Circuit Court for Baltimore City
Case No.: 24-C-21-000919

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1323

September Term, 2021

DONNA ROCHE

v.

MAYOR & CITY COUNCIL OF BALTIMORE, ET AL.

Kehoe, C.,**
Berger,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: September 17, 2024

** Kehoe, Christopher, now retired, participated in the hearing of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

Ms. Roche, individually and as the personal representative of the Estate of Gökhan Donald Öztaş, filed a wrongful death and survival action against the Mayor and City Council of Baltimore (the "City"), the Baltimore City Police Department (the "Department"), and William Berardi, an officer of the Department.[1] The defendants filed a motion to dismiss the action based upon several legal theories that we will presently discuss. The Circuit Court for Baltimore City, the Honorable Kendra Y. Ausby presiding, granted the motion and subsequently denied Ms. Roche's motion for reconsideration. Ms. Roche has appealed and presents one issue, which we have divided into two for purposes of analysis:

> 1. Did the circuit court err when it granted appellees' motion to dismiss the complaint?
>
> 2. Did the court abuse its discretion in denying appellant's motion for reconsideration?[2]

We will affirm the judgment of the circuit court.

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[1] Justice Holmes observed more than a century ago that "[t]he language of judicial decision is mainly the language of logic." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897). The dispassionate language of this opinion should not obscure our sympathy for Donna Roche and others affected by the tragic death of Mr. Öztaş.

[2] Ms. Roche frames the issues as follows:

> Did the trial court commit reversible error in granting the motion to dismiss as to defendants Officer Berardi and Baltimore PD, and denying Ms. Roche's motion for reconsideration as to Officer Berardi and Baltimore PD, in light of the clear purpose of MD. CTS. & JUD. PRO. CODE ANN. § 5-301, et seq. (known as "the Local Government Tort Claims Act"), which affords a remedy to individuals harmed by the ministerial acts of employees of Local Governments?

BACKGROUND

The Proceedings in the Circuit Court

The operative complaint is appellant's amended complaint. It alleged the following:

> On or about March 30, 2018, Gökhan Donald Öztaş ("Mr. Öztaş) was in a public area in Baltimore City, Maryland, when he was approached by Officer [William] Berardi, [a member of the Department,] who was investigating a complaint by the proprietor of a local bar/restaurant that someone was threatening customers and employees of the establishment.
>
> Officer Berardi recognized Mr. Öztaş from previous encounters with him. Officer Berardi escorted Mr. Öztaş back to the patrol car, conducted a field interview, and ran a warrant check. While awaiting a response from the warrant check, Mr. Öztaş told Officer Berardi repeatedly that he would kill himself if he had to return to jail.
>
> After the warrant check came back that Mr. Öztaş in fact was wanted, and despite being alone and without backup at the time, Officer Berardi, instead of placing Mr. Öztaş in his patrol car or otherwise restraining him, asked Mr. Öztaş to have a seat on a nearby street curb.
>
> After briefly sitting down on the curb, Mr. Öztaş stood up, and ran away from Officer Berardi; Mr. Öztaş ultimately arrived in the vicinity of Brown's Wharf along the Baltimore Harbor, where he jumped into the harbor, suffered hypothermia because of the greatly reduced temperature of the water at that time, and drowned. Mr. Öztaş' body was not discovered in the harbor until April 12, 2018. At the time, . . . Officer Berardi knew or reasonably believed that the temperature of the water would cause hypothermia to anyone entering the water without protective gear.

Based on this factual premise, the amended complaint asserted that: (1) the Department, the City, and Officer Berardi owed a duty to Mr. Öztaş to protect him from harm caused by either himself or others; (2) Officer Berardi knew or should have known that Mr. Öztaş posed an immediate risk of harm to himself or others; and (3) Officer

Berardi was or should have been trained to respond appropriately "when facing a circumstance in which that risk exi[s]ted."

The amended complaint further alleged that Officer Berardi was negligent because he: (1) failed to assess and manage properly the circumstances presented by his encounter with Mr. Öztaş; (2) failed to respond to his training; (3) failed "to carry out [the Department's and/or the City's] objective of protecting others, including protecting others from themselves"; and (4) was "otherwise negligent, reckless, and careless in his interaction with Mr. Öztaş, despite either knowing or having reason to know of the seriousness of Mr. Öztaş' threat to harm himself instead of being taken into the custody of the police." The amended complaint asserted that Officer Berardi's breaches of duty were the direct and proximate causes of Mr. Öztaş' conscious pain, suffering, and ultimate death.

Based upon these premises, and for herself and in her capacity as the personal representative of Mr. Öztaş's estate, Ms. Roche pled four causes of action: "Negligence–Respondeat Superior" against the City and the Department (Count One); "Negligent Training, Retention, and/or Supervision" against the City and the Department (Count Two); "Negligence" against Officer Berardi (Count Three); and a wrongful death claim against all of the defendants based upon the same allegations (Count Four).

The City, the Department, and Officer Berardi filed a joint motion to dismiss the amended complaint. They presented the following contentions:

First, the City was not a proper party to the action because the Department was not an agency of the City.[3] The City therefore could not be vicariously liable for the acts or omissions of the Department as a matter of law. The appellees pointed out that both the City and the Department are classified as local governmental units pursuant to the Local Government Tort Claims Act ("LGTCA").[4] They asserted that as a member of the Department, Officer Berardi was a public official for purposes of the LGTCA,[5] and that he was acting in a discretionary capacity within the scope of his official duties in his interactions with Mr. Öztaş. Therefore, as long his actions were not malicious or grossly negligent, Officer Berardi was entitled to assert qualified immunity.

Second, Ms. Roche's claims against the Department failed as a matter of law because the Department is protected by common law sovereign immunity.

[3] At the time of Mr. Öztaş's death, the Baltimore City Police Department was a State agency. *See, e.g., Esteppe v. Baltimore City Police Dep't*, 476 Md. 3, 8 n.4 (2021); *Mayor & City Council of Baltimore v. Clark*, 404 Md. 13, 23–27 (2008); *Clea v. Mayor & City Council of Baltimore*, 312 Md. 662, 669–70 (1988).

In 2021, the General Assembly enacted legislation to authorize the City to amend its charter to convert the Department to an agency of the City. The City did so and the transfer became effective on January 1, 2023. *See Matter of Gaff*, No. 1993, Sept. Term, 2021, 2023 WL 1987853, at *2 n.3 (filed February 14, 2023), *cert. denied*, 483 Md. 578 (2023).

[4] The LGTCA's definition of "local government" includes both the City and the Department. *See* Md. Code, Cts. & Jud. Proc. § 5-301(d)(4) and (21).

[5] *See* Cts. & Jud. Proc. § 5-301(c)(1) (defining "employee" as "any person who was employed by a local government at the time of the act or omission giving rise to potential liability against that person").

Third, Ms. Roche's claims against Officer Berardi failed because any breach of duty on his part arose during the course of his attempt to place Mr. Öztaş under arrest. The appellees asserted that, as a matter of law, a police officer's decision to effect an arrest is a discretionary one and officers are entitled to public official immunity for any negligent acts committed during the course of their duties. The appellees conceded that public officials are not entitled to assert common law public official immunity if they act maliciously or with gross negligence. However, the appellees pointed out that the terms "malice" and "gross negligence" do not appear in the amended complaint and that the amended complaint contains no allegations that support a conclusion that Officer Berardi acted maliciously or was grossly negligent in his interactions with Mr. Öztaş.

Ms. Roche filed a written response to the motion.[6] After summarizing the relevant factual allegations in the amended complaint that characterize Officer Berardi's handling of the arrest of Mr. Öztaş as negligent, she asserted:

> It is improper at this time to address whether the conduct of Officer Berardi was grossly negligent, as it is a question for a jury to decide. The Plaintiffs have stated beyond merely parroting "gross" in their Complaint, by enumerating a list of actions Defendant Officer Berardi committed that could be considered grossly negligent.

[6] Ms. Roche's memorandum cites to the allegations in her original complaint, and not to the allegations in the amended complaint, which was the subject of the appellees' motion to dismiss. Additionally, her memorandum characterizes Officer Berardi's conduct as "negligent acts that caused a motor vehicle collision." These problems are not fatal. At least as to the issues raised in this appeal, the factual allegations in the amended complaint are substantively identical to those in the original complaint. While the reference to a motor vehicle accident is puzzling, Ms. Roche does not otherwise assert that Mr. Öztaş died in such a mishap.

> By viewing the allegations set forth as true, the claims asserted by the Plaintiffs do grant them relief. If the Plaintiffs establish and the trier of fact determines that Officer Berardi was negligent while acting within the scope of employment, BPD and the City of Baltimore will be liable to pay for any judgment awarded against Officer Berardi regardless of sovereign immunity. If the Plaintiffs establish and the trier of fact determines that Officer Berardi was acting grossly negligent will [sic] in the furtherance of his employment and judgment was entered against him, BPD and the City of Baltimore may be liable to pay for said judgment. If the Plaintiffs establish and the trier of fact determines that Officer Berardi was acting as an individual and outside the scope of his employment while committing the alleged tortious act, then Officer Berardi is not protected under any such immunity for his tortious acts as an individual. Thus, Plaintiffs have properly named the Parties involved and alleged sufficient operative facts that if true afford the Plaintiffs relief. It would be premature at this juncture to dismiss the BPD and the City of Baltimore as Defendants.

The circuit court held a hearing on the motion. Each party presented paraphrased versions of the contentions that we have just described, and Ms. Roche additionally asserted that, based on the allegations in the amended complaint, she was entitled to "explore gross negligence" through discovery. The appellees disagreed, stating that:

> There is no claim for gross negligence, there are no allegations to support an inference of gross negligence and the words malice or gross negligence are entirely omitted from the Complaint.

The court granted the motion to dismiss. First, the court agreed with the parties that the City was not a proper party to the action. As to Officer Berardi, the court noted he was "protected by immunity in the absence of malice and gross negligence and in this case those things are simply not pled." (Cleaned up.) The court cited *Beall v. Holloway-Johnson*, 446 Md. 48, 64 (2016), for the proposition that "a legally sufficient case of ordinary negligence will frequently be enough to create a jury question of whether

negligence was or was not gross."[7] However, the court added that *Beall v. Holloway-Johnson*

> is not saying . . . [that] in every case you just say . . . we have some facts that might show negligence, therefore, we get to go to a jury to see if we can convince the jury that it is gross. [Y]ou have to actually have some facts to support gross negligence but you also have to plead it. . . . I just know that in this case, it is absolutely not pled nor [are] there any facts [alleged in the amended complaint that are sufficient to] reach a jury on the issue of gross negligence. It's just not pled that way and . . . it is required to be pled that way[.]

[7] In *Stracke v. Estate of Butler*, the Court narrowed the scope of the Court's analysis in *Beall*:

> In *Beall*, we considered, *inter alia*, whether there was sufficient evidence to support a finding of gross negligence against a police officer whose cruiser collided with a fleeing motorcyclist during a high-speed chase, and which resulted in the death of the motorist. We reiterated that a claim of gross negligence must be supported by sufficient evidence that the defendant acted with wanton or reckless disregard for the safety of others. Even given this objectively higher threshold assigned to proving gross negligence, our opinion in *Beall* morphed the distinctions between simple and gross negligence by holding that a legally sufficient case of ordinary negligence will frequently be enough to create a jury question of whether such negligence was or was not gross.
>
> We decline to further muddy this already unclear area of law. *If in almost all instances where a plaintiff can prove negligence, and the case is submitted to the jury to consider gross negligence, then many first responders will be stripped of the protective shield that the immunity was intended to provide, forcing them to go through the entire litigation process when there is only evidence of simple negligence*. This result runs contrary to the heightened threshold of gross negligence we have articulated[.]

465 Md. 407, 421–22 (2019) (cleaned up and emphasis added).

Based on these conclusions, the court granted the motion to dismiss. Ms. Roche filed a motion for reconsideration, which the court denied. She then filed a timely notice of appeal.

THE PARTIES' APPELLATE CONTENTIONS

In her brief, Ms. Roche states:

> A police officer, acting in his capacity as an employee of the police department, is a "public official," for purposes of claiming either common law public official immunity or immunity under [Cts. & Jud. Proc.] § 5-507. That immunity, however, applies only when [three] circumstances exist simultaneously: (1) the actions were performed by a public official; (2) the individual's actions were not malicious; and[] (3) the actions were discretionary, rather than ministerial.
>
> In the instant litigation, Officer Berardi argued to the trial court that, as a public official, he was entitled to immunity, and that because he was acting within the scope of his duties as a BPD officer at the time of the incident, Officer Berardi was performing a discretionary function. Using that argument as a springboard, the BPD then asserted that, because Officer Berardi was immune, it should not remain in the case because it cannot [b]e held liable for an act or omission for which Officer Berardi enjoys immunity. Ms. Roche respectfully submits, however, that Officer Berardi, at the stage of the litigation when the trial court dismissed the action against him, is not entitled to the qualified immunity provided to public officials as a matter of law, because there is a question of whether his actions, at the relevant times, were discretionary as opposed to ministerial.

(Cleaned up.)

Additionally, and relying primarily on *Bailey v. City of Annapolis*, 252 Md. App. 83 (2021), Ms. Roche contends that the circuit court erred because it dismissed her case "before [she had an] opportunity to discover evidence for the trial court even to consider

whether Officer Berardi's actions were ministerial in nature, or discretionary." She states that the amended complaint

> asserted that Officer Berardi was negligent in failing to respond to Mr. Öztaş' threat, in contravention of Officer Berardi's training and BPD's objectives, and that Mr. Öztaş' death was the direct and proximate result of Officer[] Berardi's negligence. Under the reasoning of *Bailey*, instead of dismissing the action, the trial court should have denied same, and allowed discovery to proceed, so that the issue of Officer Berardi's actions as discretionary or ministerial could be explored.

Furthermore,

> the determination whether a public official's act is ministerial or discretionary is dependent on the circumstances, as well as whether the official is allowed to act independently of the judgment or conscience of others. Once Mr. Öztaş announced his intent to kill himself rather than return to jail, whether Officer Berardi was constrained to respond according to dictated procedures or protocols, instead of making a personal, independent, decision to allow Mr. Öztaş essentially to roam freely while Officer Berardi performed a warrant check, is a question of fact.

(Citation to the record omitted.)

In response, the appellees argue that the circuit court's judgment should be affirmed for three reasons:

First, appellees contend that Ms. Roche's primary appellate contention, namely that Officer Berardi's actions were ministerial and not discretionary, is not preserved for appellate review because she did not present it to the circuit court. The appellees are correct that Ms. Roche did not raise the issue. But the appellees certainly argued to the circuit court that Officer Berardi was acting in a discretionary and not a ministerial capacity. Her appellate contention is properly before us.

Second, the appellees assert that the Department "has sovereign immunity and Officer Berardi has public official immunity[,]" and that Ms. Roche's amended complaint "alleged no facts that could have rendered the duties that Officer Berardi was performing non-discretionary." In support of their position, they point to *Houghton v. Forrest*, 412 Md. 578, 585 (2010) ("[T]here is no question that Houghton's arrest of Forrest was a discretionary act, and not a ministerial one: we have long held that the word 'discretion' denotes freedom to act according to one's judgment in the absence of a hard and fast rule." (cleaned up))[8]; and *Bailey*, 252 Md. App. at 113 ("[A] police officer's determination regarding what degree of action or investigation might be necessary in responding to a particular situation is a paradigmatic case of an action involving the exercise of personal judgment in determining the manner in which the State's police power will be utilized." (cleaned up)).

Finally, they address Ms. Roche's contention that there were Departmental "procedures or protocols" that were triggered when Mr. Öztaş stated that he would commit suicide before returning to jail. The appellees correctly point out that there is no such allegation in the amended complaint.

A. The Legal Context

Before we address the parties' appellate contentions, we will summarize the relevant statutory provisions and common law doctrines that form the framework for our analysis.

[8] *Houghton* involved an arrest made by an officer of the Department. 412 Md. at 583.

Our starting point is Judge Deborah S. Eyler's thorough exploration of these topics in *Baltimore Police Department v. Cherkes*, 140 Md. App. 282, 302–31 (2001). We will summarize the salient points.

At the time of Mr. Öztaş' death, the Department was an agency of the State and, as such, "enjoys the common law sovereign immunity from tort liability of a State agency." *Id.* at 313. Although the Local Government Tort Claims Act was amended in 1997 to include the City and the Department as local government units for purposes of the statute, both the City and the Department retained their status as State agencies for the purpose of common law governmental immunity. *Id.* at 316. The purpose of the 1997 amendment was "to extend the protections of the LGTCA]to officers of the [Department]." *Id.* at 322 (cleaned up). Moreover, "the LGTCA waives only those immunities the [local] government [unit] could have in an action raised against its employee." *Id.* at 320 (emphasis omitted) (quoting *Khawaja v. City of Rockville*, 89 Md. App. 314, 325 (1991)). Judge Eyler explained the effect of the 1997 amendments to the LGTCA:

> The sole waiver of immunity provision in the LGTCA is the waiver of the "governmental or sovereign immunity to avoid the duty to defend or indemnify an employee." CJ § 5-303(b) (2). . . . *In all other circumstances, however, the LGTCA leaves the preexisting common law immunities of the entities designated local governments unaffected*. CJ § 5-303(d)–(e). By adding the BCPD to the list of local governments in the LGTCA, therefore, the General Assembly waived the BCPD's common law State sovereign immunity only to the extent of the statutory duties to defend and indemnify. *Otherwise, the BCPD's State sovereign immunity remained intact.*

Cherkes, 140 Md. App. at 323 (emphasis added).

Police officers, including members of the Department, are "public officials for purposes of the common law public official immunity[.]" *Smith v. Danielczyk*, 400 Md. 98, 114 n.8 (2007). The doctrine of common law official immunity protects officials (whether State or local) from liability when they engage in discretionary, as opposed to ministerial, functions. *Bailey*, 252 Md. App. at 111; *Howard v. Crumlin*, 239 Md. App. 515, 526 (2018). "Public official immunity protects public officials—including police officers—who perform negligent acts during the course of their discretionary, as opposed to ministerial, duties." *Howard*, 239 Md. App. at 526 (citing *Cooper v. Rodriguez*, 443 Md. 680, 713 (2015)). In the context of law enforcement, discretionary functions are those that involve an exercise of a government official's "personal judgment that includes, to more than a minor degree, the manner in which the police power of the State should be utilized." *Id.* at 527 (cleaned up). When police officers are discharging "their law enforcement functions[,] they are clearly acting in a discretionary capacity." *Cherkes*, 140 Md. App. at 329 (cleaned up). When exercising their authority to arrest, police officers are acting in a discretionary capacity. *See, e.g., Houghton*, 412 Md. at 585 ("[T]here is no question that Houghton's arrest of Forrest was a discretionary act, and not a ministerial one: we have long held that the word 'discretion' denotes freedom to act according to one's judgment in the absence of a hard and fast rule.") (cleaned up) (quoting *Schneider v. Hawkins*, 179 Md. 21, 25 (1940)).

However, public official immunity does not apply when the public official acts maliciously. *See, e.g., Lee v. Cline*, 384 Md. 245, 267–68 (2004). In this context,

malicious conduct is "characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill-will or fraud." *Id.* at 268 (cleaned up).

In *Cooper v. Rodriguez*, 443 Md. at 723, the Supreme Court recognized another exception to common law public official immunity:

> After careful review of the relevant principles and authorities, in accordance with the dictates of Article 19,[9] we hold that gross negligence is an exception to common law public official immunity; in other words, if a public official's actions are grossly negligent, the public official is not entitled to common law public official immunity.

In this context,

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

Torbit v. Baltimore City Police Dep't, 231 Md. App. 573, 589 (2017) (quoting *Barbre v. Pope,* 402 Md. 157, 187 (2007) (citations in *Barbre* omitted)).[10]

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[9] Article 19 of the Maryland Declaration of Rights states:

> That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

[10] Maryland's public official immunity doctrine "is not applicable in an action based on rights protected by the State Constitution." *Lee*, 384 Md. at 259 (cleaned up). Ms.

(continued)

B. The Standard of Review

"An appellate court reviews without deference a trial court's application of common law public official immunity." *Cooper*, 443 Md. at 713. When reviewing the grant of a motion to dismiss, "we must determine whether the complaint, on its face, discloses a legally sufficient cause of action. In reviewing the complaint, we must presume the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom." *Bailey*, 252 Md. App. at 93 (cleaned up). We review the circuit court's decision to deny Ms. Roche's motion for reconsideration for abuse of discretion, bearing in mind that "courts do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature." *Morton v. Schlotzhauer*, 449 Md. 217, 231 (2016) (cleaned up).

C. Analysis

We conclude that the circuit court did not err in granting the motion to dismiss. Initially, we note that Ms. Roche no longer asserts that the City is liable for wrongdoing on Officer Berardi's part. As we have explained, the doctrine of sovereign immunity bars a direct recovery against the Department. Instead, and subject to the limitations in the LGTCA, the Department is obligated to pay a judgment against Officer Berardi. Thus, the dispositive issue in this appeal is whether the allegations in the complaint, if proven,

Roche does not assert that Officer Berardi violated Mr. Öztaş's rights guaranteed by the Maryland Constitution.

would support a judgment against Officer Berardi. For the reasons that we will explain, we conclude that they do not.

First, and although Ms. Roche disputes the issue, it is clear that, at the time of Officer Berardi's encounter with Mr. Öztaş, the Department was a State agency. It is equally clear that police officers are "public officials for purposes of the common law public official immunity[.]" *Smith*, 400 Md. at 114 n.8.

Second, when police officers discharge their duties as law enforcement officers, including making arrests, they act in a discretionary capacity. *Houghton*, 412 Md. at 585; *Cherkes*, 140 Md. App. at 329. For these reasons, police officers are not liable for "non-malicious negligent conduct committed in the performance of discretionary acts in furtherance" of their official duties. *Smith*, 400 Md. at 129.

Third, common law public official immunity does not apply when an officer acts "maliciously" or when an officer is "grossly negligent" in the discharge of their duty. "'Actual malice,' in Maryland law, normally refers to conduct characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill-will or fraud[.]" *Lee*, 384 Md. at 268 (cleaned up). In *Cooper v. Rodriguez*, the Court held that public official immunity does not apply "if a public official's actions are grossly negligent[.]" 443 Md. at 723.

Ms. Roche does not assert that Officer Berardi's attempted arrest of Mr. Öztaş was malicious. Nor does she argue that the officer was grossly negligent. In other words, the

facts as alleged in the amended complaint point to the conclusion that he was acting in a discretionary capacity during his encounter with Mr. Öztaş.

To avoid this outcome, Ms. Roche particularly relies on *Bailey v. City of Annapolis*, 252 Md. App. at 119. She states that:

> This Court, relying (in part) upon an affidavit in response to the summary judgment motion, reversed and remanded the case against [Sergeant Kintop of the Annapolis Police Department] as to the negligence count, deciding that there was a material dispute of fact as to whether the circumstances surrounding the officer's second application for an arrest warrant made the officer's actions ministerial, rather than discretionary.

For the reasons that we will explain, *Bailey* does not assist Ms. Roche.

The facts in *Bailey* were, to put it mildly, unusual. In 2007, an individual named James Elmer Bailey ("Bailey I") allegedly assaulted a woman in Annapolis. She reported the matter to an Annapolis City police officer who filed an application for a statement of charges which was duly issued. The statement of charges stated that Bailey I was 5'5" tall and weighed 145 pounds. However, unbeknownst to the officers, there was another James Elmer Bailey ("Bailey II"), who had the same birth date as Bailey I, and who also resided in Annapolis. But Bailey II was of a different race than Bailey I and was 6'3" tall and weighed 195 pounds. 252 Md. App. at 90. More than three years later, the police arrested Bailey II at his home. He was released later that night, and subsequently filed a civil action against the City and the officers who arrested him in the District Court. After a bench trial, but before entering judgment, the court directed Annapolis Police Department Sergeant Kintop to inform the commissioner that the court desired the

commissioner to strike the 2007 statement of charges and to issue a new, corrected statement that would contain information that would permit officers to distinguish between Bailey I and Bailey II. *Id.* at 91. Acting on the court's instructions, Kintop filed a request for a new warrant on the same day. On that same day, the warrant was issued. *Id.* The application filed by Kintop contained Bailey I's height, weight, and race but the statement of charges as issued did not. *Id.* at 91–92. The warrant was issued in 2013.

In 2017, and based on the 2013 warrant, police again arrested Bailey II. He filed suit in the Circuit Court for Anne Arundel County against the City and several individuals including Kintop. The trial court granted Kintop's motion for summary judgment as to Bailey's malicious prosecution and gross negligence claims. *Id.* at 97, 107. However, Bailey II's complaint also included a negligence claim against Kintop based on the theory that he was acting in a ministerial, and not a discretionary, capacity when he filed the application for a new statement of charges. The trial court granted Kintop's motion for summary judgment as to the negligence claim. This Court reversed the court's ruling on this issue because there was evidence in the record that Kintop had been acting in a ministerial capacity. *Id.* at 119–20.

Returning to the case before us, Ms. Roche does not assert that Officer Berardi was acting in a ministerial capacity when he attempted to arrest Mr. Öztaş. Nor could she because Maryland law is clear that police officers act in a discretionary capacity when arresting or attempting to arrest individuals. *See, e.g., Houghton*, 412 Md. at 585. The substance of Ms. Roche's amended complaint was that Officer Berardi was negligent

because he failed to take proper steps to prevent Mr. Öztaş from fleeing while he was in the process of arresting him. But police officers are immune from liability arising out of their exercise of their discretionary duties. As the *Houghton* Court explained:

> [T]here is no question that Houghton's arrest of Forrest was a discretionary act, and not a ministerial one: we have long held that the word "discretion" denotes freedom to act according to one's judgment in the absence of a hard and fast rule. The order to arrest an individual falls squarely within that definition.

Id. (cleaned up).

The current state of Maryland law is that there are three exceptions to the doctrine of common law public official immunity: (1) officers are not immune when they act in a ministerial, as opposed to a discretionary, capacity; (2) officers are not immune when they act maliciously, *Lee*, 384 Md. at 267–68; and (3) police officers are not immune when their actions are grossly negligent. *Cooper*, 443 Md. at 723. Maryland law is clear that Officer Berardi was acting in a discretionary capacity when he attempted to arrest Mr. Öztaş. In her brief, Ms. Roche concedes that there is no basis in her amended complaint for a conclusion that Officer Berardi was grossly negligent. In her amended complaint, she did not allege that Officer Berardi was acting with malice and the amended complaint fails to allege a legally sufficient factual basis for her claims against Officer Berardi.

Ms. Roche has one final contention. She asserts:

> Once Mr. Öztaş announced his intent to kill himself rather than return to jail, whether Officer Berardi was constrained to respond according to dictated procedures or protocols, instead of making a personal,

> independent, decision to allow Mr. Öztaş essentially to roam freely while Officer Berardi performed a warrant check, is a question of fact. *The Complaint asserted that Officer Berardi was negligent in failing to respond to Mr. Öztaş' threat*, in contravention of Officer Berardi's training and BPD's objectives, and that Mr. Öztaş' death was the direct and proximate result of Officer[] Berardi's negligence. Under the reasoning of *Bailey*, instead of dismissing the action, *the trial court should have denied same, and allowed discovery to proceed*, so that the issue of Officer Berardi's actions as discretionary or ministerial could be explored.

(Cleaned up and emphasis added.)

We do not agree. Her request that we should reverse the judgment of the circuit court in order to permit her to engage in discovery to assess whether Officer Berardi had been *negligent* would be an exercise in futility because *negligence* by itself is not a basis for recovering damages from either the officer or the Department.

Ms. Roche concedes that the allegations in the amended complaint do not support a conclusion of gross negligence. To prevail, Ms. Roche would have to prove that Officer Berardi was acting maliciously, that is, his decision to allow Mr. Öztaş to sit on the curb while he completed the warrant check was the result of an "evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill-will or fraud[.]" *Lee*, 384 Md. at 268 (cleaned up). There is nothing in the amended complaint that suggests Officer Berardi was acting maliciously and Ms. Roche does not suggest otherwise in her brief. To remand this case so that she could engaged in discovery to determine whether Officer Berardi was negligent would be an exercise in futility.

THE MOTION FOR RECONSIDERATION

After the circuit court entered its judgment dismissing Ms. Roche's amended complaint, she filed a motion for reconsideration, which the court denied. In the statement of issues in her brief, Ms. Roche asserted that the circuit court erred when it did so. However, she did not present any argument or analysis as to why this was so. As such, she has waived the issue. It is an appellant's "obligation to articulate and adequately argue all issues the appellant desires the appellate court to consider in the appellant's initial brief." *Westminster Mgmt., LLC v. Smith*, 486 Md. 616, 674 (2024) (cleaned up). "If a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it." *Id.* (cleaned up) (quoting *DiPino v. Davis*, 354 Md. 18, 56 (1999)).

For these reasons, we affirm the judgment of the circuit court.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. APPELLANT TO PAY COSTS.