Circuit Court for Baltimore City
Case No. 24-C-21-005463

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 728

September Term, 2022

DAVID ESTEPPE

v.

BALTIMORE CITY POLICE DEPARTMENT

Graeff,
Berger,
Arthur,

JJ.

Opinion by Berger, J.

Filed: June 14, 2023

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This case is before us on appeal from an order of the Circuit Court for Baltimore City granting summary judgment in favor of the Baltimore City Police Department (the "Department"), appellee, in a declaratory judgment action initiated by David Esteppe, appellant. Esteppe filed a Motion for Declaratory Relief to Enforce Judgment seeking an order requiring the Department to satisfy a judgment Esteppe had obtained against Adam Lewellen, a former Baltimore City Police Officer, in the same civil case. The underlying tort action, which resulted in a judgment in Esteppe's favor in 2014, was premised upon Lewellen's misconduct in office, including a perjured warrant application and subsequent search of Esteppe's home. In the 2014 tort action, Esteppe was awarded damages for negligence, violations of Articles 24 and 26 of the Maryland Declaration of Rights, and civil conspiracy after demonstrating that Lewellen had conspired with his friend, Brandi Chelchowski, to violate the rights of Esteppe, who was Chelchowski's ex-boyfriend.

The Department moved for summary judgment, arguing, *inter alia*, that Esteppe's claim was barred by the doctrine of judicial estoppel. After a hearing on March 30, 2022, the circuit court determined that judicial estoppel barred Esteppe's claim and granted the Department's summary judgment motion. Esteppe noted a timely appeal.

Esteppe presents a single issue for our consideration on appeal, which we have rephrased as follows: [1]

[1] The question, as presented by Esteppe, is:

> Whether the Circuit Court erred in ruling as a matter of law that Esteppe was estopped from pursuing this action to prove

> Whether the circuit court erred in granting the Department's summary judgment motion on the grounds that Esteppe's claim was barred by judicial estoppel.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEEDINGS

In *Baltimore City Police Dep't v. Esteppe*, 247 Md. App. 476, 488-91 (2020) (*Esteppe II*), *aff'd*, 476 Md. 3 (2021),[2] we set forth the following background regarding the underlying criminal case stemming from Lewellen's misconduct in office as a Baltimore City police officer:

> In early 2012, Mr. Esteppe ended a romantic relationship with Brandi Chelchowski that had begun in late 2011. Subsequently, Ms. Chelchowski stalked and threatened Mr. Esteppe, called and texted him dozens of times each day, and, he suspected, damaged his vehicle. Mr. Esteppe changed his phone number and sought multiple peace orders. In March 2012, Ms. Chelchowski threatened Mr. Esteppe to the effect that she had "cop friends" and that he was "going down." Mr. Lewellen was one such "close" friend, whom Ms. Chelchowski had known "for years."
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> On March 19, Ms. Chelchowski "said something to the effect of, 'You're going down next week.'" Eight days later, on March 27, then-Officer Lewellen applied for a warrant to search Mr. Esteppe's home on the pretext that Mr. Esteppe was

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> that Lewellen was motivated at least in part to serve the Department.

[2] For clarity, we shall refer to this Court's 2020 opinion as "*Esteppe II*." *Esteppe II* was an appeal from an order of the circuit court granting summary judgment to Esteppe in a prior declaratory judgment action filed by Esteppe seeking an order requiring the Department to pay the judgment, which we reversed on appeal and the Supreme Court affirmed. We shall discuss the procedural history of *Esteppe II* in more detail *infra*.

We shall refer to the unreported opinion issued by this Court in the direct appeal of the 2014 tort trial as "*Esteppe I*."

a drug dealer. In the affidavit supporting the warrant application, Mr. Lewellen stated, among other things, that he recently had orchestrated a controlled purchase in which Mr. Esteppe sold drugs to a confidential informant. Specifically, Mr. Lewellen averred that he had the confidential informant set up the buy via telephone, searched the confidential informant to ensure that he was "free of any contraband," dropped off the informant at Mr. Esteppe's residence, and "took a covert position with a clear and unobstructed view of" the location as the confidential informant "approached the door and knocked." Then, according to Mr. Lewellen's affidavit:

> The front door opened, and I observed a white male whom I recognized to be David Esteppe . . . [The confidential informant] entered the location and the door closed behind [him]. About 2 minutes later [the confidential informant] exited the location and met me nearby at a predetermined location.
>
> [The confidential informant] then provided me with 1 green ziplock bag containing a white powder substance, suspected cocaine. I then searched [the confidential informant] and [he] was found free of any other contraband.
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> [The confidential informant] advised me upon entering the location [that the confidential informant] asked Mr. Esteppe if he could get "one," which is street terminology for one unit of cocaine. [The confidential informant] then gave Mr. Esteppe $20.00 in US Currency and Mr. Esteppe provided [the confidential informant] with 1 green ziplock bag containing a white powder substance.

In what appears to be a boilerplate portion of the affidavit, Mr. Lewellen identified a number of things that, in his experience, drug dealers commonly keep in connection with their trafficking activities, including "large amounts of . . . currency"; "paraphernalia used in the manufacture, packaging, preparation, and weighing of [controlled dangerous substances] in preparation for trafficking"; "firearms and

ammunition"; "financial records and financial instruments"; "records of their drug transactions"; "books, records and other documents that identify" the names of associates; telephones and pagers; photographs and videos of themselves and their associates; "identification and travel documents"; and vehicles. The search warrant application sought permission to seize any of those items, as well as any illegal drugs.

Based on Mr. Lewellen's affidavit, the court issued a warrant authorizing the search of Mr. Esteppe's home and seizure of items found there. Later that day, Mr. Lewellen and several other officers "busted in" through Mr. Esteppe's front door and executed the search warrant. During the search, the officers repeatedly accused Mr. Esteppe of being a drug dealer and asked him to identify the location of the drugs in his home. The officers did not uncover any illegal drugs. They did, however, find and seize a black powder rifle and a shotgun that Mr. Esteppe kept for hunting. Mr. Esteppe was arrested and charged for unlawful possession of a firearm based on a relatively new law — of which Mr. Esteppe had been unaware — that disqualified him from possessing firearms.[3] When he was arrested, Mr. Esteppe heard Mr. Lewellen say that "Brand[i] led us to it."

After his arrest and release awaiting trial, Mr. Esteppe, along with other witnesses, informed the Department of their suspicions that he may have been set up. The Department's Internal Affairs Division began an investigation, during which the confidential informant listed in the warrant application stated that he had never seen or met Mr. Esteppe, nor had he ever set foot in Mr. Esteppe's house or called him on the phone. Investigators obtained phone records for the confidential informant and Mr. Esteppe, which verified that the two had not had any phone contact.

[3] Mr. Esteppe was convicted of assault in 2008, a fact that Mr. Lewellen listed under the "Criminal History" section of his warrant application. Unknown to Mr. Esteppe at the time, just months before his arrest the General Assembly had made it illegal for anyone convicted of a crime of violence to possess a rifle or shotgun. See 2011 Md. Laws, ch. 164, codified at Md. Code Ann., Pub. Safety § 5-206 (Repl. 2018; Supp. 2019). [(Footnote in original; original footnote number 2.)]

> After he was interviewed for the investigation, the confidential informant contacted Mr. Lewellen, who met with the confidential informant and pressured him to recant the information he had provided to the investigators. Mr. Lewellen had the informant call the investigators over speakerphone in Mr. Lewellen's presence and "direct[ed] him what to say." The informant complied at the time, but then subsequently reported that interaction to the Internal Affairs investigators.
>
> Subsequently, the State entered a *nolle prosequi* in the criminal case against Mr. Esteppe, thereby dropping all charges.
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> In two separate charging documents, the State charged Mr. Lewellen with perjury as to the affidavit, misconduct in office, and obstruction, among other crimes. He pleaded guilty to perjury and misconduct in office, and resigned from the Department as part of his plea deal. At the plea hearing, the prosecutor recited a statement of facts to which Mr. Lewellen agreed, with no modifications or objections. The statement included, among other things, that Mr. Lewellen had been "close" friends with Ms. Chelchowski "for years"; the affidavit he had submitted in support of the warrant application was "bogus," "fraudulent," and "perjurious"; he "was the lead on th[e] execution of that search warrant"; and he had directed the confidential informant "to recant what he told Internal Affairs."

Esteppe II, 247 Md. App. at 488-91.

We also set forth the following background regarding the civil tort action filed by Esteppe that ultimately resulted in the 2014 judgment against Lewellen:

> In March 2013, Mr. Esteppe filed a complaint for damages against Mr. Lewellen, the Department, the Mayor and City Council of Baltimore (the "City"), and the State of Maryland. Mr. Esteppe brought counts for assault, battery, false arrest, false imprisonment, intentional infliction of emotional distress, malicious prosecution, negligence, violations of the Maryland Declaration of Rights, and civil conspiracy. The circuit court dismissed the claims against all defendants but Mr. Lewellen.

In November 2014, the court held a bench trial. During his opening statement, counsel for Mr. Esteppe advanced his theory that Mr. Lewellen's actions were motivated not by malice toward Mr. Esteppe, but rather by Mr. Lewellen's "desire to please and remain in a relationship with Brand[i] Chelchowski." Counsel explained that "subsequent to Mr. Esteppe breaking up with Ms. Chelchowski, she got involved in a relationship with the Defendant, Adam Lewellen. And then she encouraged him – as we understand it – to basically bring down Mr. Esteppe. So, the motivation was to please her, and not to get Mr. Esteppe. That's our position."

Mr. Esteppe's case-in-chief consisted only of his testimony and the transcript of Mr. Lewellen's guilty plea, which the Court admitted as substantive evidence. After hearing Mr. Esteppe's case-in-chief, the court granted Mr. Lewellen's motion for judgment regarding the counts of assault, battery, false arrest, false imprisonment, and malicious prosecution, as well as the request for punitive damages. The court denied Mr. Lewellen's motion concerning the counts for intentional infliction of emotional distress, negligence, constitutional tort, and civil conspiracy.

During his closing argument, Mr. Esteppe's counsel argued that Mr. Lewellen's "conduct was intentional" and his purpose singular:

> As a matter of fact, that was why he did it. He knew, he knew that this woman – who he knew, he was friends with – had broken up with David Esteppe, and . . . in fact, what maybe she knew or didn't know at that time was that Lewellen was trying to make headway with her. So, for all of the wrong motives, he was using his power – he was abusing his authority – to try to cause pain, which he succeeded in doing to someone else. . . . [H]is real motive was the intentional infliction of emotional distress.

On rebuttal closing, Mr. Esteppe's counsel returned to the same theme:

> Mr. Lewellen[] entered into an illegal agreement with this woman who was the former girlfriend of Mr. Esteppe — and whom he was trying to court to become his girlfriend . . . .
>
> He wanted to get in tight with her – he, through his agreement with her, led to conduct on his part that he was so, so trying to impress her that he was willing to put his career on the line. And in fact, he did put his career on the line, and destroyed it by going to a judge and lying under oath . . . .

After closing arguments, the trial court ruled in favor of Mr. Lewellen on the intentional infliction of emotional distress count because the court was "not convinced by a preponderance of the evidence" that Mr. Esteppe's embarrassment and humiliation were sufficiently "severe" and "extreme." The court then found in favor of Mr. Esteppe on all three of his remaining claims and awarded him $166,007.67 in damages.

This Court affirmed in an unreported opinion. *See Lewellen v. Esteppe*, No. 2009, Sept. Term 2014, 2015 WL 7941110 (Dec. 4, 2015) [("*Esteppe I*")]. Among other rulings, this Court held that the circuit court had properly admitted and considered the statement of facts from Mr. Lewellen's plea agreement as substantive evidence, *id.* at *6-*11, and that sufficient evidence supported the court's ruling that Mr. Lewellen and Ms. Chelchowski had engaged in a civil conspiracy, with Mr. Lewellen's act of perjury "committed in furtherance of that agreement," *id.* at *16. We stated:

> The evidence before the circuit court indicated that Ms. Chelchowski and [Mr. Esteppe] had been in a relationship, that Ms. Chelchowski was angered when [Mr. Esteppe] ended that relationship, that Ms. Chelchowski threatened [Mr. Esteppe] by telling him that "I have cop friends and you're going down," that Ms. Chelchowski told [Mr. Esteppe] that he was "going down next week" on March 19, 2012 – approximately one week before [Mr. Esteppe]

> had been surprised by police at his house, and that [Mr. Lewellen] told [Mr. Esteppe] while searching his house that "Brandi led us to it." In light of this evidence, the court was justified in circumstantially finding an agreement between Ms. Chelchowski and [Mr. Lewellen], and [Mr. Lewellen]'s fraudulent application for the search warrant was surely an act committed in furtherance of that agreement.
>
> *Id.*

Esteppe II, 247 Md. App. at 491-93 (footnotes omitted).

In *Esteppe II*, we further summarized Esteppe's attempt to enforce the civil judgment against the Department following the conclusion of the civil tort case:

> In April 2016, Mr. Esteppe sent two letters requesting that the City pay the judgment entered against Mr. Lewellen. The City refused, replying by letter that (1) because the City and the Department had been dismissed from the case, "the issue of whether Mr. Lewellen was acting within the scope of his employment was not, nor could it have been, adjudicated" in the underlying case, and (2) the LGTCA did not obligate the City or the Department to pay the judgment because Mr. Lewellen was not acting within the scope of his employment when he "obtain[ed] the perjured warrant against Mr. Esteppe . . . for personal reasons having nothing to do with the lawful objectives of the [Department]."
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> Mr. Esteppe then filed a "Motion for Declaratory Relief to Enforce Judgment" against both the Department and the City. Mr. Esteppe, who filed his motion in the same civil case in which he had obtained his judgment against Mr. Lewellen, sought "a written declaration specifying that (a) Mr. Lewellen's conduct, on which the underlying tort judgment was based, occurred in the scope of Mr. Lewellen's employment, and (b) that the City and the Department are required to pay the judgment that Mr. Esteppe obtained against Mr. Lewellen." Mr. Esteppe argued that "[t]he City and the Department [we]re necessary parties" at that juncture of the proceedings based on their "interest in the declaratory relief

sought." Therefore, he contended, their prior dismissal from the case "ha[d] no effect on [their] responsibility to comply with the LGTCA at the post-judgment stage" or their obligation "to pay judgments against their employees."

Mr. Esteppe also argued that "Mr. Lewellen's criminal conduct, though not expressly authorized by the [City and the Department], was within the scope of [his] employment." Specifically, Mr. Esteppe contended that Mr. Lewellen's conduct had involved routine police work — investigating potential crime, swearing out an affidavit, executing a warrant, and making an arrest — that benefited his employer, and thus was within the scope of his employment, notwithstanding any mixed or entirely improper motive. The motion relied entirely on the record developed in Mr. Esteppe's case against Mr. Lewellen; Mr. Esteppe sought no new discovery, nor did he add to the evidentiary record. According to the certificate of service attached to his motion, Mr. Esteppe served the motion personally on the City Solicitor and the Department's chief solicitor.

The Department filed a written response in opposition to Mr. Esteppe's motion in which it argued that he lacked standing to seek indemnification from the Department, that the Department had sovereign immunity from his claim, and that Mr. Lewellen had acted outside the scope of his employment. The Department did not request discovery, nor did it seek to introduce any new evidence in opposition to Mr. Esteppe's motion. Instead, for its factual defense based on scope of employment, the Department's responsive brief relied exclusively on the transcript from Mr. Lewellen's guilty plea hearing and the judgment against Mr. Lewellen for conspiring with Ms. Chelchowski. Notably, the Department did not assert a defense based on Mr. Esteppe's failure to join it as a party.

* * *

Mr. Esteppe's motion for declaratory relief to enforce the judgment was heard by a different judge than the trial judge. At oral argument on his motion — in stark contrast to his arguments during his case against Mr. Lewellen — Mr. Esteppe argued that the Department was "asking us to assume facts that aren't here, namely that [Mr. Lewellen] did this

solely to please the woman." According to Mr. Esteppe, the record contained only "innuendo" and "speculation" that Mr. Lewellen had acted to please Ms. Chelchowski.[4] Mr. Esteppe contended that Mr. Lewellen had acted within the scope of his employment because it was undisputed that, at the time of Mr. Lewellen's tortious conduct, he "was working," had obtained a search and seizure warrant, and "went through the ministerial duties of filling out the probable cause statement and filling out the affidavit and going to [the issuing judge]." In other words, Mr. Esteppe argued, Mr. Lewellen was "doing things that police officers do."

The motions judge took the matter under advisement. Nine months later, having not yet received a ruling, Mr. Esteppe filed a supplement to his motion to call the court's attention to two recently decided cases. Specifically, Mr. Esteppe averred that under *Johnson v. Mayor & City Council of Baltimore*, 233 Md. App. 43, 161 A.3d 95 (2017), (1) the Department "is the responsible 'local government' under the LGTCA when a judgment is rendered against a Baltimore City police officer"; and (2) "[w]hen the [Department] fails to pay a judgment for which it is responsible, the plaintiff may bring an enforcement proceeding to collect from the [Department]." Mr. Esteppe also argued that under *Prince George's County v. Morales*, 230 Md. App. 699, 149 A.3d 741 (2016), Mr. Lewellen's exertion of police authority put his conduct within the scope of his employment as a police officer. The Department filed an opposition to the supplement in which it argued that Mr. Esteppe's reliance on *Johnson II* and *Morales* was misplaced.

In December 2018, the motions court issued a three-page memorandum and order in which it found that "[a]t the time of the tortious conduct, . . . Lewellen was clearly within his scope of employment." The court reasoned:

[4] In its opposition to Mr. Esteppe's motion, the Department cited *Vogel v. Touhey*, 151 Md. App. 682, 718-19, 828 A.2d 268 (2003), for the proposition that "Mr. Esteppe is judicially estopped from contesting any of the facts of this case or asserting any legal position . . . inconsistent" with those "he advanced in the earlier trial, and that were accepted by the trial court and this Court on appeal." [(Footnote in original; original footnote number 6.)]

> > Executing a search warrant to seize an illegal firearm is exactly the type of conduct for which Lewellen was employed. As the search was executed whilst Lewellen was on duty, and in a jurisdiction for which Lewellen had police powers, the conduct occurred in an authorized area. A primary goal of the [Department] in recent years is the seizure of illegal firearms and the arrest of those in possession of those weapons, and therefore the search, however motivated, furthered a purpose of Lewellen's master, the [Department].
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> Indeed, when considering the issue at trial, [the trial judge] similarly concluded:
>
> > And it's undisputed that [Mr. Lewellen] was working. It's undisputed that it was a search and seizure warrant. It's undisputed that he went through the ministerial duties of filling out the probable cause statement, and filling out the Affidavit, and going to [the issuing judge].
>
> Thus, the motions court held, "the [Department] is liable for the judgment held by Esteppe against Lewellen."

Esteppe II, 247 Md. App. at 493-97 (some footnotes omitted).

The Department appealed to this Court, and we reversed. *Id.* at 528. We explained that Esteppe's motion "was more akin to a motion for summary judgment on the question of the Department's liability under the [Local Government Tort Claims Act] to pay the judgment rendered against Mr. Lewellen," and, accordingly, we applied the *de novo* standard of review generally applicable to summary judgment rulings. *Id.* at 497-99. We examined whether there was "a material factual dispute as to whether an employee's actions were taken within the scope of employment." *Id.*

On appeal, we rejected the Department's argument that Lewellen's conduct was outside the scope of his employment as a matter of law based upon its illegal and tortious nature. *Id.* at 521. We disagreed, however, with the motions court's determination that Lewellen was acting within the scope of employment. *Id.* at 524-26. We observed that "the motions court did not identify any evidence in the record that Mr. Lewellen's actions were motivated by a purpose to serve the Department." *Id.* at 523. We further observed that Lewellen had "not identified any such evidence, nor have we found any." *Id.* Indeed, we emphasized that "the only evidence in the record before the motions court regarding Mr. Lewellen's motive indicates that he was acting to further his own interests." *Id.* at 524. After summarizing the evidence in the record, we observed that "[a]t no point during the underlying proceeding did either party identify a motive for Mr. Lewellen's conduct other than his purely personal desire to please Ms. Chelchowski." *Id.* at 526.

We further explained that Esteppe "bore the burden to prove that Mr. Lewellen acted, even in part, to further the Department's interests," and "the record submitted in connection with Mr. Esteppe's motion contain[ed] evidence of only one motive for Mr. Lewellen's actions – a personal desire to please Ms. Chelchowski." *Id.* at 527. We held that "[b]ecause Mr. Esteppe failed to establish, based on undisputed facts in the record before the motions court, that Mr. Lewellen's action were actuated at least in part by a purpose to serve the Department . . . the motions court erred in entering what was, in effect, summary judgment in favor of Mr. Esteppe." *Id.* We, therefore, reversed and remanded for further proceedings. *Id.* at 528.

Because only the grant of Esteppe's motion was before the Court on appeal in *Esteppe II*, we "decline[d] to address the Department's alternative argument that Mr. Esteppe was estopped from arguing that Mr. Lewellen was motivated by a desire to further the Department's interests because of positions Mr. Esteppe had taken previously in the litigation." *Id.* at 527 n.22. We observed that "[i]f the Department raises the issue on remand, the circuit court will have the opportunity to consider it in the first instance."

Following the issuance of our ruling in *Esteppe II*, Esteppe filed a petition for certiorari in the Supreme Court of Maryland (at the time named the Court of Appeals of Maryland),[5] asking for the judgment issued by the circuit court to be reinstated. The Department opposed the petition but also filed a conditional cross-petition, in which the Department requested that summary judgment be entered in the Department's favor because Esteppe should be estopped from reversing the positions that he successfully argued at trial. The Supreme Court granted both petitions.

After summarizing the procedural history of the case, the Supreme Court presented its analysis in the following two paragraphs:

[5] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland and the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland, and any reference to the Court of Special Appeals of Maryland shall be deemed to refer to the Appellate Court of Maryland.").

> Before us, the parties generally reprise the same arguments that they made to the [Appellate Court of Maryland], with only slight variation.[6] We have examined the record in this case and considered carefully the arguments made by Mr. Esteppe and the Police Department. We find the well-researched and well-reasoned opinion of the [Appellate Court] to be unassailable in its analysis and conclusions. That court has correctly applied the law as it relates to the scope of employment for purposes of LGTCA liability in light of our recent decision in [*Baltimore City Police Department v.*] *Potts*, [468 Md. 265 (2020)].[7] This is one of those instances in which there is little profit in restating what has already been well-said by the intermediate appellate court, other than to say that we adopt it as our own. *See, e.g.*, *Kponve v. Allstate Ins. Co.*, 448 Md. 311, 138 A.3d 1259 (2016); *TIG Ins. Co. v. Monongahela Power Co.*, 437 Md. 372, 86 A.3d 1245 (2014); *Sturdivant v. Maryland Department of Health & Mental Hygiene*, 436 Md. 584, 84 A.3d 83 (2014). Instead, we add "an endorsement that removes any doubt as to the standing of that

[6] Mr. Esteppe asserts that the [Appellate Court], in stating that "no new evidence" was presented at the hearing on his motion, overlooked the exhibits submitted with his motion – in particular, materials related to the search warrant Mr. Lewellen obtained with a perjured affidavit. However, with respect to the exhibits related to the search warrant, many, if not all, of those items had been introduced into evidence at the trial or had been the subject of testimony during trial of the tort action. The opinion of the [Appellate Court] thoroughly describes the application for that search warrant, its execution, and the criminal charges against Mr. Esteppe. 247 Md. App. at 488-91, 236 A.3d 808. The remaining exhibits attached to his motion were a copy of the criminal charges brought against him and copies of filings previously made in this case that are already in the record. To the extent that any of these attachments to the motion were not already in the record, Mr. Esteppe does not elaborate why he thinks any of this "new evidence" adds anything to his argument. [(Footnote in original; original footnote number 8.)]

[7] With respect to the Police Department's argument that Mr. Esteppe is estopped from arguing that Mr. Lewellen acted to further the Police Department's interests because of an allegedly inconsistent position taken earlier in this litigation, we agree with the [Appellate Court] that, given the unusual procedural posture of this case, that argument is more appropriately made in the first instance on remand, if the Police Department files its own motion for summary judgment. [(Footnote in original; original footnote number 9.)]

> decision as the law of Maryland." *Sturdivant*, 436 Md. at 590, 84 A.3d 83.
>
> In sum, we agree with the [Appellate Court] that Mr. Esteppe was not entitled to judgment as a matter of law. We further agree that his lack of success on his motion did not necessarily mean that the Police Department – which has not filed a cross-motion of any sort – was so entitled and that remand to the Circuit Court for further proceedings is appropriate.

Esteppe v. Balt. City Police Dep't, 476 Md. 3, 13-14 (2021) (footnotes in original).

Subsequently, Esteppe filed a Complaint for Declaratory Judgment and to Enforce Judgment in the circuit court.[8] In the complaint, Esteppe presented allegations that differed significantly from the allegation he raised in the prior tort litigation. For example, in the declaratory judgment complaint, Esteppe alleged that Lewellen investigated Esteppe because he "suspected that Esteppe may have been involved . . . [in] CDS sales . . . [and] other financial crimes," while in the tort action, Esteppe alleged that Lewellen's statements about Esteppe being "under investigation" were "false statements of material fact" that Lewellen made "knowingly." Similarly, Esteppe alleged in the declaratory judgment complaint that "[i]n applying for and executing the warrant, Lewellen intended to further the Department's business, to win, to detect CDS crimes," while in the prior litigation Esteppe alleged that Lewellen's behavior was done "for improper, unjust, and abusive purposes."

[8] Esteppe filed the complaint in this separately-captioned case after the circuit court ruled that Esteppe's efforts to obtain additional discovery in the underlying civil case were improper and ordered Esteppe to file an appropriate pleading.

The Department moved for summary judgment, asserting that Esteppe's claim was barred by judicial estoppel. Following a hearing on March 30, 2022, the circuit court granted the Department's motion for summary judgment, finding that judicial estoppel applied and barred Esteppe from taking "inconsistent positions in an attempt to seek deeper pockets." This appeal followed.

STANDARD OF REVIEW

The entry of summary judgment is governed by Maryland Rule 2-501, which provides:

> The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

Md. Rule 2-501(f).

The Supreme Court has described the standard of review to be applied by appellate courts reviewing summary judgment determinations as follows:

> On review of an order granting summary judgment, our analysis "begins with the determination [of] whether a genuine dispute of material fact exists; only in the absence of such a dispute will we review questions of law." *D'Aoust v. Diamond*, 424 Md. 549, 574, 36 A.3d 941, 955 (2012) (quoting *Appiah v. Hall*, 416 Md. 533, 546, 7 A.3d 536, 544 (2010)); *O'Connor v. Balt. Cnty.*, 382 Md. 102, 110, 854 A.2d 1191, 1196 (2004). If no genuine dispute of material fact exists, this Court determines "whether the Circuit Court correctly entered summary judgment as a matter of law." *Anderson v. Council of Unit Owners of the Gables on Tuckerman Condo.*, 404 Md. 560, 571, 948 A.2d 11, 18 (2008) (citations omitted).
>
> Thus, "[t]he standard of review of a trial court's grant of a motion for summary judgment on the law is *de novo*, that is,

> whether the trial court's legal conclusions were legally correct." *D'Aoust*, 424 Md. at 574, 36 A.3d at 955.

Koste v. Town of Oxford, 431 Md. 14, 24-25 (2013).

DISCUSSION

In this appeal, we address Esteppe's assertion that the circuit court erred by granting the Department's motion for summary judgment on the grounds that judicial estoppel barred Esteppe's claim. As we shall explain, we agree with the circuit court that judicial estoppel precluded Esteppe from asserting that Lewellen was personally motivated when engaging in the misconduct at issue, and, accordingly, the circuit court did not err in entering summary judgment in favor of the Department.

The doctrine of judicial estoppel protects "the integrity of the judicial system from one party who is attempting to gain an unfair advantage over another party by manipulating the court system." *Donlon v. Montgomery Cnty. Pub. Schools*, 460 Md. 62, 105 (2018) (quoting *Dashiell v. Meeks*, 396 Md. 149, 171 (2006). In *Meeks v. Dashiell*, 166 Md. App. 415, 436 (2006), *aff'd*, 396 Md. 149 (2006), we described the history of the doctrine of judicial estoppel in Maryland as follows:

> Although the phrase "judicial estoppel" was first used by the [Supreme Court] in 1966, in *Messall v. Merlands Club, Inc.*, 244 Md. 18, 29, 222 A.2d 627 (1966), the doctrine that precludes a party from seeking an unfair advantage in the courts by asserting a position contrary to one previously taken in an earlier judicial proceeding was recognized by the [Supreme Court] at least as early as 1877 in *Edes v. Garey*, 46 Md. 24, 41 (1877). In *Edes*, the Court noted that the plaintiffs had taken a position in prior judicial proceedings that was directly contrary to the claim they were seeking to assert against sureties on a bond. The Court was "of opinion that

> under the facts and circumstances disclosed by the record, the [plaintiffs] are precluded from recovering against the . . . sureties . . . ." *Id.* at 40. After describing the inconsistent claims, the Court stated, *id.* at 41:
>
> This is certainly claiming at one time in one right, and then at another time setting up a claim not only inconsistent with, but in fact utterly denying the first. "A man shall not be allowed," says the Court of Exchequer, in *Cave v. Mills*, 7 H. & W. 927 [(1862)], "to blow hot and cold, to claim at one time and deny at another."

166 Md. App. at 436. In the intervening 146 years since the Supreme Court's decision in *Edes v. Garey*, the Court has addressed judicial estoppel on several occasions. *See, e.g.*, *Dashiell, supra*, 396 Md. at 170; *Underwood-Gary v. Mathews*, 366 Md. 660, 667 n.6 (2001); *WinMark Ltd. P'ship v. Miles & Stockbridge*, 345 Md. 614, 620 (1997); *Van Royen v. Lacey*, 266 Md. 649, 651-5 (1972); *Stone v. Stone*, 230 Md. 248, 253 (1962); *Kramer v. Globe Brewing Co.*, 175 Md. 461, 463 (1938); *Hall v. McCann*, 51 Md. 345, 351 (1879).

In order for judicial estoppel to apply to foreclose a litigant's argument, the following three circumstances must exist:

> (1) one of the parties takes a position that is inconsistent with a position it took in previous litigation; (2) the previous inconsistent position was accepted by a court; and (3) the party who is maintaining the inconsistent positions must have intentionally misled the court in order to gain an unfair advantage.

Donlon, *supra*, 460 Md. at 104 (quoting *Bank of New York Mellon v. Georg*, 456 Md. 616, 624-28 (2017) (cleaned up) (quoting *Dashiell, supra*, 396 Md. at 170). The circuit court

determined that all three of these circumstances were satisfied in this case. Esteppe asserts that none of them are satisfied. As we shall explain, we agree with the circuit court.

I. Inconsistent Position

The first requirement that must be satisfied for judicial estoppel to apply is that one of the parties must take a position that is inconsistent with a position that party took in previous litigation. Esteppe contends that his position regarding Lewellen's motive in the civil tort case is not inconsistent with his position in the declaratory judgment case. In the current case, Esteppe contends that Lewellen's motive in submitting a perjured warrant affidavit and conducting a search of Esteppe's residence was at least, in part, professional. In other words, Esteppe concedes that Lewellen was personally motivated but contends that Lewellen also was partially professionally motivated, and that this position is not inconsistent with the position he took in the civil tort case. The circuit court rejected this assertion, and so do we.

Our review of the record reflects that in the civil tort case resulting in a judgment against Lewellen, Esteppe consistently took the position that Lewellen was motivated *only* by his personal interests. Esteppe maintains that trial counsel's comments regarding Lewellen's motive in the civil case were "no more than a guess about what was going through Lewellen's mind throughout his course of conduct," and asserts that these types of "theories or hyperbole in the heat of argument are not the type of statements to which estoppel has been applied." Esteppe characterizes trial counsel's comments as a "few isolated statements in opening and closing."

We disagree with Esteppe's characterization of the position taken by trial counsel in the civil case. As we explained in *Esteppe II*, "[d]uring his closing argument [in the civil case], Mr. Esteppe's counsel argued that Mr. Lewellen's 'conduct was intentional' and *his purpose singular*." 247 Md. App. at 492 (emphasis supplied). We observed that Esteppe's counsel argued the following:

> As a matter of fact, that was why he did it. He knew, he knew that this woman -- who he knew, he was friends with -- had broken up with David Esteppe, and . . . in fact, what maybe she knew or didn't know at that time was that Lewellen was trying to make headway with her. So, for all of the wrong motives, he was using his power -- he was abusing his authority -- to try to cause pain, which he succeeded in doing to someone else . . . . [H]is real motive was the intentional infliction of emotional distress.
>
> * * *
>
> Mr. Lewellen[ ] entered into an illegal agreement with this woman who was the former girlfriend of Mr. Esteppe -- and whom he was trying to court to become his girlfriend . . . .
>
> He wanted to get in tight with her -- he, through his agreement with her, led to conduct on his part that he was so, so trying to impress her that he was willing to put his career on the line. And in fact, he did put his career on the line, and destroyed it by going to a judge and lying under oath . . . .

Id. In the context of his argument that Lewellen had entered into a conspiracy with Brandi Chelchowski, trial counsel expressly argued that Lewellen and Chelchowski "entered an agreement to[,] in essence, destroy Mr. Esteppe."

When determining that the circuit court had erred by entering summary judgment in favor of Esteppe in *Esteppe II*, we emphasized that "the only evidence in the record before the motions court regarding Mr. Lewellen's motive indicates that he was acting to

further his own interests." *Id.* at 524. We explained that trial counsel's "characterizations of the evidence throughout the underlying tort action are to the same effect," i.e., consistent with a purely personal motive. *Id.* at 525. We observed that Esteppe's "attorneys successfully argued" as follows:

> - "And we submit, Your Honor, that this conduct of the Defendant, Mr. Lewellen, was . . . motivated by his desire to please and remain in a relationship with [Ms.] Chelchowski."
>
> - "[S]ubsequent to Mr. Esteppe breaking up with Ms. Chelchowski, she got involved in a relationship with the Defendant, Adam Lewellen. And then she encouraged him – as we understand it – to basically bring down Mr. Esteppe. So the motivation was to please her, and not to get Mr. Esteppe."
>
> - "[H]e knew that this woman – who he knew, he was friends with – had broken up with David Esteppe, and ... in fact, what maybe she knew or didn't know at that time was that Lewellen was trying to make headway with her. So, for all of the wrong motives, he was using his power – he was abusing his authority – to try to cause pain, which he succeeded in doing to someone else. . . . [His] real motive was the intentional infliction of emotional distress."
>
> - "Mr. Lewellen[ ] entered into an illegal agreement with this woman who was the former girlfriend of Mr. Esteppe – and whom he was trying to court to become his girlfriend. . . .
>
>   "[Mr.] Lewellen and [Ms. Chelchowski] entered an agreement to in essence, destroy Mr. Esteppe. And based upon that agreement – which he was all too willing to do, because he wanted to get in tight with her – he, through his agreement with her, led to conduct on his part that he was so, so trying to impress her that he was willing to put his career on the line. And in fact, he did put his career on the line, and destroyed it by going to a judge and lying under oath and obtaining a Warrant and going to Mr. Esteppe's house."

- "Imagine going outside this courthouse, and running into somebody, and ask what their reaction was to a Baltimore City Police Officer – who was trying to get in good with a girl to become his girlfriend – and he did all this stuff. . . . I think the average person on the street would be outraged that a Baltimore City Police Officer could get away with that."

Id. at 525-26. We further emphasized that "at no point during the underlying proceeding did either party identify a motive for Mr. Lewellen's conduct other than his purely personal desire to please Ms. Chelchowski." *Id.* at 526. We held that the record "contain[ed] evidence of only one motive for Mr. Lewellen's actions -- a personal desire to please Ms. Chelchowski" and that "Mr. Esteppe failed to establish, based on undisputed facts in the record before the motions court, that Mr. Lewellen's actions were actuated at least in part by a purpose to serve the Department." *Id.* at 527.

We reject Esteppe's contention that his assertions regarding Lewellen's motive in the civil case are reconcilable with his position in the case *sub judice*. Although it is possible for an officer to engage in misconduct with mixed motives, the record reflects that this is not the position Esteppe took in the civil case. As we explained in detail in *Esteppe II* and summarized above, the record in the civil case reflects that Esteppe consistently and repeatedly advanced only a purely personal motive for Lewellen's actions. Furthermore, we reject Esteppe's assertion that the comments regarding Lewellen's motive in the civil case were only hyperbole or theories. The explanation for why Lewellen perjured himself was not a tangential matter in the civil case. Rather, it was a central pillar of Esteppe's claim of civil conspiracy. Accordingly, in our view, the first circumstance that must be

satisfied in order for judicial estoppel to apply -- that one of the parties takes a position that is inconsistent with a position it took in previous litigation -- is easily satisfied in this case.

II. Inconsistent Position Accepted by a Court

The second circumstance that must be established for judicial estoppel to preclude an argument is that the previous inconsistent position was accepted by a court. Esteppe asserts that the trial court did not make a specific finding regarding Lewellen's motive in the civil case, and, therefore, cannot be said to have accepted Esteppe's prior assertion that Lewellen was personally motivated. The Department contends that by finding Lewellen liable for civil conspiracy, the circuit court accepted the factual narrative advanced by Esteppe, including the assertion that Lewellen acted in concert with Chelchowski because he was motivated by his affection for her. We agree with the Department.

In the complaint filed in the civil case, Esteppe specifically alleged that after he ended a romantic relationship with Chelchowski, she threatened to "have friends in law enforcement bring charges against [Esteppe] for improper, unjust, and abusive purposes." Esteppe further alleged that Lewellen "entered an agreement with Ms. Chelchowski to harass, illegally arrest, and/or illegally obtain a search warrant for [Esteppe's] home." As we explained *supra* in Part I of this opinion, the record is replete with examples of Esteppe's trial counsel arguing that Esteppe's motive was to please Chelchowski.

When ruling in Esteppe's favor as to the civil conspiracy claim, the trial judge expressly commented that Lewellen and Esteppe did not know each other, that Esteppe "[d]id not know who [Lewellen] was," and that he "[d]id not have a relationship with him"

or "know anything about him." The circuit court found that the reason that "Lewellen would lie [and] misrepresent facts in a [s]earch [w]arrant in order to go into a stranger's home" was "a link, a chain that attached Officer Lewellen to Mr. Esteppe. And her name is Brand[i Chelchowski]."

Although the trial court did not make an explicit factual finding regarding Lewellen's motive, the court expressly found Lewellen liable for a civil conspiracy with Chelchowski to harm Esteppe. The only motive advanced by Esteppe at trial was the singular personal motive to conspire with Chelchowski in order to impress her by getting revenge on her ex-boyfriend. By finding Lewellen liable for conspiracy, the circuit court accepted the positions advanced by Esteppe at trial. Furthermore, the fact that Lewellen entered into the conspiracy out of his personal desire to please Chelchowski was the *only* factual narrative presented at trial. The trial court's verdict as to the conspiracy cause of action reflects an acceptance of the factual narrative advanced by Esteppe at trial.

Esteppe emphasizes that motive itself is not an element of civil conspiracy, but judicial estoppel only requires that inconsistent positions be accepted by a court and does not require that the positions be elements of a particular offense or claim. *Donlon, supra*, 460 Md. at 104 ("Judicial estoppel is a principle that precludes a party from taking *a position* in a subsequent action inconsistent with *a position taken by him or her in a previous action*.") (internal quotation and citation omitted). We agree with the Department that by finding in Esteppe's favor on the civil conspiracy claim, the circuit court necessarily accepted Esteppe's position regarding Lewellen's motive. Lewellen had no relationship

with Esteppe and no reason to "lie [and] misrepresent facts in a [s]earch [w]arrant in order to go into [Esteppe's] home" other than to please and/or curry favor with Chelchowski. The conspiracy alleged by Esteppe at trial had the singular motive and purpose of obtaining revenge on Chelchowski's ex-boyfriend, and the only reason advanced by Esteppe below for Lewellen to enter into such an agreement was his personal desire to impress Chelchowski. The circuit court accepted Esteppe's position, thereby finding Lewellen liable for conspiracy. Accordingly, we reject Esteppe's contention that his prior inconsistent position was somehow not accepted by the court.

III. Intent to Mislead

The third and final circumstance that must be satisfied for judicial estoppel to apply is that the party who is maintaining the inconsistent positions must have intentionally misled the court in order to gain an unfair advantage. The circuit court determined that Esteppe was attempting to mislead the court, explaining as follows:

> For [Esteppe] to now change his argument would allow a party to take inconsistent positions in an attempt to seek deeper pockets. The [c]ourt finds that this shifting does, in fact, and is for the purpose of misleading the court by misleading the court to believe that he has other motivation than what was originally presented to the court in earlier litigation.

Esteppe contends that this conclusion was incorrect and that there was no attempt to mislead the court. We are not persuaded.

As we explained *supra*, Esteppe consistently argued in the prior litigation that Lewellen's sole motive for his misconduct was his personal desire to please and/or curry favor with Chelchowski. By now arguing that Lewellen was, at least in part, professionally

motivated, Esteppe seeks to shift gears and gain the unfair advantage of recovering against the Department – an entity with deeper pockets than Lewellen individually. This is not a circumstance in which a litigant has taken inconsistent positions on a minor issue or one that has little likelihood of affecting the outcome of a case. Rather, whether Lewellen was, at least in part, professionally motivated when he engaged in the misconduct central to this case, is wholly determinative of Esteppe's declaratory judgment action. We agree with the Department that arguing to one judge that the circumstantial evidence presented at trial leads to the inference of a specific nefarious purpose, and telling another judge that his prior position was "nothing but innuendo" and "speculation" constitutes an attempt to deceive.

Furthermore, we disagree with Esteppe that the Department somehow conceded this element at the summary judgment hearing. At the hearing, counsel for the Department described the doctrine of judicial estoppel, arguing, in part, that it "precludes [a party] from taking any position to -- that detracts from the integrity of the judicial system by attempting to gain an unfair advantage by, the case law says, manipulating the court system." Counsel continued as follows:

> *And I'm not arguing that is what the Plaintiff is doing*. Obviously, he's advocating for his client here; however, by taking one action and stating that it was solely motivated by this personal desire that – and the elements and the quotes that were given by Plaintiff's counsel were that Lewellen's conduct was motivated by his desire to please and remain in a relationship with Chelchowski, that the motivation was to please her and not to get Esteppe, that his real motive was the intentional infliction of emotional distress.

Esteppe asserts that the italicized language above reflects a concession by the Department that Esteppe was not attempting to mislead the court. It is somewhat unclear what the antecedent of the word "that" is in the Department's comment that it was "not arguing *that* is what the Plaintiff is doing," but the Department asserts on appeal that the cited language reflects an assertion that Esteppe's attempt to have his current position adopted is misleading, and not that Esteppe's position in the civil litigation was misleading. Furthermore, in rebuttal argument, the Department made clear that it was arguing that Esteppe was attempting to intentionally mislead the court and that it had not conceded the matter, arguing as follows:

> In terms of the prong of intentional misleading, Your Honor, as shown in the record and as I've discussed, there's at least six separate instances where Plaintiff's counsel specifically stated that the motivation was personal yet in the 2016 motions hearing where they first attempted to get indemnification by BPD, same counsel said that there was "nothing but innuendo or speculation that there was personal motivation."
>
> I mean, that is a direct opposition to there was personal motivation and then in an attempt to get [the Department] to pay for it, there's nothing but speculation and innuendo that it was personal motivation.

We, therefore, reject Esteppe's contention that the Department conceded this issue before the circuit court.[9]

[9] Indeed, during closing argument, counsel for Esteppe waived any argument that the matter was conceded, commenting, "[y]ou know, I think I could make the argument almost that [counsel for the Department], you know, basically gave up prong three just now based on language. That's not what I'm saying, Your Honor. I'm not going to make that argument."

We agree with the circuit court that consistently asserting that Lewellen had a purely personal motive in the civil litigation, while asserting that he had a professional motive in the declaratory judgment action, reflects an intent to mislead the court in order to seek deeper pockets to satisfy a judgment. Accordingly, we agree that judicial estoppel applied in this matter and that Esteppe is estopped from advancing an argument that Lewellen was, at least in part, professionally motivated. Because employers can only be held liable for their employees' tortious acts when the torts are motivated "at least in part by a purpose to serve the [employer]," *Sawyer v. Humphries*, 322 Md. 247, 255 (1991), the application of judicial estoppel is dispositive of Esteppe's declaratory judgment action. We, therefore, affirm the circuit court's entry of summary judgment in favor of the Department.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.