰⁴

In discussing the functions of judge and jury in determining whether a lack of probable cause has been established, the court quoted the traditional rule set forth in *Boyd v. Cross*.²⁰⁵ “As to the existence of the facts relied on to constitute the want of probable

197. *Wilson*, 339 Md. at 705, 664 A.2d at 918.

198. *See id.* at 714-16, 664 A.2d at 922-23.

199. *See id.* at 714 n.3, 664 A.2d at 922 n.3. *See supra* notes 14-15 and accompanying text for a discussion of the necessary elements for a malicious prosecution case.

200. *See id.* at 714-18, 664 A.2d at 922-24.

201. *See id.*

202. *See id.*

203. *See id.* at 716, 664 A.2d at 923. In its instruction to the jury, the trial court defined probable cause as “the reasonable belief that the Plaintiff was guilty. That is, the facts and circumstances which the Defendant knew, or should have known, would lead a reasonable person to believe that the Plaintiff had committed the offense.” *Id.* at 710, 664 A.2d at 920. The trial court then instructed the jury that “failure to conduct an adequate investigation may destroy the probable cause. . . . So that probable cause does not exist if a proper investigation could have cleared the accused.” *Id.*

204. *Id.* at 716, 664 A.2d at 923.

205. 35 Md. 194 (1872).

cause, that is a question for the jury; but what will amount to the want of probable cause in any case, is a question of law for the court."²⁰⁶ The court then followed the reasoning of Judge Rodowsky in *Palmer Ford, Inc. v. Wood*,²⁰⁷ who explained that "it is ordinarily improper for a trial court to '[furnish] the jury with a legally correct definition of probable cause which the jury is then to apply to the facts as the jury finds them to be.'"²⁰⁸ In this situation, the court should "explain to the jury whether or not probable cause exists under the various factual scenarios which may be generated by the evidence."²⁰⁹

Regarding the malice element of malicious prosecution, the court explained that malice may be inferred from a lack of probable cause, and therefore "a plaintiff who has generated sufficient evidence of lack of probable cause to send the case to the jury is also entitled to have the jury consider the issue of malice."²¹⁰ However, the court also explained that the malice required for malicious prosecution "consists of a wrongful or improper motive in initiating legal proceedings against the plaintiff."²¹¹ The court held that in malicious prosecution actions, "the plaintiff must establish that the defendant committed the tort with some improper purpose or motive. Mere negligence in instituting unjustified criminal proceedings against the plaintiff cannot satisfy the 'malice' requirement."²¹² The court then concluded that the jury instruction regarding the malice element was improper, in that it alternatively defined malice in terms of recklessness.²¹³

206. *Wilson*, 339 Md. at 716, 664 A.2d at 923 (quoting *Boyd*, 35 Md. at 197).

207. 298 Md. 484, 471 A.2d 297 (1984).

208. *Wilson*, 339 Md. at 716, 664 A.2d at 923 (quoting *Palmer Ford, Inc.*, 298 Md. at 503, 471 A.2d at 307).

209. *Id.*

210. *Id.* at 717, 664 A.2d at 924.

211. *Id.* at 718, 664 A.2d at 924.

212. *Id.* at 719, 664 A.2d at 925.

213. *See id.* at 720, 664 A.2d at 925. The trial court gave the following instruction to the jury concerning the malice element of malicious prosecution: "A person acts with malice if his primary purpose in starting a prosecution is other than bringing the offender to justice. If a prosecution was started without probable cause, you may find from that alone some evidence of malice." *Id.* at 710, 664 A.2d at 920. The trial court then gave the following alternative instruction to the jury, that the court of appeals found improper:

In a case like this, you can have implied . . . malice. And what is that? The law considers that malice exists in the risk and danger that were known or should have been known at the time. The conduct was performed in such a way as to show it was . . . reckless and . . .

The next issue the court resolved was whether a person can be liable for wrongfully procuring the arrest of an individual pursuant to a facially valid warrant.²¹⁴ Because this was an issue of first impression in Maryland,²¹⁵ the court relied mainly on the decisions of other jurisdictions that have settled this issue.²¹⁶ In reversing the court of special appeals, the court held that the "tort of false imprisonment does not lie against an individual who wrongfully procures the plaintiff's arrest, where there was no detention prior to the issuance of an arrest warrant, and where the arrest is made by a

dangerous

Id. at 720, 664 A.2d at 925.

214. *See id.* at 723-27, 664 A.2d at 927-28.

215. *See id.* at 726, 664 A.2d at 928.

216. In *Burt v. Ferrese*, 871 F.2d 14 (3d Cir. 1989), the plaintiff, Burt, owned a construction company that was performing concrete work for the City of Rehoboth Beach, Delaware. *See id.* at 15. One of Burt's employees, without Burt's knowledge or consent, used water from a city fire hydrant to clean equipment, a violation of a city ordinance. *See id.* Upon learning of the incident, the city manager, Ferrese and Blizzard, the supervisor of the city water department, obtained a warrant for Burt's arrest and he was subsequently arrested by two city police officers. *See id.* The charge against Burt was ultimately *nolle prossed* by the Delaware Department of Justice, and Burt proceeded to file suit against Ferrese for, *inter alia*, false arrest and detention. *See id.* Noting that the tort of false arrest and detention is also called false imprisonment, the court of appeals held that "[w]hile defendants might well have committed the tort of malicious prosecution, defendants are not subject to liability for the tort of false arrest and detention, as plaintiff was arrested pursuant to a warrant." *Id.* at 17.

A similar conclusion was reached by the Court of Appeals of New York in *Broughton v. State*, 335 N.E.2d 310 (N.Y. 1975). Broughton, a visitor to a mobile home that was searched by police officers pursuant to a search warrant, was arrested when the officers discovered several pounds of marijuana on the premises. *See id.* at 312. Broughton was then indicted for criminal possession of a dangerous drug in the first degree. *See id.* The indictment was subsequently dismissed, after the evidence obtained was suppressed "on the ground that the search warrant affidavit was insufficient as a matter of law." *Id.* at 313. In a nonjury civil trial, Broughton was awarded damages for "lost wages, mental anguish, humiliation and anxiety." *Id.* In discussing the differences between the torts of malicious prosecution and false imprisonment, the court of appeals explained that "[w]hen an unlawful arrest has been effected by a warrant an appropriate form of action is malicious prosecution." *Id.* at 314; *see also* RESTATEMENT (SECOND) OF TORTS § 35 cmt. a (1965) (noting that an unlawful detention gives rise to a cause of action for false imprisonment, "except where the confinement was by arrest under a valid process issued by a court having jurisdiction").

police officer executing a facially valid arrest warrant."²¹⁷

In finding that the trial court improperly submitted the false imprisonment claim to the jury, the court noted that Wilson did not challenge the facial validity of the warrant issued by the Prince George's County District Court Commissioner.²¹⁸ In addition, she did not claim that she was detained without her consent while being questioned during the investigation into the unauthorized credit transactions.²¹⁹ Therefore, as a matter of law, the defendants were not liable for false imprisonment.²²⁰

The final issue addressed by the court was whether an award for punitive damages could be sustained based on a showing of implied malice rather than actual malice.²²¹ Because the underlying compensatory award against the defendants was based on both false imprisonment and malicious prosecution, the court addressed the issue of punitive damages with respect to each tort separately.²²²

The court of appeals initially noted that because it held the defendants were not liable for false imprisonment as a matter of law, false imprisonment could not be the basis for an award of punitive damages.²²³ Nonetheless, the court reviewed prior case law on this issue to explain how the court of special appeals erred in its reasoning. The court of special appeals followed the earlier decision of *Montgomery Ward & Co. v. Keulemans*²²⁴ in upholding the jury award of punitive damages against the defendants.²²⁵

In *Keulemans*, the court of appeals held that "punitive damages may be recovered where there is actual malice, or where malice may be implied from wantonness, or from want of probable cause in a case of false arrest, . . . or in a case of malicious prosecution."²²⁶ The *Keulemans* court had relied on dictum in *Montgomery Ward &*

217. *Wilson*, 339 Md. at 726-27, 664 A.2d at 928.

218. *See id.* at 727, 664 A.2d at 929.

219. *See id.*

220. *See id.*

221. *See id.* at 727-36, 664 A.2d at 929-33.

222. *See id.*

223. *See id.* at 729-30, 664 A.2d at 930 ("[s]ince an award of compensatory damages must underlie any award of punitive damages in Maryland, no punitive damages may be awarded in the present case based upon false imprisonment").

224. 275 Md. 441, 340 A.2d 705 (1975).

225. *See Montgomery Ward Stores v. Wilson*, 101 Md. App. 535, 548-49, 647 A.2d 1218, 1225 (1994), *aff'd in part, rev'd in part*, *Montgomery Ward v. Wilson*, 339 Md. 701, 664 A.2d 916 (1995).

226. *Keulemans*, 275 Md. at 448-49, 340 A.2d at 709-10.

*Co. v. Cliser*²²⁷ suggesting that the legislation now codified at section 5-307 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland²²⁸ may have changed the standard for an award of punitive damages in a false imprisonment case.²²⁹ Because malice may be implied from want of probable cause, the *Cliser* court concluded "it would now seem possible to recover punitive damages in a false arrest case without proof of actual malice."²³⁰

In reversing the court of special appeals, the court pointed out that until the dictum in *Cliser*, Maryland courts maintained that punitive damages in false imprisonment cases could only be recovered where actual malice was shown by evidence of "intent to injure, ill will or spite, evil motive, fraud, or knowing wrongdoing."²³¹ The court then dismissed the suggestion from *Cliser* that section 5-307 changed the standard for an award of punitive damages in a false imprisonment case:

In our view, however, the dictum in the *Cliser* case was unfortunate and was unsupported by the language or purpose of § 5-307 The statute was obviously designed to offer an additional protection to merchants and their employees under certain circumstances, rather than to make it easier for plaintiffs to recover damages. Nothing in the statutory language suggests a purpose of making it easier for plaintiffs to recover punitive damages in false imprisonment actions.²³²

Thus, the court concluded that punitive damages are only recoverable with a showing of actual malice in false imprisonment actions.²³³

Although punitive damage awards have historically been denied in Maryland absent a showing of actual malice in false imprisonment cases, punitive damages have traditionally been recoverable in

227. 267 Md. 406, 298 A.2d 16 (1972).

228. MD. CODE ANN., CTS & JUD. PROC. § 5-307 (1995).

229. See *Cliser*, 267 Md. at 421, 298 A.2d at 25.

230. *Id.*

231. *Montgomery Ward v. Wilson*, 339 Md. 701, 730, 664 A.2d 916, 930 (1995) (citing *D.C. Transit Sys. v. Brooks*, 264 Md. 578, 583-84, 287 A.2d 251, 254 (1972); *Great Atl. & Pac. Tea Co. v. Paul*, 256 Md. 643, 657, 261 A.2d 731, 739-40 (1970); *Dennis v. Baltimore Transit Co.*, 189 Md. 610, 617, 56 A.2d 813, 816-17 (1948); *Fleisher v. Ensminger*, 140 Md. 604, 609, 620, 118 A. 153, 155, 159 (1922)).

232. *Wilson*, 339 Md. at 730-31, 664 A.2d at 931.

233. See *id.* at 732, 664 A.2d at 931.

malicious prosecution cases on the basis that malice may be inferred from a lack of probable cause for the prosecution of the action.²³⁴ The court explained, however, that recent decisions have "clarified and modified the standards for the allowability of punitive damages in tort cases."²³⁵ An award of punitive damages must generally be based upon actual malice in both intentional and non-intentional torts.²³⁶ These recent decisions have reflected the "traditional policy and purpose of punitive damages in Maryland, which have been 'articulated in our cases for over a century.'"²³⁷

In *Owens-Illinois, Inc. v. Zenobia*,²³⁸ the court explained that "[p]unitive damages are awarded in an attempt to punish a defendant whose conduct is characterized by evil motive, intent to injure, or fraud, and to warn others contemplating similar conduct of the serious risk of monetary liability."²³⁹ Because of the "penal nature" of punitive damages, the *Zenobia* court also required the use of a clear and convincing standard of proof in the assessment of punitive damages in any tort case.²⁴⁰

In modifying the common law with respect to the standard for an award of punitive damages in a malicious prosecution case, the court concluded that permitting a wrongful motive to be inferred from a lack of probable cause is inconsistent with the clear and con-

234. *See id.* See *supra* notes 127-38 and accompanying text for a history of punitive damages in malicious prosecution actions in Maryland.

235. *Wilson*, 339 Md. at 733, 664 A.2d at 932. In recent decisions, the court of appeals has continued to expand the scope of *Zenobia* with respect to the allowability of punitive damages, and thus has greatly narrowed the circumstances that would support an award of punitive damages. *See, e.g.*, *Ellerin v. Fairfax Savings*, 337 Md. 216, 652 A.2d 1117 (1995) (holding that actual malice must be shown in order to support an award of punitive damages in action for fraud or deceit); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc., Inc.*, 336 Md. 635, 650 A.2d 260 (1994) (holding actual malice required to be shown to support an award of punitive damages in action for wrongful interference with contract or economic relations); *Komornick v. Sparks*, 331 Md. 720, 629 A.2d 721 (1993) (holding intoxicated driver did not act with actual malice when he negligently caused an automobile accident, and thus punitive damages were not available).

236. *See Wilson*, 339 Md. at 733, 664 A.2d at 932.

237. *Id.* (quoting *Ellerin v. Fairfax Savings*, 337 Md. 216, 227, 652 A.2d 1117, 1122 (1995)).

238. 325 Md. 420, 601 A.2d 633 (1992).

239. *Id.* at 454, 601 A.2d at 650, *quoted in* *Montgomery Ward v. Wilson*, 339 Md. at 733, 664 A.2d at 932.

240. *See Zenobia*, 325 Md. at 469, 601 A.2d at 657.

vincing standard of proof expressed in *Zenobia*.²⁴¹ In addition, allowing punitive damages on a basis of such implied malice does not conform to the recent decisions of the court of appeals that limit punitive damages to cases "where there exists heinous conduct, characterized by fraud, ill will, spite, evil motive, conscious wrongdoing, or intent to injure."²⁴² Thus, the court stated the change in the law in Maryland with respect to an award of punitive damages in a malicious prosecution action as follows:

Henceforth, for punitive damages to be allowable in malicious prosecution actions, a plaintiff must establish by clear and convincing evidence the defendant's wrongful or improper motive for instigating the prosecution. Although the jury may draw an inference of such motive from lack of probable cause for purposes of compensatory damages, it may not rely on the inference in considering punitive damages.²⁴³

In applying this standard to the present case, the court found no evidence of actual malice on the part of the defendants to support an award of punitive damages, and thus reversed the circuit court's award of punitive damages.²⁴⁴

IV. ANALYSIS

With its decision in *Montgomery Ward v. Wilson*, the Court of Appeals of Maryland clarified Maryland law with respect to the torts of malicious prosecution and false imprisonment, addressed an issue of first impression in the area of false imprisonment, and drove the final nail into the coffin of the "implied malice" standard as a basis for an award of punitive damages in any tort action. Indeed, the facts and circumstances surrounding the *Wilson* case, including the

241. See *Wilson*, 339 Md. at 735, 664 A.2d at 933.

242. *Id.*

243. *Id.* at 735-36, 664 A.2d at 933.

244. See *id.* at 736, 664 A.2d at 933. The court noted that the plaintiff's theory of the case, that Bresnahan had performed an inadequate investigation prior to initiating the criminal proceedings against her, is consistent with a finding that the proceedings were negligently, rather than maliciously, brought against the plaintiff. See *id.* In addition, there was no evidence contradicting Bresnahan's testimony that he received information from two witnesses that Wilson had made unauthorized credit transactions. See *id.* Thus, "there was insufficient evidence from which the jury could have concluded that Bresnahan acted from a wrongful motive when he initiated Wilson's criminal prosecution." *Id.*

events at trial, permitted the court to address a broad range of issues and substantially impact the way malicious prosecution and false imprisonment actions are handled in Maryland.

Throughout its analysis of this case, the court goes to great lengths to identify and examine the errors made by both the trial court and defense counsel. Many of the "errors" found by the court arguably were not subject to judicial review, in that they were not properly preserved for appeal. Nonetheless, the net effect of the court's in-depth analysis was not only to state the law as it exists in Maryland, but to provide guidance to courts and practitioners in handling malicious prosecution and false imprisonment cases. In addition, because of the additional safeguards provided by the *Wilson* court to future defendants, it will now be much more difficult for plaintiffs to prevail in malicious prosecution and false imprisonment actions in Maryland.

A. *Malicious Prosecution*

The court's analysis of the tort of malicious prosecution focused on the last two elements outlined in *Exxon Corp. v. Kelly*,²⁴⁵ i.e., absence of probable cause for the proceeding and "malice," or a primary purpose in instituting the proceeding other than that of bringing an offender to justice.²⁴⁶ The first two elements, a criminal proceeding instituted or continued by the defendant against the plaintiff and termination of the proceeding in favor of the accused,²⁴⁷ were not discussed by the court.

It is now clear that in malicious prosecution actions in Maryland, the role of the jury is more limited than in other civil actions in general, and the role of the court is correspondingly enhanced.²⁴⁸ Where the facts are undisputed, the question of probable cause is one entirely for the court to determine. However, where the facts are disputed, the jury must determine the "existence of the facts relied on to constitute the want of probable cause."²⁴⁹ Although the jury retains its role as fact-finder, the court's function is to determine what amounts to a lack of probable cause.²⁵⁰ At trial, the court instructs the jury as to whether or not probable cause ex-

245. 281 Md. 689, 381 A.2d 1146 (1978).

246. See *supra* notes 41-75 and accompanying text.

247. See *supra* notes 16-40 and accompanying text.

248. See *supra* notes 200-09 and accompanying text.

249. *Wilson*, 339 Md. at 715-16, 664 A.2d at 923 (quoting *Boyd v. Cross*, 35 Md. 194, 197 (1872)).

250. See *id.*

ists under different hypothetical situations.²⁵¹ It is, therefore, "ordinarily improper for a trial court to '[furnish] the jury with a legally correct definition of probable cause which the jury is then to apply to the facts as the jury finds them to be.'" ²⁵²

This restriction of the function of the jury in a malicious prosecution action, a view followed by the majority of jurisdictions,²⁵³ benefits defendants. By removing from the jury the question of whether probable cause exists, the trial judge, who is schooled in the law, can better apply the appropriate legal principles and standards of probable cause to the facts of a case. Having the trial judge make this determination safeguards defendants from inconsistent or unsound jury verdicts that may be motivated by sympathy for the plaintiff, a misplaced desire to punish the particular defendant in the case, or simply a difficulty in distinguishing between the question of the plaintiff's innocence and the defendant's civil liability.

A few jurisdictions retain the traditional role of the civil jury in malicious prosecution actions, allowing the question of want of probable cause to be determined by the jury.²⁵⁴ As justification for allowing juries to determine whether probable cause existed at the initiation of criminal proceedings against the accused, the Supreme Court of South Carolina stated in *Jennings v. Clearwater Mfg. Co.*,²⁵⁵ that the true rule was to allow juries to determine the question of probable cause, which is consistent with the rule in negligence cases concerning mixed questions of law and fact.²⁵⁶ Considering the generally unfavorable attitude of courts toward malicious prosecution actions, however, the rule expressed in *Montgomery Ward v. Wilson*, which removes the question of whether probable cause exists from the hands of the jury into the more able hands of judges, would appear to be the better rule.²⁵⁷ Moreover, the rule restricting the function of the jury in malicious prosecution actions furthers the public policy of encouraging citizens to bring to justice those who are ap-

251. *See id.*

252. *Id.* (quoting *Palmer Ford, Inc. v. Wood*, 298 Md. 484, 503, 471 A.2d 297, 307 (1984)).

253. Annotation, *Probable Cause or Want Thereof, in Malicious Prosecution Action, as Question of Law for Court or of Fact for Jury*, 87 A.L.R. 2d 183, 189 (1963).

254. *See id.* at 200-02 (citing *Edgington v. Glassmeyer*, 168 N.E.2d 425 (Ohio 1959); *Jennings v. Clearwater Mfg. Co.*, 172 S.E. 870 (S.C. 1934)).

255. 172 S.E. 870 (S.C. 1934).

256. *See id.* at 872-73 (citing *Caldwell v. Bennett*, 22 S.C. 1 (1884)).

257. *See supra* notes 248-52 and accompanying text.

parently guilty of committing a crime,²⁵⁸ by safeguarding the rights of the civil defendant from an unrestricted jury.

In addition to clarifying the respective roles of judge and jury in a malicious prosecution action, the court appeared to disagree with the plaintiff's theory that Bresnahan lacked probable cause to initiate proceedings against Wilson because he failed to perform an adequate investigation. The court first commented on the trial court's jury instruction that "probable cause does not exist if a proper investigation could have cleared the accused," coupled with the defendant's failure to ask the court to rule that their investigation was reasonably complete as a matter of law.²⁵⁹ Although the court did not conclude that the instruction was improper, the court did suggest that the facts revealed by the trial testimony may well have established probable cause as a matter of law. The court acknowledged that Wilson's testimony did contradict the testimony of Bresnahan, Fuller, and Holmes with regard to Wilson's actions.²⁶⁰ However, her testimony did not directly contradict the testimony that Bresnahan had been told by both Fuller and Holmes that Wilson had made unauthorized credit card charges.²⁶¹ Thus, Wilson's testimony did not go directly to the issue of whether Bresnahan *reasonably believed* that Wilson had committed a theft at the time he initiated criminal proceedings. If Bresnahan's belief that Wilson had committed a crime was in fact reasonable, the existence of probable cause could be established and would serve to defeat Wilson's claim of malicious prosecution.²⁶² The court then summarized Wilson's argument, apparently accepted by the trial court and not objected to by the defendants, as follows: "Thus, under the plaintiff's theory of the case, *regardless of the inculpatory information which Bresnahan had received about Wilson*, questions about the reasonableness of the subsequent investigation might still justify a finding of lack of probable cause."²⁶³

Although the court made no further comment as to the plaintiff's theory of the case, it may be inferred from the testimony at trial that probable cause may have been established as a matter of law. Because probable cause is measured by the circumstances as they reasonably appeared *to the defendant* at the time proceedings

258. See *supra* note 12.

259. *Montgomery Ward v. Wilson*, 339 Md. 701, 715-16, 664 A.2d 916, 923 (1995).

260. See *id.* at 715, 664 A.2d at 923.

261. See *id.*

262. See *supra* notes 42-44 and accompanying text.

263. *Wilson*, 339 Md. at 715, 664 A.2d at 923 (emphasis added).

are initiated against the accused,²⁶⁴ and it was uncontradicted that Bresnahan was told of Wilson's alleged unauthorized credit card charges,²⁶⁵ it would appear that the trial court could have found the existence of probable cause as a matter of law.

Regarding the element of malice, the court restated the well-recognized principle that malice in this context may be inferred from a lack of probable cause.²⁶⁶ In addition, malice in this form does not require evidence of spite, hatred, or revenge.²⁶⁷ However, the court clarified the standard for satisfying the malice element in a malicious prosecution action, where it is inferred from a lack of probable cause. Mere negligence or "reckless" conduct in instituting criminal proceedings will not satisfy the malice element.²⁶⁸ In order to satisfy the malice element, there must be proof that the defendant initiated the criminal proceedings with some improper purpose or motive.²⁶⁹ The requirement that there be proof of an improper purpose or motive on the part of the defendant works to the defendant's advantage. Now, a plaintiff in a malicious prosecution action will have to show the defendant's state of mind at the time of the initiation of the proceedings, rather than mere negligence. Moreover, the requirement of proof of defendant's improper purpose or motive in instituting criminal proceedings is based on sound legal principles, followed by virtually all jurisdictions.²⁷⁰ The strict requirement that the plaintiff must prove the malice element of a malicious prosecution action²⁷¹ furthers the public policy of en-

264. *See* *Brewer v. Mele*, 267 Md. 437, 451, 298 A.2d 156, 165 (1972) (emphasis added).

265. *See Wilson*, 339 Md. at 715, 664 A.2d at 923.

266. *See id.* at 717, 664 A.2d at 924 ("[I]n early cases, as well as more recent ones, this Court has taken the position that the 'malice' element of malicious prosecution may be inferred from a lack of probable cause.") (citations omitted).

267. *See id.* at 719, 664 A.2d at 925.

268. *See id.* The court found the jury was given an improper instruction that alternatively defined malice in terms of recklessness. *See id.*

269. *See id.*

270. *See* STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 28:1, at 6-7 (1990) ("Attempts to pursue tort claims or causes of action on a theory of 'negligent prosecution' have turned out to be unsuccessful.")

271. *See* *Boose v. City of Rochester*, 421 N.Y.S.2d 740 (N.Y. App. Div. 1979). In discussing the merits of the plaintiff's malicious prosecution claim that was based on an inadequate investigation by the police department, the court stated that the plaintiff's "right to be free of . . . unjustified and unreasonable litigation is limited by the obvious policy of the law to encourage proceedings against those who are apparently guilty of criminal conduct and to let finished litigation remain undisturbed and unchallenged." *Id.* at 744. The court then held

couraging citizens to aid in the prosecution of criminals without fear of civil liability.²⁷²

B. False Imprisonment

In reaching its holding on the false imprisonment issue, the court differentiated between the torts of false imprisonment and malicious prosecution. "False imprisonment is the invasion of the interest in freedom from unlawful confinement, while a malicious prosecution is the unlawful use of legal procedure to bring about a legal confinement."²⁷³ Relying on out-of-state and secondary authority, the court concluded that an individual who wrongfully procures the arrest of another is not liable for false imprisonment where there was no detention prior to the issuance of the warrant and where the arrest is made by a police officer pursuant to a facially valid arrest warrant.²⁷⁴

In dicta, the court also made several other observations. Although an individual who wrongfully procures the arrest of another can insulate himself from liability for false imprisonment by complying with the formal requirements of the law, he may become liable for malicious prosecution if the necessary elements of malicious prosecution are satisfied.²⁷⁵ In addition, wrongfully procuring a warrantless arrest does not insulate the wrongdoer from liability for false imprisonment.²⁷⁶ Finally, in the absence of malice, the court indicated that an action for ordinary negligence might lie against an individual who negligently procures a warrant for the arrest of another.²⁷⁷

Thus, in order to pursue a claim for liability against a third party who wrongfully procures an arrest by properly swearing out a warrant, the issue is one of proper pleadings. That is, the plaintiff must simply file a malicious prosecution action, rather than an action for false imprisonment. Although this is the correct course of

that the plaintiff's cause of action, sounding in negligence, could not be maintained. *See id.* "[P]laintiff's recovery must be determined by established rules defining . . . malicious prosecution, rules which permit damages only under circumstances in which the law regards the . . . prosecution as improper and unjustified." *Id.*

272. *See supra* note 12.

273. *Wilson*, 339 Md. at 723-24, 664 A.2d at 927 (quoting HARPER, JAMES & GRAY, THE LAW OF TORTS § 3.9 at 297 (2d ed. 1986)).

274. *See id.* at 726-27, 664 A.2d at 928.

275. *See id.* at 725, 664 A.2d at 928.

276. *See id.* at 723, 664 A.2d at 927.

277. *See id.* at 727, 664 A.2d at 929.

action for the plaintiff to pursue, there are different considerations inherent in the two separate torts that stem from the different elements needed to satisfy each cause of action.²⁷⁸ It may, for example, be more difficult to prove a case of malicious prosecution than false imprisonment for two important reasons. First, a plaintiff in a malicious prosecution action must show a lack of probable cause on the part of the defendant in instituting the criminal proceedings.²⁷⁹ As a corollary to this element, the defendant can defeat the plaintiff's case by establishing the existence of probable cause at the time criminal proceedings were initiated.²⁸⁰ In a false imprisonment action, however, lack of probable cause is not a necessary element, and the existence of probable cause is not a defense.²⁸¹ Second, the element of malice required to sustain a malicious prosecution action need not be shown in a false imprisonment action.²⁸² Therefore, with the court's decision in *Wilson*, it is now more difficult for a plaintiff to prevail on a tort claim against an individual who wrongfully procures an arrest by using the proper legal mechanisms in doing so. This difficulty occurs because the defendant is shielded from liability for false imprisonment and the plaintiff must prove the more difficult elements of malicious prosecution in order to prevail.

In addition to following the proper procedures in swearing out a warrant, a private prosecutor can further insulate himself from liability when attempting to bring criminal proceedings against another. Prior to obtaining an arrest warrant, the private prosecutor could consult with an attorney, and thereby insulate himself from liability for malicious prosecution. If all facts are disclosed to the attorney, the reliance upon the advice of counsel in obtaining a warrant or instituting criminal proceedings would be a strong defense to a malicious prosecution action.²⁸³ The combination of truthfully consulting with an attorney and then obtaining a warrant through the proper legal channels would make it extremely difficult for the plaintiff to prevail on any liability theory.

278. See *supra* notes 15, 77 and accompanying text for a discussion of the elements of each cause of action.

279. See *supra* note 15 and accompanying text.

280. See *supra* notes 74-75 and accompanying text.

281. See *supra* notes 77-78 and accompanying text.

282. See *supra* notes 15, 77 and accompanying text.

283. See *Gladding Chevrolet v. Fowler, Inc.*, 264 Md. 499, 509, 287 A.2d 280, 286 (1972); see also *supra* note 53 and accompanying text.

The *Wilson* court's decision regarding the issue of false imprisonment clearly benefits future defendants because it provides a safeguard to the private citizen who utilizes the proper procedures in swearing out a warrant to effectuate an arrest against an alleged wrongdoer. In accord with the overwhelming weight of authority,²⁸⁴ this decision is important for two main reasons. First, by providing a safeguard to the citizen who swears out a warrant against an individual suspected of committing a criminal offense, citizens are encouraged to use the proper mechanisms of the law to insulate themselves from personal liability. This, in turn, fosters more control of the criminal justice system by the courts and law enforcement officers. Presumably, the magistrate responsible for issuing an arrest warrant is better able than the average citizen to determine whether probable cause exists, assuming the private prosecutor truthfully discloses all of the pertinent facts of the alleged crime. In addition, a volatile and dangerous situation may arise where an untrained private citizen attempts to make a "citizen's arrest." Second, the public policy of encouraging citizens to bring to justice individuals suspected of committing crimes²⁸⁵ is furthered by safeguarding the citizen who tries to do so. Provided there was no improper purpose or motive on the part of the private prosecutor in procuring the arrest of an individual,²⁸⁶ no tort liability will attach where there was no detention prior to the issuance of the warrant and when the arrest is made by a police officer pursuant to a facially valid arrest warrant.²⁸⁷

C. Punitive Damages

In addressing the punitive damages issue for both false imprisonment and malicious prosecution, the court followed the recent Maryland trend of limiting punitive damages in all tort actions.²⁸⁸ Regarding false imprisonment, the court asserted that the law in

284. See, e.g., *Bulkley v. Klein*, 23 Cal. Rptr. 855 (Cal. Ct. App. 1962); *Mullen v. Brown*, 138 Mass. 114 (1884); *Thomas v. M.R.A.*, 713 S.W.2d 570 (Mo. App. 1986); *Genito v. Rabinowitz*, 225 A.2d 590 (N.J. Sup. Ct. 1966); *Kaye v. Shane*, 118 N.Y.S.2d 592 (1953); *James v. Southwestern Ins. Co.*, 354 P.2d 408 (Okla. 1960); *Erp v. Carroll*, 438 So. 2d 31 (Fl. Dist. Ct. App. 1983); *Tredway v. Birks*, 242 N.W. 590 (S.D. 1932). See generally RESTATEMENT (SECOND) OF TORTS § 45 A cmt. b (1965).

285. See *supra* note 12.

286. See *supra* notes 266-71 for discussion of the malice element of the tort of malicious prosecution.

287. See *supra* note 274 and accompanying text.

288. See *supra* note 235 and accompanying text.

Maryland law has always been that punitive damages could only be recovered where the tort was committed with actual malice.²⁸⁹ Explaining how the law became muddled, the court cited the "unfortunate"²⁹⁰ dicta in *Montgomery Ward & Co. v. Cliser*,²⁹¹ which stated that punitive damages may now be available in a false imprisonment action without proof of actual malice.²⁹² This dicta was later followed in *Montgomery Ward & Co. v. Keulemans*,²⁹³ which further contributed to the inconsistency in the law.²⁹⁴ However, the court pointed out that the punitive damages award in *Keulemans* was based on malicious prosecution, and not on false imprisonment.²⁹⁵ Thus, the court concluded that the Court of Appeals of Maryland has never held, in a false imprisonment case, that punitive damages could be awarded without a showing of actual malice.²⁹⁶ Although this appears to be a technical distinction, given the language in *Keulemans*, the result follows the court's recent stance on the issue of punitive damages.²⁹⁷

A few courts have accepted the same reasoning as did the court in *Keulemans*, that a showing of want of probable cause in an action for false imprisonment warrants an inference of malice sufficient to permit a recovery of punitive damages.²⁹⁸ None of these cases, however, offer a justification for this rule. In false imprisonment actions, there does not appear to be a clear majority rule concerning the appropriate standard necessary to support an award of punitive damages. Depending on the jurisdiction, the legal standards sufficient to permit an award of punitive damages range from: an inference of malice as a result of want of probable cause, as in *Keulemans*,²⁹⁹ to an inference of malice as a result of a disregard of, or indifference to, another's rights;³⁰⁰ an inference of malice as a re-

289. See *Montgomery Ward v. Wilson*, 339 Md. 701, 730-32, 664 A.2d 916, 930-31 (1995).

290. See *supra* notes 227-29.

291. 267 Md. 406, 298 A.2d 16 (1972).

292. See *id.* at 421, 298 A.2d at 25.

293. 275 Md. 441, 340 A.2d 705 (1975).

294. See *Wilson*, 339 Md. at 731, 664 A.2d at 931.

295. See *id.*

296. See *id.* at 731-32, 664 A.2d at 931.

297. See *supra* notes 121-26 and accompanying text.

298. See, e.g., *Standard Oil Co. v. Davis*, 94 So. 754 (Ala. 1922); *Farish v. Smoot*, 58 So. 2d 534 (Fla. 1952); *Melton v. LaCalamito*, 282 S.E.2d 393 (Ga. App. 1981); *Jackson v. Thompson*, 188 S.W.2d 853 (Mo. App. 1945).

299. See *supra* notes 136-38.

300. See, e.g., *Birmingham Ledger Co. v. Buchanan*, 65 So. 667 (Ala. 1914); *Wrains*

sult of the particular circumstances of each case;³⁰¹ actual malice, “in the sense of conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will, or fraud,” as in *Wilson*;³⁰² to other states of mind, such as willful,³⁰³ wanton,³⁰⁴ reckless,³⁰⁵ or intentional³⁰⁶ conduct. The importance of the court’s decision in *Wilson*, with regard to the availability of punitive damages in false imprisonment actions, is not the particular standard it chose for the allowability of punitive damages. Rather, the importance is that the court articulated a standard that is consistent with its decisions concerning punitive damages since the seminal case of *Owens-Illinois, Inc. v. Zenobia*.³⁰⁷ Although restricting the availability of punitive damages in false imprisonment actions clearly benefits future defendants, it is arguable that everyone benefits from consistency in the law because justice is administered fairly.

The court could not rely on a close scrutiny of the language in prior decisions, as it did in addressing the issue of punitive damages in false imprisonment actions, to reach its holding that punitive damages are only recoverable in malicious prosecution actions with a showing of actual malice. The court was unable to do so because it had been well-settled in Maryland that implied malice could form the basis of a punitive damages award in malicious prosecution actions.³⁰⁸ Instead, the court accepted the defendants’ argument that the recent decisions of the court of appeals have clarified and modified the standards used in assessing punitive damages in tort actions.³⁰⁹ Thus, allowing an award of punitive damages to be based

v. Rose, 175 So.2d 75 (Fla. App. 1965); *Garvis v. K-Mart Discount Store*, 461 S.W.2d 317 (Mo. App. 1970); *Kolzem v. Broadway & Seventh Ave. R.R. Co.*, 20 N.Y.S. 700 (1892).

301. See, e.g., *Hammargren v. Montgomery Ward & Co.*, 241 P.2d 1192 (Kan. 1952); *Jackson v. Thompson*, 188 S.W.2d 853 (Mo. App. 1945); *Vandermeer v. Pacific Northwest Dev. Corp.*, 545 P.2d 868 (Or. 1976).

302. *F.B.C. Stores, Inc. v. Duncan*, 198 S.E.2d 595 (Va. 1973).

303. See *Travelers Indem. Co. v. Hoard*, 340 S.W.2d 260 (Tenn. App. 1960).

304. See, e.g., *Wrains v. Rose*, 175 So. 2d 75 (Fla. App. 1965); *Doyle v. Douglas*, 390 P.2d 871 (Okla. 1964); *McAleer v. Good*, 65 A. 934 (Pa. 1907).

305. See, e.g., *Shelton v. Barry*, 66 N.E.2d 697 (Ill. App. 1946); *Guion v. Associated Dry Goods Corp.*, 374 N.E.2d 364 (N.Y. App. Div. 1977); *Skillern & Sons, Inc. v. Stewart*, 379 S.W.2d 687 (Tex. Civ. App. 1964).

306. See, e.g., *Garvis v. K-Mart Discount Store*, 461 S.W.2d 317 (Mo. App. 1970); *Big Town Nursing Home, Inc. v. Newmank*, 461 S.W.2d 195 (Tex. Civ. App. 1970).

307. 325 Md. 420, 601 A.2d 633 (1992). See *supra* notes 121-26 for a discussion of *Zenobia*.

308. See *supra* notes 127-38 and accompanying text.

309. *Montgomery Ward v. Wilson*, 339 Md. 701, 733, 664 A.2d 916, 932-33 (1995).

on implied malice is inconsistent with the recent decisions that have explained the policies and purposes of punitive damages in Maryland, namely to punish the wrongdoer and deter others.³¹⁰

Again, as is the case with the issue of false imprisonment, the court has provided consistency to Maryland law in the area of punitive damages by applying the actual malice standard expressed in *Zenobia*³¹¹ to malicious prosecution actions. As a practical matter, it would not make sense to have one standard for assessing punitive damages in the majority of causes of actions, and a lesser standard for malicious prosecution or false imprisonment cases. In addition, by restricting the availability of punitive damages to plaintiffs, the Court of Appeals of Maryland has embodied the general views of the Maryland legislature, which has also recently limited the amount of damages available to plaintiffs by enacting a statutory cap on non-economic damages in tort actions.³¹²

Although not mentioned by the *Wilson* court, its decision concerning punitive damages in malicious prosecution actions clears up another inconsistency in Maryland common law. Maryland courts have long recognized that malicious prosecution actions are generally disfavored by the law, because public policy encourages the exposure of criminal activity.³¹³ However, punitive damages had traditionally been available in Maryland in malicious prosecution actions based on a *lower* standard than in other torts,³¹⁴ a practice that is inconsistent with public policy. Therefore, the public policy of encouraging private citizens to prosecute criminals is furthered by requiring clear and convincing evidence of actual malice to support an award of punitive damages in a malicious prosecution action. Clearly, restricting the availability of punitive damages in malicious prosecution actions benefits future defendants, and provides an additional safeguard to the private citizen who wishes to utilize the public court system to bring an alleged criminal offender to justice.

V. CONCLUSION

In *Montgomery Ward v. Wilson*, the court of appeals was presented with an opportunity to clarify Maryland law as it applied to the torts of malicious prosecution and false imprisonment. In

310. *See id.*

311. *See supra* notes 121-25 and accompanying text.

312. *See* MD. CODE ANN., CTS. & JUD. PROC. § 11-308 (1995).

313. *See supra* note 12.

314. *See supra* notes 127-38.

holding that an individual who wrongfully procures the arrest of another is not liable for false imprisonment, where there was no detention prior to the issuance of an arrest warrant and where the arrest is made by a police officer executing a facially valid arrest warrant,³¹⁵ the court has provided citizens in Maryland who attempt to prosecute criminal offenders a substantial amount of insulation from liability.³¹⁶ The prudent citizen will seek the advice of an attorney prior to swearing out an arrest warrant, and thus insulate himself even further from any liability.³¹⁷

Furthermore, the court was able to make a strong statement concerning punitive damages in Maryland. There can no longer be any question, after overturning a century old common-law principle,³¹⁸ that actual malice is the standard to be used for considering an award of punitive damages in *any* tort.

Joseph R. Salko

315. See *Wilson*, 339 Md. at 725-26, 664 A.2d at 928.

316. See *supra* notes 248-312 and accompanying text.

317. See *supra* notes 53, 283 and accompanying text.

318. See *supra* notes 127-38 and accompanying text.