IN THE COURT OF APPEALS
STATE OF GEORGIA

CASE NUMBER A14A2021

CRAIG BROWN, HANK SCOTT, and DAVID HANEY
Appellants (Defendants below)

v.

MICHAEL JUSTIN BELT
Appellee (Plaintiff below)

BRIEF OF APPELLANTS

FROM THE SUPERIOR COURT FOR THE COUNTY OF GLYNN,
STATE OF GEORGIA, CIVIL ACTION NO. CE13-00528-063
THE HONORABLE STEPHEN G. SCARLETT, SR. PRESIDING

RICHARD K. STRICKLAND (Georgia Bar Number 687830)
ERIC L. BUMGARTER (Georgia Bar Number 525789)
BROWN, READDICK, BUMGARTNER,
CARTER, STRICKLAND & WATKINS, LLP
5 Glynn Avenue
Brunswick, GA 31521-0220
(912) 264-8544

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CRAIG BROWN et al.	*	
	*	
Appellants	*	
(Defendants below)	*	
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v.	*	**CASE NUMBER: A14A2021**
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MICHAEL JUSTIN BELT et al.	*	
	*	
Appellee	*	
(Plaintiff below).	*	

BRIEF OF APPELLANTS

COME NOW Appellants Craig Brown, David Haney, and Hank Scott, Defendants below, and file this brief on appeal.

Part One - Statement of Facts and Proceedings Below

1. Introduction and Summary.

The issue for determination in this case is whether the appellant Glynn County Police Officers are entitled to qualified immunity, and thus summary judgment, for appellee's federal claim of malicious prosecution, made pursuant to 42 USC § 1983. This action is predicated on the arrest of appellee Belt on the

premises of Colonial Mall in Brunswick, Georgia on December 14, 2008. Appellee was arrested for misdemeanor obstruction when - - while he was the subject of a shoplifting investigation – he refused to verify his identification, and was acting strangely.

The Superior Court granted defendants' motion for summary judgment, except for plaintiff/appellee Belt's federal malicious prosecution claim. Appellants argued below, and contend here, that they are entitled to qualified immunity from suit.

"Government officials performing discretionary functions are granted a qualified immunity shielding them from imposition of personal liability pursuant to 42 USC § 1983 insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Thomas v. Holt, 221 Ga. App. 345, 347-348(1) (1996). "Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit." Maxwell v. Mayor of Savannah, 226 Ga. App. 705, 707(1) (1997).

The order issued by the trial court states "[t]here was no clearly established law in December of 2008 which held persons who actually enter private property with firearms when that had been prohibited by the owner could not be required to identify themselves." (R-207) (emphasis supplied). According to the Court's own Order, the law was not clearly established. The officers should have been afforded qualified immunity.

Additionally, appellant officers demonstrated that there was at least arguable probable cause for appellee's arrest. Upon arrival, they were informed by mall security that appellee, who was openly carrying a firearm, was a shoplifting suspect. Further, appellee, through his actions in his criminal case, conceded there was actual probable cause for his arrest. He also conceded that there was no malice on the part of the officers. There is no evidence in the record to support appellee's claim of malicious prosecution.

The Superior Court correctly granted summary judgment on all other claims, but wrongly denied "qualified immunity" on the federal malicious prosecution claim.

2. Statement of Facts.

On December 14, 2008, Mr. Belt drove to the Colonial Mall in Brunswick, Georgia. Exhibit C (Supp.R-) ¶ 6); (Belt dep. 20:4-22)[1]. He exited his vehicle and attempted to enter the mall while openly wearing a Hi-Point 9mm handgun. (Supp.R-2); (Belt dep. 21:5-16).

Mall security guard Salvatore Glorioso observed Belt approach one of the mall entrances. He informed Belt that the mall had a no-weapons policy, and that it was against mall policy for him to carry a firearm into the mall. (Supp.R-2); (Belt dep. 23:1 - 26:8). Mr. Glorioso also informed Belt that there had been a shoplifting earlier at the mall. (Belt dep. 24:9 - 25:1; 37:5-9).

After his initial interaction with Mr. Glorioso, Belt began to return to his vehicle parked in the mall parking lot. (Supp.R-3, 4). As Belt returned to his vehicle, he encountered another security guard, David O'Neal, who had

[1] The depositions and transcript are included in the record, but they are not sequentially numbered with the rest of the record. Hence, citations to depositions refer directly to the page numbers of the depositions themselves.

approached from another mall entrance. (Belt dep. 26:1-23). Mr. O'Neal asked for Belt's identification and firearms license, but Belt declined to produce either. (Supp.R-3); (Belt dep. 27:9 - 28:24). Mr. O'Neal requested police backup, and Glynn County officer Scott arrived shortly thereafter. (Belt dep. 29:1-6; 30:4-9).

Upon arrival, Officer Scott spoke with Mr. O'Neal, who told him that Belt was a suspect in a shoplifting at a store inside the mall, and "that Mr. Belt was being evasive, wouldn't provide any identification." (Scott dep. 10:5-11; 11:3-13; 12:3-6). The sole reason officer Scott ever investigated Belt was because he was a suspect in a shoplifting. (Scott dep. 21:20-22; 22:1-5). Officer Scott advised Belt that he was a suspect in a shoplifting, and he asked Belt for his identification and firearms license, but Belt repeatedly refused to verify his identification. (Supp.R-3); (Belt dep. 32:3-7; 33:17-19); (Scott dep. 13:2-13).

Officer Scott explained that Belt was evasive. (Scott dep. 13:14-17). Officer Scott deposed that Belt was stand-offish in that he did not want to answer questions, continued to say he was being illegally detained, was generally uncooperative, and acted shifty, and he testified that Belt paced back and forth as if he might flee the scene. (Scott dep. 13:23 - 16:1). Further, Belt continued to

conduct a telephone conversation while the police tried to interact and question him. (Belt dep. 38:1-19; 41:13 - 42:4).

Shortly after Belt's initial interaction with Officer Scott, Sgt. Brown arrived. (Belt dep. 38:25 - 39:4). Upon arrival, Sgt. Brown spoke with Officer Scott, who informed him that Belt tried to enter the mall with a firearm. Sgt. Brown was told that Belt insisted upon entering the mall with his firearm. Sgt. Brown was also told that Belt was a shoplifting suspect. Accordingly, Sgt. Brown sought to verify Belt's identity. (Brown dep. 10:13-23; 13:16-25).

Sgt. Brown asked Belt for his identification and firearms license, but Belt repeatedly refused to produce either. (Supp.R-3); (Belt dep. 40:4-11; 41:1-13); (Scott dep. 22:6-10; 23:14-17); (Brown dep. 15:3-16; 16:10-12). Sgt. Brown explained to Belt why the police needed to verify his identity, since he was a suspect in a shoplifting. (Brown dep. 23:10-20).

Based upon Belt's refusal to present any type of identification, he was arrested for obstruction. (Supp.R-3); (Brown dep. 17:12 - 18:23); (Belt dep. 44:2-8). Belt's driver's license, firearm license, and social security card were all found on his person. (Brown dep. 22:3-16).

Some time later, a store employee came outside and declared that Belt was not the shoplifter. (Belt dep. 45:9-14); (Brown dep. 23:24 - 24:12). Belt was transported to the Glynn County Detention Center, was bonded out that evening, and waived all preliminary hearings, including a committal hearing and arraignment. A jury was selected for the trial on the charge of obstruction. However, that charge was dismissed before the start of trial. (Belt dep. 46:22 - 48:20); (R-76).

3. Method by which error preserved.

Plaintiffs' initial complaint alleged, *inter alia*, a state law claim for malicious prosecution. (R-12).The officers moved for summary judgment. (R-135). Belt and Georgia Carry.Org, Inc. responded, and filed an amended complaint withdrawing all state law claims. (R-150, 158, 169). The officers filed a reply brief. (R-178). On the day of the summary judgment hearing, plaintiffs filed a Second Amended Complaint, asserting for the first time a federal claim for malicious prosecution. (Supp.R-5). The Superior Court heard oral argument on this claim, and on April 29, 2014 issued an order partially denying the officers'

motion, specifically as to Belt's federal claim for malicious prosecution, and thus denied the officers' qualified immunity. (Transcript of hearing; R-200[2]).

Out of an abundance of caution, appellants obtained and filed a Certificate of Immediate Review on May 1, 2014. (R-212). Appellants filed an Application for Interlocutory Review with this Court on May 7, 2014. That application was granted and, accordingly, appellants timely filed their Notice of Appeal in Glynn County Superior Court on May 29,2014. (R-1). On May 28, 2014, prior to the grant of the interlocutory appeal, appellants filed their first notice of appeal, jurisdiction for which is based on the collateral order doctrine. (R-5).[3]

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[2] Summary judgment was granted against co-plaintiff Georgia Carry.Org. Inc.

[3] Although the order appealed from is interlocutory, defendants contend that the Court of Appeals has jurisdiction under the collateral order doctrine. Like sovereign immunity, qualified immunity is "an entitlement not to stand trial rather than a mere defense to liability." Cameron v. Lang, 274 Ga. 122, 123-124 (2001). And the Court of Appeals has held that an order denying such an immunity claim is appealable under the collateral order doctrine because "the order ... conclusively determine[s] the disputed question, resolve[s] an important issue completely separate

Part Two - Enumeration of Errors

1. The trial court erred by denying appellants qualified immunity.

2. The trial court erred by failing to grant summary judgment to the appellants because Belt failed to state a federal claim for malicious prosecution.

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from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment." (Punctuation omitted.) Board of Regents of the University System of Georgia v. Canas, 259 Ga. App. 505, 507 (2009). See Also Eshleman v. Key, 755 S.E.2d 926 (March 28, 2014). Nevertheless, out of an abundance of caution, defendants herein also obtained a Certificate of Immediate Review, and applied for interlocutory review because there is one Georgia case (prior to Cameron v. Lang) which suggests the collateral order doctrine may not apply. See, Turner v. Giles, 264 Ga. 812, 813-14 (1994) . Defendants contend that Cameron is an accurate reflection of current Georgia law regarding appellate jurisdiction in qualified immunity cases, and urge the Court to so hold in this case, in order to limit confusion in future cases. However, in the instant case, jurisdiction is appropriate under both methods.

3. The trial court erred by ruling that jury issues remained as to whether the Glynn County Police officers had a valid reason to request Belt to verify his identity.

Part Three - Argument and Citation of Authority

1. Standard of Review

In reviewing a grant or denial of summary judgment, the appellate court conducts a *de novo* review of the law and evidence. *Gen. Elec. Capital v. Gwinnett*, 240 Ga. App. 629, 630 (1999).

2. The Superior Court should have ruled that, based upon the record, the Glynn County Police Officers were entitled to qualified immunity.

The only claim to survive summary judgment is appellee Belt's federal law malicious prosecution claim. Pretermitting that it fails as a matter of law, the officers should have been granted summary judgment because they are entitled to qualified immunity. Qualified immunity is not merely a defense to liability, but rather immunity from a lawsuit. Atterbury v. City of Miami Police Dep't, 322 Fed. Appx. 724, (11th Cir. 2009) (citing Pearson v. Callahan, 555 U.S. 223, (2009)). "Government officials performing discretionary functions are granted a qualified

immunity shielding them from imposition of personal liability pursuant to 42 USC § 1983 insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Thomas v. Holt, 221 Ga. App. 345, 347-348(1) (1996). See Also Sharp v. Fisher, 532 F.3d 1180, 1183 (11th Cir. 2008); Beshers v. Harrison, 495 F.3d 1260 (11th Cir. 2007). Qualified immunity relieves government officials from the need to "constantly err on the side of caution" by protecting them from liability and the burdens of litigation. Holmes v. Kucynda, 321 F.3d 1069, 1077 (11th Cir. 2003). "In all but the most exceptional cases, qualified immunity protects government officials performing discretionary functions from the burdens of civil trials and from liability for damages." Bd. of Commrs. of Effingham County v. Farmer, 228 Ga. App. 819, 823(2) (1997).

Qualified immunity balances two important interests: the need to hold public officials accountable when they exercise power irresponsibly with the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. Pearson, *supra*. As long as the official's conduct is not unlawful, the doctrine of qualified immunity exempts the government official from

damage suits to enable them to perform their responsibilities without threats of liability. Hutton v. Strickland, 919 F.2d 1531, 1536 (11th Cir. 1990).

A plaintiff seeking to overcome the defendants' privilege of qualified immunity must show: "(1) that the officer violated her federal constitutional or statutory rights, and (2) that those rights were clearly established at the time the officer acted." Douglas Asphalt Co. v. Qore, Inc., 541 F.3d 1269, 1273 (11th Cir. 2008).

In the Eleventh Circuit, "for the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors in the defendants' place, that what he is doing violates federal law." Jenkins v. Talladega City Board of Education, 115 F.3d 821, 823 (11th Cir. 1997) (*en banc*) (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987). "[A] public official is entitled to qualified immunity unless, at the time of the incident, the preexisting law dictates, that is, truly compel[s], the conclusion for all reasonable similarly situated public officials that what [the official] was doing violated [the plaintiff's] federal rights in the circumstance." Wilson v.

Zellner, 200 F. Supp. 2d 1356, 1360 (M.D. Fla. 2002), (citing Marsh v. Butler County, 268 F.3d 1014, 1030-31 (11th Cir. 2001) (*en banc*)).

A. The law was not clearly established.

The Superior Court's own Order denying qualified immunity sets forth, "[t]here was no clearly established law in December of 2008 which held that persons who actually enter private property with firearms when that had been prohibited by the owner could not be required to identify themselves." (R-207). It is undisputed that Belt was on private property with a firearm when questioned. (Supp.R-3). By the Court's own Order, the law was not clearly established at the time of the incident, and so the officers should have been granted summary judgment because they are entitled to qualified immunity.

B. Belt did not suffer an unreasonable seizure.

To establish a malicious prosecution claim under § 1983, a plaintiff must prove both the elements of the common law tort of malicious prosecution and a violation of his right to be free from unreasonable seizures arising from that prosecution. Kingsland v. City of Miami, 382 F.3d 1220, 1234 (11th Cir.2004); Wood v. Kesler, 323 F.3d 872, 881 (11th Cir.2003); Whiting v. Tavlor, 85 F.3d

581, 584 & n. 4 (11th Cir.1996). Singleton v. Martin, CV405-141, 2008 WL 80263 (S.D. Ga. Jan. 7, 2008). Since there was at least arguable reasonable suspicion to stop Belt, and at least arguable probable cause to arrest him, Belt was not unlawfully seized, and the officers are entitled to qualified immunity.

1. Arguable reasonable suspicion existed to stop Belt.

Prior to his arrest for obstruction, Belt was stopped in the mall parking lot on suspicion that he was a shoplifting suspect. Upon arrival, Officer Scott was specifically told by mall security guard O'Neal that Belt was a shoplifting suspect. (Scott dep. 11:3-13). It was lawful for the officers to stop Belt if, under the totality of the circumstances, they had an objectively reasonable suspicion that he had engaged, or was about to engage, in a crime. "The 'reasonable suspicion' must be more than an 'inchoate and unparticularized suspicion or hunch.'" United States v. Powell, 222 F.3d 913, 917 (11th Cir. 2000) (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)). The officers deposed at length that Belt was initially stopped because he was a shoplifting suspect, and because of his strange behavior, not because of some "hunch." (Scott dep. 13:23 - 16:1; 21:20-22; 22:1-5).

A law enforcement official remains entitled to qualified immunity if he "reasonably but mistakenly concludes that reasonable suspicion is present." Jackson v. Sauls, 206 F.3d 1156, 1165-66 (11th Cir. 2000). "When an officer asserts qualified immunity, the issue is not whether reasonable suspicion existed in fact, but whether the officer had 'arguable' reasonable suspicion to support an investigatory stop." Id.

It is immaterial whether Belt actually was involved in the shoplifting. All that is required for the officers' actions to have been lawful is that they had arguable reasonable suspicion, which they demonstrated in explaining why Belt was detained. The officers heard a call concerning a man with a gun at the mall. When they arrived at the scene, they were immediately informed by mall security guards that Belt was a shoplifting suspect. (Scott dep. 10:5-11; 11:3-13; 12:3-6); (Brown dep. 10:13-23; 13:16-25). Officers Brown and Scott asked Belt for identification, and he refused to present any form of identification. (Supp.R-3); (Belt dep. 32:3-7; 33:17-19; 40:4-11; 41:1-13); (Scott dep. 22:6-10; 23:14-17); (Brown dep. 15:3-16; 16:10-12). The officers continued to request Belt's identification, but he refused, was evasive, uncooperative, and acted furtively as if

he might flee. (Scott dep. p.13-16). "Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot, the officer may briefly stop the suspicious person and make 'reasonable inquiries' aimed at confirming or dispelling his suspicions." Proescher v. Bell, 966 F. Supp. 2d 1350, 1364 (N.D. Ga. 2013) (quoting Terry at 30).

The facts of this case are remarkably similar to Proescher v. Bell, *supra*. In Proescher, a security guard at a park in Gwinnett County, Georgia observed plaintiff openly carrying a firearm. The security guard considered this suspicious because it was unusual, and so he called the police. Upon arrival, the police officers sought plaintiff's identification, but he was evasive and would not provide identification other than a weapon's license. Plaintiff was ultimately arrested for criminal trespass. Plaintiff subsequently filed a § 1983 suit alleging Fourth Amendment violations. Judge Duffey granted defendants' Motion for Summary Judgment, holding, *inter alia*, that plaintiff's behavior provided the officers with reasonable suspicion of criminal activity, and probable cause for his arrest.

> "The totality of the circumstances here and the reasonable inferences from the facts support the existence of a reasonable suspicion. Bell was advised by a police dispatcher that a security guard had reported a suspicious person in the park who was 'carrying a gun out in the open' as he walked near a playground, who, when Bell arrived at the park, did have a visible weapon, and who evaded Bell's questions and requests for identification bearing a photograph, provided more than a sufficient basis constitutionally to detain Plaintiff. See Adams v. Williams, 407 U.S. 143, 146–47, 92 S.Ct. 1921 (1972) ("Reasonable cause for a stop and frisk" may arise through "information supplied."); United States v. Herrera, 711 F.2d 1546, 1555 (11th Cir.1983).The Court finds, under a totality of the circumstances, that Bell had a reasonable suspicion to detain."

Proescher v. Bell, *supra*, (string cite omitted.) See Also Georgia Carry.Org, Inc. v. Kabler, 2:12-CV-00171-LGW-JEG (S.D. Ga Feb.27, 2014) (wherein Judge Wood held that defendant McInstosh County deputy had actual reasonable suspicion to stop and pull over plaintiff, a member of Georgia Carry.Org, after

plaintiff appeared to attempt to conceal a weapon when he entered a Darien gas station.)

The officers here thoroughly articulated the facts that gave rise to their suspicion, which, in light of Kabler and Proescher, were more than reasonable to conduct an investigatory stop. At the very least the officers had arguable reasonable suspicion, and so they are entitled to qualified immunity.

2. At least "arguable" probable cause existed for Belt's arrest and prosecution on the charge of obstruction.

Although actual probable cause existed to arrest Belt for obstruction, the officers are entitled to qualified immunity so long as there was arguable probable cause.

The appropriate standard when determining if an officer is entitled to qualified immunity under 42 USC § 1983 is not whether there was actual probable cause, but whether there was "arguable" probable cause. Pickens v. Hollowell, 59 F.3d 1203, 1206 (11th Cir.1995); Means v. City of Atlanta Police Dep't, 262 Ga. App. 700, 705 (2003). "Probable cause exists where 'the facts and circumstances within the arresting officers' knowledge and of which they had reasonably

trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Draper v. United States, 358 U.S. 307, 313 (1959), citing Carroll v. United States, 267 U.S. 132, 162 (1925).

i. Belt conceded probable cause existed for his arrest and prosecution.

By waiving a preliminary examination, committal hearing, and arraignment, Belt conceded probable cause for his arrest. It has long been the rule in this state that committal of a defendant by a magistrate is *prima facie* evidence of probable cause for such prosecution. Garmon v. Warehouse Groceries Food Ctr., Inc., 207 Ga. App. 89, 93 (1993); Monroe v. Sigler, 256 Ga. 759, 760(3) (1987); Luke v. Hill, 137 Ga. 159(5) (1911). However, "the waiver of a preliminary examination by a person charged with a crime is *prima facie* evidence of probable cause the same as if defendant had been duly committed by the magistrate following an evidentiary investigation or hearing. That is, the waiver of preliminary hearing by [Belt] in the criminal prosecution for [obstruction] is tantamount to a finding by the magistrate that there is sufficient cause to believe [Belt] guilty, thereby giving

rise to a *prima facie* establishment of probable cause for [Belt's] arrest and prosecution for [obstruction]." Garmon v. Warehouse Groceries Food Ctr., Inc., *supra* (internal citations omitted.)

Upon deposition, Belt admitted that he waived any preliminary examination and thus, as a matter of law, conceded that probable cause existed for his arrest on the charge of obstruction. (Belt dep. 48:7-9). A certified copy of the State Court Clerk's file concerning the charge reveals that Belt waived all preliminary hearings. (R-76). Accordingly, Belt admitted probable cause for his arrest and prosecution. His claim for malicious prosecution fails, and the officers were entitled to summary judgment. See Also Means v. City of Atlanta Police Dep't., *supra*, (finding probable cause where, among other reasons, plaintiff waived a preliminary/probable cause hearing.)

ii. Actual probable cause existed for Belt's arrest and prosecution on the charge of obstruction.

What facts and circumstances amount to probable cause is purely a question of law. Barber v. H & H Muller Enterprises, 197 Ga. App. 126, 129 (1990); Kemp v. Rouse-Atlanta, Inc., 207 Ga. App. 876, 880 (1993).

Belt was arrested when, during the investigation of a shoplifting for which he was identified as a suspect, he refused to provide identification. (Supp.R-3); (Brown dep. 17:12 - 18:23); (Belt dep. 44:2-8). Belt was arrested pursuant to O.C.G.A.§ 16-10-24(a), which states that "[a] person who knowingly and wilfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor." Belt was aware that officers Scott and Brown were on-duty Glynn County Police Officers. (Supp.R-2, 3). He was arrested for wilfully obstructing and hindering their investigation when he refused to provide identification, after repeatedly being instructed to do so. (Supp.R-3); (Brown dep. 17:12 - 18:23); (Belt dep. 44:2-8.)

Refusal to provide identification to an officer has been held to be sufficient for the arrest, charge, and conviction of obstruction pursuant to O.C.G.A. § 16-10-24(a). However, as set forth above, the officers are entitled to summary judgment simply by demonstrating that there was arguable probable cause for the charge, not whether plaintiff would have ultimately been convicted.

In Hudson v. State, 135 Ga. App. 739 (1975) the Court of Appeals held that refusal to provide identification to an officer could hinder the officer in the execution of the officer's duties.

In Bailey v. State, 190 Ga. App. 683 (1989) the Court of Appeals affirmed the guilty conviction on an obstruction charge where the convicted appellant's refusal to identify himself was both discourteous and actually hindered and obstructed an officer in her investigation of a reckless driving and stop-sign violation.

In Clark v. State, 243 Ga. App. 362 (2000), the Court of Appeals affirmed the conviction of obstruction, *inter alia*, when appellant refused to provide any identification at a traffic stop. Appellant argued that merely refusing to identify one's self to a police officer was not a crime. The Court of Appeals held, "[r]efusal to provide identification in such circumstances can be the basis for prosecution under O.C.G.A. § 16–10–24(a)." Id. at 365.

Contrary to the Superior Court's Order, the officers articulated a reason they requested Belt's identification. It is undisputed that when the officers arrived at the scene, they were immediately informed by mall security that Belt was a

shoplifting suspect. (Scott dep. 10:5-11; 11:3-13; 12:3-6); (Brown dep. 10:13-23; 13:16-25). Officers Brown and Scott asked Belt to verify his identity, but he repeatedly refused, was evasive, uncooperative, and acted furtively as if he might flee. (Supp.R-3); (Belt dep. 32:3-7; 33:17-19; 40:4-11; 41:1-13); (Scott dep. p.13-16; 22:6-10; 23:14-17); (Brown dep. 15:3-16; 16:10-12). Officer Brown explained to Belt why he ought to verify his identity, and that if he did not present a form of identification, then he would be arrested for obstruction. (Brown dep. 23:10-20). Belt again refused, and so Officer Brown arrested him without incident. (Supp.R-3); (Brown dep. 17:12 - 18:23); (Belt dep. 44:2-8). Officer Brown plainly stated that Belt hindered his investigation of the shoplifting. (Brown dep. 18:6-11). Probable cause existed for Belt's arrest. Whether Belt would have been ultimately convicted is immaterial. "Just as probable cause may exist although a suspect is in fact innocent, probable cause may exist where the police do not know of the existence or validity of an exculpatory defense." GeorgiaCarry.Org, Inc. v. Metro. Atlanta Rapid Transit Auth., CIV.A 109-CV-594-TWT, 2009 WL 5033444 (N.D. Ga. Dec. 14, 2009).

3. The Superior Court should have granted Summary Judgment because appellee failed to state a claim of malicious prosecution.

Because there was probable cause for the arrest and prosecution of Belt, and because the officers never acted with actual malice, or actual intent to cause injury[4],they are entitled to judgment as a matter of law.

For a federal malicious prosecution claim arising in Georgia, the constituent elements are: "(1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused." Wood v. Kesler, 323 F.3d 872 (11th Cir. 2003). The "existence of probable cause defeats a §1983 malicious prosecution claim." Grider v. City of Aurburn, Ala., 618 F.3d 1240, 1256 (11th Cir.2010). Even in the absence of actual probable cause,

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[4] Though actual malice or actual intent to cause injury are generally elements of a law enforcement officer's "official immunity," they appear to have been incorporated as a part of a malicious prosecution in Georgia. See Valades v. Uslu, 301 Ga. App. 885 (2009).

arguable probable cause entitles a malicious prosecution defendant to qualified immunity. Id. at 1257. Mehta v. Foskey, CV 510-001, 2013 WL 870325 (S.D. Ga. Mar. 7, 2013) reconsideration denied, CV 510-001, 2013 WL 1808764 (S.D. Ga. Apr. 29, 2013). Here, the officers had both actual and arguable probable cause that Belt committed the crime of obstruction. Consequently, summary judgment on Belt's federal malicious prosecution claim is appropriate.

A. Belt conceded probable cause existed for his arrest and prosecution.

As set forth above, by waiving a preliminary examination, committal hearing, and arraignment, Belt conceded that there was probable cause for his arrest. See Garmon v. Warehouse Groceries Food Ctr., Inc., *supra*; Monroe v. Sigler, *supra*; Luke v. Hill, *supra*.

B. No malice attributable to applicants.

"Malice is an essential element of a malicious prosecution claim." Valades v. Uslu, *supra* at 889-90 (internal citations and punctuation omitted, emphasis provided.)

The Georgia Code defines malice as consisting "in personal spite or in a general disregard of the right consideration of mankind, directed by chance against the individual injured." O.C.G.A. § 51-7-2. See Also Valades v. Uslu, *supra*. "[T]he law does not presume malice or animus against an officer merely because in the discharge of his legal functions, he does an illegal act." Pinkston v. City of Albany, 196 Ga. App. 43, 44(1), 46 (1990). "Malice in an action for malicious prosecution or malicious arrest consists in personal spite or in a general disregard of the right consideration of mankind, directed by chance against the individual injured." Barber v. H & H Muller Enterprises, 197 Ga. App. 126, 130 (1990). To have a cause of action and raise an issue of malicious prosecution under O.C.G.A. § 51–7–40, for a jury, plaintiff must at least show some evidence of the animus required by O.C.G.A. §§ 51–7–2 and 51–7–3. Kemp v. Rouse-Atlanta, Inc., *supra* at 880-81 (1993). The mere fact that the prosecution is subsequently abandoned is not, by itself, sufficient to prove malice or lack of probable cause. McQueary v. Atlanta Airlines Terminal Corp., 198 Ga. App. 318, 320 (1991).

Although a police officer who acts with malice and without probable cause in making an arrest may be held liable in tort therefor, absent such a showing of

"actual malice," in the sense of a deliberate intent to commit a wrongful act, or a "wicked or evil motive," police officers enjoy official immunity for their actions, even when personal injuries or other rough treatment is involved. Valades v. Uslu, *supra*; Tittle v. Corso, 256 Ga. App. 859 (2002) (whole court); Selvy v. Morrison, 292 Ga. App. 702 (2008). See Also Ga. Law of Torts § 29:5 (2013-2014 ed.)

Belt himself deposed that the officers did not intend to harm him. (Belt dep. 56:2). Accordingly, there was no malice on the part of the officers, let alone actual malice which might preclude immunity. The officers were entitled to summary judgment on Belt's claim.

C. Actual probable cause existed for Plaintiff Belt's arrest and prosecution on the charge of obstruction.

Even if there was evidence of actual malice, Belt would still have to prove a total lack of probable cause for his arrest. "An arrest under process of law, without probable cause, when made maliciously, shall give a right of action to the party arrested." O.C.G.A. § 51–7–1. "Lack of probable cause shall exist when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused. Wills v. Arnett, 306 Ga.

App. 503, 505 (2010); See Also Ga. Law of Torts § 29:5 (2013-2014 ed.) What facts and circumstances amount to probable cause is purely a question of law. Barber v. H & H Muller Enterprises, *supra* 129(2)(b); Kemp v. Rouse-Atlanta, Inc., *supra*. As set forth above, the officers had at least arguable probable cause to arrest Belt for obstruction. Moreover, Georgia case law demonstrates convictions for obstruction for behavior on par with Belt's behavior at the scene. Accordingly, as a matter of law, actual probable cause existed for his arrest, and thus, summary judgment was required.

4. The trial court erred by ruling that jury issues remained as to whether the Glynn County Police officers had a valid reason to request Belt to verify his identity.

The trial court found that there were unresolved questions of fact concerning whether appellant police officers had a valid reason to request Mr. Belt to verify his identity. As discussed above concerning why appellants are entitled to qualified immunity and summary judgment, there are no unresolved issues of fact. The court determined that "[t]here was no clearly established law in December of 2008 which held that persons who actually enter private property with firearms

when that had been prohibited by the owner could not be required to identify themselves. Therefore, an officer who asked someone who entered a 'no-firearms' location with a firearm [to provide identification] would not be subject to suit under § 1983." (R-207). Further, as noted above, it is undisputed that all of the interactions Mr. Belt had with appellants occurred on mall premises, which is a "no-firearms" location. (Supp.R-2, 3). Accordingly, there are no issues of fact left to be resolved as to whether Belt did or did not enter a "no-firearms" location; it is undisputed that he did, so appellants are not subject to suit under § 1983.

The trial court also incorrectly found that issues of fact remain as to whether the officers received a shoplifting report and thus had a reasonable basis for questioning Mr. Belt. (R-208). However, the evidence here is likewise undisputed. Officer Scott was the first of the appellants to arrive at the scene. (Plaintiff's dep. 29:1-6; 30:4-9). Upon arrival, a mall security guard told Officer Scott that Belt was a suspect in a shoplifting at a store inside the mall, and "that Mr. Belt was being evasive, wouldn't provide any identification." (Scott dep. 10:5-11; 11:3-13; 12:3-6). The reason officer Scott investigated Belt was because he was a suspect

in a shoplifting. (Scott dep. 21:20-22; 22:1-5). There is no evidence to the contrary, and so there is no question of fact in this regard.

5. Conclusion

For the reasons set forth herein, the Superior Court erred by denying appellants qualified immunity, and by denying appellants' Motion for Summary Judgment as to Belt's federal malicious prosecution claim. The Superior Court's denial of qualified immunity, and summary judgment, should be reversed.

Respectfully submitted, this 22nd day of July, 2014.

BROWN, READDICK, BUMGARTNER,
CARTER, STRICKLAND & WATKINS, LLP

/s/Richard K. Strickland
Richard K. Strickland
Georgia Bar Number: 687830

/s/Eric L. Bumgartner
Eric L. Bumgartner
Georgia Bar Number: 525789
ATTORNEYS FOR APPELLANTS

P. O. Box 220
Brunswick, GA 31521-0220
(912) 264-8544

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing pleading by addressing same to:

John R. Monroe, Esq.
9640 Coleman Road
Roswell, GA 30075

and depositing same in the United States Mail with sufficient postage affixed to assure delivery.

This the 22nd day of July, 2014.

/s/Richard K. Strickland
Richard K. Strickland
Georgia Bar Number: 687830

BROWN, READDICK, BUMGARTNER,
CARTER, STRICKLAND & WATKINS, LLP
5 Glynn Avenue
P. O. Box 220
Brunswick, GA 31521-0220
(912) 264-8544