Vermont Superior Court
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Washington Unit

STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-176
GREGORY BOMBARD, Plaintiff, v. JAY RIGGEN, Vermont State Police Trooper, and STATE OF VERMONT Defendants.	

RULING ON THE STATE'S MOTION TO DISMISS

This case arises out of Plaintiff Gregory Bombard's interactions with Vermont State Police Trooper Jay Riggen in St. Albans in 2018. Mr. Bombard alleges that he was driving on North Main St. when Officer Riggen, traveling in the opposite direction, pulled him over *mistakenly* believing that Mr. Bombard had given him "the finger," an ancient, rude gesture commonly understood to mean "fuck you" or "shove it up your ass." See https://en.wikipedia.org/wiki/The_finger. After questioning Mr. Bombard, Mr. Riggen accepted that he was mistaken about the gesture and let him go. Mr. Bombard, upset at the incident, started to pull out, gave Mr. Riggen the finger, and uttered "asshole" and "fuck you." Mr. Riggen pulled him over again, handcuffed and arrested him, jailed him at the St. Albans barracks, and had his car towed. Mr. Bombard was charged with two counts of disorderly conduct. The criminal court eventually dismissed one count, and the State later dropped the other.

Mr. Bombard asserts that the first stop violated his constitutional right to be free from unreasonable seizures under the Fourth Amendment and Article 11 of the Vermont Constitution and amounts to the tort of false arrest (count 1). U.S. Const. amend. IV.; Vt. Const. ch. I, art. 11. He alleges that the first stop also amounted to unconstitutional retaliation for the perceived but not actual exercise of his free speech rights pursuant to the First Amendment and Article 13 of the Vermont Constitution (count 2). U.S. Const. amend. I; Vt. Const. ch. I, art. 13. He claims that his arrest (count 3) and the seizure of his vehicle (count 4) following the second stop were unconstitutional retaliation for the exercise of his Article 13 rights. In count 5, he claims that Mr. Riggen's course of conduct has unconstitutionally "chilled" his state and federal free speech rights. Mr. Bombard asserts all claims against Mr. Riggen personally, those based on his federal rights pursuant to 42 U.S.C. § 1983. He asserts against the State the state-law claims only. He seeks declaratory relief, compensatory damages, and attorney fees to the extent available under 42 U.S.C. § 1988(b).

Defendants have filed a consolidated motion to dismiss addressing all claims, except the constitutional claims of count 1, pursuant to both Rules 12(b)(6) (failure to state a claim) and 12(b)(1) (lack of subject matter jurisdiction).[1] The determinative issues in dispute are as follows: (1) whether the court should adopt the First Amendment retaliation standard of *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019) for Article 13 purposes; (2) whether Mr. Bombard has alleged the absence of probable cause; (3) whether Mr. Bombard should be collaterally estopped by the criminal court's probable cause finding and prima facie case ruling from attempting to prove any such absence of probable cause in this case; (4) whether the court should adopt *Heffernan v. City of Paterson, N.J.*, 136 S.Ct. 1412 (2016) for purposes of Mr. Bombard's state and federal perceived speech claims; (5) whether the State's sovereign immunity defense to the Article 13 claims is foreclosed by *Zullo v. State*, 2019 VT 1, 209 Vt. 298; (6) whether the false arrest claim is within the scope of the discretionary function exception to the statutory waiver of the State's sovereign immunity; (7) whether Mr. Riggen has qualified immunity; and (8) whether Mr. Bombard's "chilled speech" claim is sufficiently pleaded.

As set forth briefly below, the court concludes that *Nieves*, *Heffernan*, and *Zullo* properly apply in the context of this case; Mr. Bombard has sufficiently pleaded a lack of probable cause, and collateral estoppel does not bar him from attempting to prove that; and it would be premature to rule dispositively on the false arrest claim, qualified immunity, and the chilled speech issue at this time.

(1) *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019)

In many settings, a plaintiff asserting a First Amendment retaliation claim must establish only that the conduct engaged in was constitutionally protected and a motivating factor for the retaliatory conduct. If proven, the burden then switches to the defendant to prove that the same action would have been taken regardless of the improper motivation. See *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). "[B]ut when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution." *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

In *Hartman*, the Court held that retaliatory prosecution claims are different and more complex than other retaliation settings. They are different because a body of highly relevant evidence will be available that typically is not in other cases:

> What is different about a prosecution case, however, is that there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge.

[1] Rule 12(b)(1) standards apply to the State's sovereign immunity arguments. All other issues in the State's motion are subject to Vermont's Rule 12(b)(6) standard. The court notes that the State repeatedly refers to Mr. Bombard's "plausible" allegations, presumably referring to the contemporary 12(b)(6) standard under the analogous federal rule. See generally *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The Vermont Supreme Court has not, however, adopted the federal standard. *Island Indus., LLC v. Town of Grand Isle*, 2021 VT 49, ¶ 24 ("[W]e have rejected the heightened pleading standards the United States Supreme Court has adopted under the Federal Rules of Civil Procedure.").

> Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive.

Id. at 261. They also present a more complex problem of causation—that the retaliatory motive caused the constitutional injury—insofar as such claims cannot be brought against the prosecutor, who is immune, and thus must be brought against others who are claimed to have improperly induced the prosecutor, who is entitled to the presumption of regularity, to bring a charge that would not have been brought otherwise. *Id.* at 263. "The issue [of probable cause] is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time or expense." *Id.* at 265. The Court thus concluded that "it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven." *Id.* at 265–66. If not, the claim fails.

In *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019), the Court extended the requirement to the closely related setting of retaliatory arrest claims, which present a different but still complex problem of causation. See *id.* at 1723–24 ("The causal inquiry is complex because protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest. Officers frequently must make 'split-second judgments' when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information." (citation omitted)). More generally, the problem is the same: "For both claims, it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct." *Id.* at 1724. The Court also emphasized the need for an objective standard in this context, and that probable cause speaks to the objective reasonableness of the arrest. *Id.* at 1724–25. It thus imposed "*Hartman's* no-probable-cause rule in this closely related context."[2] *Id.* at 1725. If the plaintiff can prove an absence of probable cause, the claim proceeds under the traditional *Mt. Healthy* test.[3] *Id.* If not, the claim fails.

Mr. Bombard argues that *Nieves* was very badly decided, and the court should not make the same mistake under Article 13; it should simply apply the traditional *Mt. Healthy* test. However, the court finds *Nieves* persuasive and sees no reason to not apply it here. Moreover, the Vermont Supreme Court already has adopted *Hartman's* no-probable-cause rule in the context of an Article 13 retaliatory prosecution claim. *Lay v. Pettengill*, 2011 VT 127, ¶ 21, 191 Vt. 141. Nothing in *Pettengill* or Article 13 case law more generally causes the court to think that it would not adopt *Nieves* in the context of a retaliatory arrest claim.

(2) *Allegation of probable cause*

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[2] The requirement is subject to an exception: "[T]he no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 139 S.Ct. at 1727.

[3] As minor point of clarification: whereas Mr. Bombard argues that the *Mt. Healthy* test should apply here and not *Nieves*, the State argues that *Nieves* should apply and not *Mt. Healthy*. However, *Mt. Healthy* continues to apply under *Nieves*, which merely modified *Mt. Healthy* by *adding* the no-probable-cause requirement.

The State argues that Mr. Bombard has failed to allege the absence of probable cause and, further, that he should be collaterally estopped from attempting to prove its absence due to the criminal court's probable cause finding and prima facie case determination.[4]

The court construes the pleadings "as to do substantial justice." V.R.C.P. 8(f). With that standard in mind, the court has no problem inferring from the complaint that Mr. Bombard asserts an absence of probable cause for his arrest. The plain thrust of the complaint is that all of Mr. Riggen's conduct was based on Mr. Bombard's real or perceived noncriminal speech and nothing else. That is sufficient for pleading purposes.

(3) *Collateral estoppel as to probable cause*

Collateral estoppel "bars the relitigation of an issue, rather than a claim, that was actually litigated by the parties and decided in a prior case. The elements of collateral estoppel are: (1) preclusion is asserted against one who was a party in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits; (4) there was a full and fair opportunity to litigate the issue in the prior action; and (5) applying preclusion is fair." *In re Tariff Filing of C. Vermont Pub. Serv. Corp.*, 172 Vt. 14, 20 (2001) (citation omitted).

As set forth above, Mr. Bombard has the burden of proving the absence of probable cause in this case by a preponderance of the evidence. He essentially argues that estopping him from attempting to do so on the basis of the criminal court's rulings would be unfair. The State argues that the Court's analysis in *Lay v. Pettengill*, 2011 VT 127, 191 Vt. 141 demonstrates the propriety of applying collateral estoppel here.

In *Pettengill*, which included a retaliatory prosecution claim, the civil court found probable cause for one charge but not for another. It nevertheless granted judgment to the defendant on the theory that one charge validly brought would have inflicted the same injury as two, even if one lacked probable cause. *Id.* at 152–53. Although not fully clear in the decision, the appellant apparently argued to the Supreme Court that the civil court's probable cause determination was in error or he should not have had to prove an absence of probable cause at all. In any event, the Court explained that the "mere fact that a criminal tribunal found probable cause normally provides a presumption that probable cause existed in the context of a subsequent wrongful prosecution claim." *Pettengill*, 2011 VT 127, ¶ 22. It further found that those circumstances generally support the application of the doctrine of collateral estoppel. *Id.* ¶¶ 24–25. Surveying the case law, however, it noted that "[w]here issue preclusion has not been found, it is generally because the result of the initial hearing is alleged to have been procured on the basis of false testimony." *Id.* at ¶ 26. That apparently was not the issue in *Pettengill.* The appellant in that case evidently was simply seeking a second bite at the apple.

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[4] The State also argues that the facts affirmatively demonstrate probable cause. The argument depends heavily on the State's adoption of the underlying facts as determined in the criminal court's prima facie ruling and in Mr. Riggen's affidavit in that case. The allegations of the complaint in this case paint a different picture, however. The court will not address the matter further under the Rule 12(b)(6) standard.

The determination of probable cause under criminal Rule 4 generally is made on the basis of the information and sworn statements presented by the State alone. The defendant has no opportunity to affirmatively prove the absence of probable cause, Mr. Bombard's task in this case. The defendant may present evidence under criminal Rule 12(d). However, the criminal court must view the evidence in the light most favorable to the State, and it must disregard modifying evidence presented by the defendant. See *State v. Millette*, 173 Vt. 596, 596 (2002). Thus, if the defendant's evidence attacks the credibility of a witness for the State, including the arresting police officer, the defendant has no "full and fair" ability to prove that lack of credibility for Rule 12(d) purposes.

The court understands Mr. Bombard to be alleging not only that Mr. Riggen's conduct was based on a retaliatory motive, but that the facts reasonably known to Mr. Riggen could not have fairly supported a finding of probable cause or a determination of a prima facie case in the criminal court. In other words, those determinations were predicated on a false narrative that Mr. Bombard did not have a full and fair opportunity to confront. Mr. Bombard therefore is not simply seeking a fresh look by this court at the same evidence that the criminal court already evaluated in hopes of a different outcome. Rather, he is seeking a first opportunity to fairly make the showing required of him under *Nieves*. In these circumstances, the court sees no basis under *Pettengill* or otherwise for estopping him from doing so.

(4) *Heffernan v. City of Paterson, N.J.*, 136 S.Ct. 1412 (2016)

The State argues that Mr. Bombard's perceived speech claims must be dismissed because they necessarily fail for the basic reason that he cannot assert that he engaged in any protected activity—speech. The U.S. Supreme Court addressed this issue in *Heffernan v. City of Paterson, N.J.*, 136 S.Ct. 1412 (2016), concluding that, while engaging in protected activity ordinarily is a necessary element of a retaliation claim, in the context of perceived speech, where there was no protected activity, the reason for the retaliatory conduct "is what counts." *Id.* at 1418. Retaliation based on the perception of speech "can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake." *Id.* at 1419. The retaliation therefore is actionable even where the speech that provoked it did not occur.

The State argues that this case is distinguishable from *Heffernan*, which should be limited to its specific factual context. The State also argues that the courts that have had the opportunity to apply *Heffernan* so limit it, and none has applied it in the context of a retaliatory arrest claim.

Heffernan is a simple case, the *ratio decidendi* of which makes obvious good sense. In *Heffernan*, a police officer's employer demoted him based on the mistaken belief that the officer had engaged in political speech protected by the First Amendment when in fact the officer had not. The lower courts rejected the officer's § 1983 claim because he had not engaged in any protected activity; there had been no speech. The U.S. Supreme Court reversed because, in substance, regardless that the retaliation was based on a factual mistake as to whether the speech had occurred, the constitutional harm is the same. A First Amendment retaliation claim can be predicated on protected activity that occurred or the mistaken belief that protected activity occurred when really it did not.

The State argues that *Heffernan* should be limited to the public employment setting in cases featuring political association issues. In support, it cites the lack of case law applying *Heffernan* beyond that corner of First Amendment law. If offers, however, no cogent rationale for restricting it to that context, and it cites no decisions explaining why it should not apply more broadly or in the specific context at issue here.

The rationale of *Heffernan* is eminently sensible. The alternative would have the perverse consequence of insulating otherwise unconstitutional retaliation from scrutiny simply because the malicious actor not only had bad intent but was mistaken as to the facts, all despite an injury that is the same regardless. The court has found no cases explaining why *Heffernan* should not apply in this context, and the State offers no such rationale, much less a persuasive one.

The court adopts *Heffernan* for purposes of Mr. Bombard's First Amendment and Article 13 claims.

(5) *Zullo v. State*, 2019 VT 1, 209 Vt. 298

The State argues that it retains sovereign immunity to Mr. Bombard's Article 13 claims. Mr. Bombard argues that the State's position is not tenable following *Zullo v. State*, 2019 VT 1, 209 Vt. 298. The State argues that *Zullo* is limited to Article 11 claims.

In *Zullo*, the plaintiff asserted Article 11 claims against the State based on the stop, seizure, and search of his vehicle. Among other things, the Court addressed whether such claims are subject to the State's common law sovereign immunity. The Court framed the issue as whether the common law doctrine could absolutely bar a constitutional tort based on a self-executing state constitutional right. After analyzing the issue and the sparse case law from other states—which is not limited to any particular constitutional tort—the Court concluded "that the common law doctrine of sovereign immunity cannot jurisdictionally bar suits alleging constitutional torts." *Id.* at ¶ 29.

The rationale of *Zullo* applies equally to the Article 13 constitutional tort claims that Mr. Bombard brings in this case. See *Shields v. Gerhart*, 163 Vt. 219, 227 (1995) (concluding that Article 13 is self-executing). The State presents no cogent rationale to the contrary. The Vermont Tort Claims Act, 12 V.S.A. §§ 5601–5606, which waives the State's sovereign immunity in certain circumstances, therefore is irrelevant to these claims.

(6) *False arrest*

The State also argues that Mr. Bombard's false arrest claim is barred by sovereign immunity because it falls within the discretionary function exception to the statutory waiver for tort claims. 12 V.S.A. § 5601(e)(1). Mr. Bombard argues that the exception does not shield the State from liability when the "discretion" amounts to a constitutional violation. The State did not anticipate this argument in its memorandum in support of dismissal and did not respond to it in its reply.

Vermont has adopted the federal discretionary function test described in *United*

States v. Gaubert, 499 U.S. 315, 324 (1991) for state law purposes. That test is intended to preserve immunity for "governmental actions and decisions based on considerations of public policy." *Kennery v. State*, 2011 VT 121, ¶ 32, 191 Vt. 44 (citation omitted).

Many federal courts have concluded that the federal discretionary function exception does not apply when the discretion at issue exceeds constitutional bounds, and thus a common law tort that amounts to a constitutional violation is not barred by sovereign immunity under this exception. As the D.C. Circuit Court has explained, "the absence of a limitation on the discretionary-function exception for constitutionally ultra vires conduct would yield an illogical result: the [tort claims act] would authorize tort claims against the government for conduct that violates the mandates of a statute, rule, or policy, while insulating the government from claims alleging on-duty conduct so egregious that it violates the more fundamental requirements of the Constitution." *Loumiet v. U.S.*, 828 F.3d 935, 944–45 (D.C. Cir. 2016). Most circuit courts that have addressed the matter are in accord. See *id.* at 943 (collecting cases). Only the 7th and 11th have ruled otherwise. See generally *Shivers v. U.S.*, 1 F.4th 924 (11th Cir. 2021); *Kiiskila v. United States*, 466 F.2d 626, 627–28 (7th Cir. 1972). On balance, the court is persuaded that the discretionary function exception does not apply when the tortious conduct is constitutional in proportion. An exercise of discretion that is abused may fall within the exception. But when the conduct rises to the level of a constitutional violation, the discretion is not merely that much more abused; rather, its character has changed fundamentally. "The government has no discretion to violate the . . . Constitution; its dictates are absolute and imperative." *Loumiet*, 828 F.3d at 944 (citation and quotation marks omitted).

Insofar as Mr. Bombard has pleaded a false arrest claim that is unconstitutional in nature, it is not barred by the discretionary function exception to the statutory waiver of the State's sovereign immunity.

(7) *Qualified immunity*

Mr. Riggen argues that he is entitled to qualified immunity. Mr. Bombard argues in a footnote that the doctrine of qualified immunity should be abolished and otherwise argues that Mr. Riggen's entitlement to qualified immunity should not be determined at the dismissal stage.

Regardless whether the world would be better off without the doctrine of qualified immunity, currently it is available to Mr. Riggen as a defense under both Vermont and federal law that binds this court.

The Vermont Supreme Court has summarized the doctrine as follows:

> Government employees . . . may . . . be eligible for qualified immunity if, when undertaking the challenged acts, they were, in good faith, performing discretionary acts within the course of their employment and the scope of their authority. The test for good faith is "the objective reasonableness of the official's conduct." We have held that "acts are objectively reasonable if an officer of reasonable competence could have made the same choice in similar circumstances." If "plaintiffs cannot show" that a defendant was acting outside the course of their employment and scope of

> their authority or "that defendant's conduct . . . was ministerial rather than discretionary in nature or that defendant acted in bad faith or violated clearly established law, [the] defendant is immune from their lawsuit."

Sutton v. Vermont Regl. Ctr., 2019 VT 71A, ¶ 49 (citations omitted). As the Second Circuit has explained:

> [A] defendant presenting [a qualified] immunity defense on a Rule 12(b)(6) motion instead of a motion for summary judgment must accept the more stringent standard applicable to this procedural route. Not only must the facts supporting the defense appear on the face of the complaint, but, as with all Rule 12(b)(6) motions, the motion may be granted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."

McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004). The face of the complaint is wholly insufficient for the court to now rule "beyond doubt" that Mr. Riggen will be entitled to qualified immunity in this case. The issue needs factual development.

(8) *Chilled speech*

The State also argues that Mr. Bombard has insufficiently pleaded that his free speech rights have been "chilled." It asserts: "because the second stop, arrest, and towed vehicle were lawful and he continued to later protest these actions in both criminal and civil court, Plaintiff does not cognizably allege such actions chilled his speech." It supports this argument largely by reference to cases in which, under the circumstances presented, no injury was apparent or at least only an indirect injury was asserted. The State's argument is out of step with Vermont's Rule 12(b)(6) standard. See n.4 at 4. Moreover, if filing a lawsuit based on chilled speech itself proved that no speech was chilled, no legal claim premised on chilled speech could ever be cognizable. The face of Mr. Bombard's complaint is not clear that no actual chilling is in issue in this case.

Order

For the foregoing reasons, the State's motion to dismiss is denied.

SO ORDERED this 21st day of December, 2021.

Robert A. Mello
Superior Judge