UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1253

SAUDIA SCOTT,

Plaintiff – Appellant,

v.

OLD NAVY, LLC, c/o GAP, Inc.; GAP, INC.,

Defendants – Appellees,

and

JANE DOE I, An Employee of Old Navy, LLC c/o GAP Inc.; DOES 2–10, Employees of Old Navy, LLC c/o GAP Inc.,

Defendants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. George L. Russell, III, District Judge. (1:18-cv-01189-GLR)

Argued: May 3, 2022 Decided: July 15, 2022

Before GREGORY, Chief Judge, and NIEMEYER and HARRIS, Circuit Judges.

Vacated in part and remanded by unpublished opinion. Judge Harris wrote the opinion, in which Chief Judge Gregory joined. Judge Niemeyer wrote a dissenting opinion.

ARGUED: Martina Deanne Evans, M.D. EVANS, ATTORNEY AT LAW, P.C., Baltimore, Maryland, for Appellant. Christopher Redmond Dunn, DECARO, DORAN, SICILIANO, GALLAGHER & DEBLASIS, LLP, Bowie, Maryland, for Appellees.

PAMELA HARRIS, Circuit Judge:

While Saudia Scott was shopping at an Old Navy store in Maryland, a store employee called the police to report her as a shoplifter. Scott was not a shoplifter, and she paid for her purchases and left the store as the employee watched. But the employee did not notify the police that her suspicions appeared to be unfounded, and as a result, Scott was detained by armed police officers while they investigated the situation.

Scott sued Old Navy for false imprisonment and negligence, among other claims. The district court granted summary judgment to Old Navy. According to the court, Scott had not been deprived of her liberty, as required to make out a false imprisonment claim, when armed police officers told her she had been accused of a crime, ordered her to return to the store, and kept her there for approximately 20 minutes – and no reasonable jury could find to the contrary. And as to negligence, the court concluded, the Old Navy employee had acted reasonably, as a matter of law, at all times – even once it became clear that Scott was not a shoplifter and in fact had paid for her merchandise.

We disagree. Viewing the record in the light most favorable to Scott, as we must at the summary judgment stage, we think a reasonable jury could find in her favor on both these issues. Because those are the only grounds on which the district court relied in awarding summary judgment on Scott's false imprisonment and negligence claims, we vacate the court's judgment in part and remand for further proceedings.

I.

A.

We begin with the facts established by the summary judgment record, viewed in the light most favorable to Scott. *See Dean v. Jones*, 984 F.3d 295, 301 (4th Cir. 2021). Unless otherwise noted, these facts are undisputed.

Scott, a Black woman, is a mother of three, grandmother of one, and longtime employee of the Baltimore public-school system. She is also a small-business owner: Through her boutique clothing company, "I Am Naturally Beautiful," she resells clothing, often bought at stores like Old Navy, on which she screen-prints her signature logo. Dkt. No. 91-8 ("Scott Tr.") at 8–14, 26–27; Dkt. No. 91-6 ("Scott Aff.") ¶ 3.[1]

One afternoon in July 2016, Scott made a trip to Old Navy to stock up on supplies for her business, looking specifically to buy "t-shirt dresses" for later resale. Scott Aff. ¶ 3. Because she had visited Old Navy's website first, she knew "exactly what [she] wanted to buy" upon arrival – "grey t-shirt dresses" – and soon found them near the front of the store. *Id.* ¶ 4.

[1] We granted Scott's motion to proceed on the original record with an abbreviated appendix, so most of our citations are to the district court docket. *See* Fed. R. App. P. 30(f); 4th Cir. R. 30(d). Those citations are abbreviated "Dkt. No. __." Citations to the abbreviated appendix are abbreviated "App'x __." Most of the facts recited here come from the transcript of Scott's deposition testimony and her affidavit filed along with her summary judgment submissions, and from the transcript of the deposition testimony of Megan Yost, the Old Navy employee who called the police to report Scott for suspected shoplifting.

After finding the dresses, Scott asked a store employee – Megan Yost, who is central to these events – what their price was and if there were any more in stock. Yost told her the price and that she likely could find more dresses in the clearance section toward the back of the store. Scott then grabbed 11 of the dresses, ranging in size from small to extra-large, draped them over her arm, and headed to the clearance section. Once there, she placed the dresses on top of a nearby shopping cart.

It was at this point, unbeknownst to Scott, that Yost grew suspicious of her. Around this time, Yost was told by a co-worker that Scott had entered the store "with another man who proceeded to come behind the registers and take a handful of [] shopping bags and run out of the door." Dkt. No. 91-7 ("Yost Tr.") at 25–26. Yost testified that she believed the two were working together because they came into the store together and then, after separating, got on the phone with one another – though at the time of her deposition, Yost could remember little about the man other than that he, like Scott, was Black. Scott, for her part, testified that she entered the store alone, and that she was on the phone with a female friend, not the man described by Yost, at the time. And phone records confirm that Scott was on the phone with a friend named Olivia Wright when she entered the store at around 2:00 p.m. and that she had no calls with any man at any relevant time that afternoon.

Put on alert by the purported theft of the shopping bags, Yost testified, she found that Scott's conduct raised "a lot of red flags," *id.* at 26: Scott had grabbed "an entire size run" of the same dress having "barely look[ed] at them," *id.* at 29, 32; had asked about the dresses' price even though a sign nearby showed it, *id.* at 29 (describing Scott as asking "self-explanatory" questions), 65–66; and was "looking up at the ceiling a lot," *id.* at 29.

So Yost investigated by sneaking up behind Scott – staying "quiet" and "holding [her] keys" so they did not "jingle" – and asking her if she could help with anything. *Id.* at 29–30. Scott was "startled" and declined further assistance, *id.* at 29, which further heightened Yost's suspicions, *id.* at 70. At that point, Yost had seen enough, and concluded that Scott and the unidentified man from earlier "were going to take the dresses and return them to other Old Navys with the bags that were stolen." *Id.* at 38. At 2:06 p.m., Yost returned to the front of the store and called the police to report that Scott "was potentially about to shoplift." *Id.* at 153.

Meanwhile, Scott continued shopping. And about ten minutes after Yost made the call to the police, Scott returned to the front of the store with the dresses she had decided to buy. In the checkout line, she briefly called her daughter to ask if she had any Old Navy coupons, and also asked Yost about an advertised promotion through which customers could receive cash back on purchases up to $75, wanting to know whether she could split her purchase into multiple transactions to receive more rewards. Scott claims that Yost said yes, and at 2:18 p.m. Scott checked out in two transactions (one for $79.50 and the other for $94.33), received a receipt, and left the store.

As Scott walked to her car, she noticed two police cars near the store's entrance but continued on her way. While she began to load her bags into her car, however, police "lights suddenly [came] on," and two uniformed officers approached her "carrying guns." Scott Aff. ¶ 8. They "started circling around [her] car," Scott Tr. at 61, and one of the officers told her she had been accused of shoplifting. The officer then said, "I need you to go back in the store." *Id.*; *see* Scott Aff. ¶ 8. In "disbelief," Scott asked if he was serious;

he responded, "[l]et's go back in the store," and asked for her identification. Scott Tr. at 61–62. Scott testified that the officers were "polite" and "professional." *Id.* at 101. But she was nevertheless "intimidated and scared" and "fearful for [her] safety." Scott Aff. ¶ 8. If she defied the officers' instructions to return to the store, she believed, she would have been arrested, leaving her with no choice but to "return and stay inside the store" as directed. *Id.* ¶ 9.

When Scott reentered the store with the officers, Yost told her, "I'm sorry, I'm sorry." *Id.* ¶ 10; *see also* Yost. Tr at 60–61 (Yost "apologized"). Yost was then taken to the back of the store for a conversation with one officer while the other officer stayed with Scott near the front. About 20 minutes after the officers arrived, they told Yost that there was nothing they could do because no theft had occurred, and one officer escorted Scott outside. Scott then drove away, but soon after departing pulled over on the side of the road and "cried uncontrollably." Scott Aff. ¶ 12.

B.

In April 2018, Scott sued Old Navy, LLC and its parent company, GAP, Inc. (For ease of reference, we refer to the defendants together as "Old Navy.") In an amended complaint, Scott brought multiple claims under Maryland state law, alleging false imprisonment, negligence, intentional infliction of emotional distress ("IIED"), and defamation, all arising from Yost's actions.[2] She also identified various theories of

[2] As the district court explained and the parties agree, because the relevant events took place in Maryland, Maryland law applies to this case. *See Scott v. Old Navy, LLC*, No. CV GLR-18-1189, 2020 WL 510228, at *5 n.5 (D. Md. Jan. 31, 2020).

secondary liability under which, she claimed, Old Navy could be held liable for Yost's allegedly tortious conduct.

In January 2020, the district court granted Old Navy's motion for summary judgment on all of Scott's claims. *Scott v. Old Navy, LLC*, No. CV GLR-18-1189, 2020 WL 510228, at *1 (D. Md. Jan. 31, 2020). It began by assessing the evidentiary record, addressing several facts that Scott believed to be in dispute. Some, the court held, were not genuinely disputed. *See, e.g.*, *id.* at *4 (discussing time of police call). Others, it held, *were* genuinely disputed, but the dispute was immaterial. *See, e.g.*, *id.* at *5 (discussing reason why Yost left her employment at Old Navy). In that latter category, the court explained, were questions about the existence of Scott's bag-stealing "accomplice." *Id.* at *3. Yost, as mentioned, claimed that Scott had entered the store with a man and that her association with him was the "first red flag" alerting Yost to possible shoplifting. *Id.* (quoting Yost Tr. at 28). Scott, on the other hand, described this as "an obvious fabrication" given Scott's documented phone call with her friend, the lack of any corroborating footage, and other inconsistencies in Yost's testimony. *Id.* (internal quotation marks omitted). The district court recognized that "Yost's and Scott's versions of events differ significantly on this point," but concluded, without further explanation, that this dispute was immaterial "because it does not affect the disposition of Scott's false imprisonment claim or any other of her claims." *Id.*[3]

[3] The district court noted that this factual dispute could be material to one of Old Navy's affirmative defenses to false imprisonment: the "shopkeeper's privilege," which precludes liability where a merchant has probable cause to believe that the person being (Continued)

The court then turned to the merits of Scott's claims. As to false imprisonment, it granted summary judgment on one ground only: Scott could not show, as a matter of law, the non-consensual deprivation of liberty necessary to make out a claim. According to the court, there was no record evidence from which a jury could find that "Scott's movement was [] restricted" by the police officers, who had not touched her, handcuffed her, or told her she was under arrest. *Id.* at *5. Instead, the evidence compelled the conclusion that Scott "[v]oluntar[ily] consent[ed]" to any confinement when she "complied" with a police officer's "order to return to the store." *Id.* at *6 n.7 (internal quotation marks omitted).

With respect to negligence, the court also rested entirely on one ground, holding "as a matter of law that Yost's decision to call the police for suspected shoplifting was reasonable under the circumstances," given the "red flags" that Yost had perceived. *Id.* at *7. The court addressed no other element of Scott's claim for negligence. And although Scott had emphasized Yost's failure to take corrective action *after* she witnessed Scott pay for her purchases,[4] the district court did not address that issue or otherwise consider Yost's

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detained has committed theft. *Scott*, 2020 WL 510228, at *3 n.4 (citing Md. Code Ann., Cts. & Jud. Proc. § 5-402(a)). But the dispute did not need to be resolved here, the court determined, given its finding that "Scott was not falsely imprisoned in the first instance." *Id.* On appeal, no party addresses this defense and so, like the district court, we express no view on its potential application to this case.

[4] *See, e.g.*, App'x 12–15 (amended complaint); Dkt. No. 89-1 at 20–21, 31 (arguing in opposition to summary judgment that Yost's conduct could be found unreasonable given that she saw Scott get in a check-out line, "watched as [Scott] rang up her purchases in two (2) separate transactions," "watched as [Scott] left the Store and walked to her car," "watched as Officers detained and returned [Scott] to the store," and yet "refused to cancel the call to [the] police").

conduct after her call to the police and after it seems to have become clear that Scott intended to – and then did – pay for the dresses at issue.

The court also disposed of two other claims not at issue in this appeal, holding that Scott's defamation claim was untimely and that her claim for IIED failed for lack of "extreme or outrageous" conduct.[5] *Id.* at *7–8. And finally, the court concluded that Scott's claims seeking to hold Old Navy secondarily liable for Yost's misconduct could not survive, given the absence of any underlying tort by Yost. *Id.* at *8–9.

Scott timely appealed.

II.

We review the district court's grant of summary judgment to Old Navy de novo. *See Dean*, 984 F.3d at 301. Summary judgment is appropriate only "if, taking the facts in the best light for" Scott, and drawing all reasonable inferences in her favor, "no material facts are [genuinely] disputed and [Old Navy] is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted). A dispute is genuine if a reasonable jury could resolve it in Scott's favor, and a fact is material if it might affect the outcome of the case. *See Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013). Our task at this point is neither "to weigh the evidence and determine the truth of the matter," *Anderson v.*

[5] Scott's brief on appeal is focused exclusively on her false imprisonment and negligence claims; the defamation claim is addressed only in passing, in a short footnote, and the IIED claim not at all. As a result, we understand her to have abandoned those claims on appeal, and do not address their merits. *See, e.g.*, *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 250 n.8 (4th Cir. 2015).

Liberty Lobby, 477 U.S. 242, 249 (1986), nor to "opine on how an ultimate fact-finder might evaluate the parties' differing accounts," *Dean*, 984 F.3d at 306. We decide only whether, taken in the light most favorable to Scott, the evidence here creates a "genuine issue for trial." *Anderson*, 477 U.S. at 249.

Under these familiar principles, we agree with Scott that the district court erred in granting summary judgment. The sole bases for its dismissal of Scott's claims for false imprisonment (that Scott's movement was not restricted by the police officers) and negligence (that Yost acted reasonably under the circumstances) improperly resolved genuinely disputed questions in Old Navy's favor. While a reasonable jury might not be *compelled* to find in Scott's favor on these points, that is, a reasonable jury *could* find in her favor, if we assume – as we must in this posture – that it credited her evidence and drew reasonable inferences in her favor. Because neither the district court nor Old Navy has provided us with any alternative grounds to support the court's rulings, we vacate the grant of summary judgment on these claims and remand for further proceedings.

A.

We begin with Scott's claim for false imprisonment. Under Maryland law, the elements of false imprisonment are (1) "the deprivation of the liberty of another"; (2) "without consent"; and (3) "without legal justification." *Heron v. Strader*, 761 A.2d 56, 59 (Md. 2000). If the defendant is a police officer, then the test of "legal justification" is supplied by the law of arrest. *Id.* But there is no claim in this case that the police officers who responded to Yost's call – and were by all accounts professional and polite in their dealings with Scott – acted outside their authority. Instead, Scott's claim is that a private

party – Old Navy, through Yost – "wrongfully procure[d] [her] arrest without probable cause . . . by falsely informing a police officer that the factual basis for a warrantless arrest exist[ed]." *Montgomery Ward v. Wilson*, 664 A.2d 916, 926 (Md. 1995). And even if the officers themselves would not be liable in those circumstances, Scott can prevail on that claim under Maryland law if she can show that Yost caused her false imprisonment by "knowingly giv[ing] false information" to the police. *Id.* at 926–27 (internal quotation marks omitted); *see Dawson v. Balt. City Bd. of Sch. Comm'rs*, No. 2015, Sept. Term 2015, 2016 WL 6664900, at *6 (Md. Ct. Spec. App. Nov. 10, 2016) (explaining that a plaintiff may pursue a false imprisonment claim against a defendant "who causes the deprivation of liberty by another, such as a store who makes a report of shoplifting to police").

The district court did not reach the "legal justification" element of Scott's claim.[6] Instead, it granted summary judgment to Old Navy because, in its view, the evidence compelled a determination that Scott's "movement was not restricted" by the officers, and that Scott had instead voluntarily consented to any restraint. *Scott*, 2020 WL 510228, at *5–6 & n.7. We agree with Scott that a reasonable jury could reach a different conclusion. Construed favorably to Scott, the summary judgment record would allow for a finding that she was deprived of her liberty without her consent when uniformed and armed police officers turned on their car's flashing lights, circled her car, told her she had

[6] Here and in the district court, Scott has argued that Yost's misconduct was indeed knowing. The district court did not address this question, and neither has Old Navy. "Mindful that we are a court of review, not of first view," we leave any remaining disputes on this front to the district court in the first instance. *United States v. Buster*, 26 F.4th 627, 636 n.3 (4th Cir. 2022) (cleaned up).

been accused of theft, and then, as the district court put it, "order[ed]" her "to return to the store." *Id.* at *6 n.7.

The district's court contrary determination rests on a mistaken assessment of both the law and the factual record. First, the district court appears to have taken an unduly narrow view of what counts as a "deprivation of liberty" for false imprisonment purposes under Maryland law. It is clear, as the district court recognized, that a cognizable deprivation of liberty requires "some direct restraint of the person." *See id.* at *5 (quoting *Mason v. Wrightson*, 109 A.2d 128, 131 (Md. 1954)). But it is not the case, as the district court seems to have believed, that such restraint may only be accomplished by force or threat of force. *See id.* at *6 (finding absence of evidence that officers used "force or threats of force" (cleaned up)). Instead, "any deprivation by one person of the liberty of another without his consent, whether by violence, threat *or otherwise*, constitutes an imprisonment." *Mason*, 109 A.2d at 131 (emphasis added) (internal quotation marks omitted). Consistent with this more expansive understanding of "direct restraint," the Maryland Court of Special Appeals has explained that although *criminal* liability for false imprisonment requires the use of "force, threat of force, or deception, . . . in the *common law type*" – at issue here – "the means are not necessarily so limited." *Amaral v. Amaral*, No. 86, Sept. Term 2014, 2015 WL 9257028, at *6 (Dec. 17, 2015) (emphasis added)

(internal quotation marks omitted) (collecting cases). Indeed, that is the "key difference" between criminal and civil false imprisonment under Maryland law. *Id.*[7]

That brings Maryland law into line with the hornbook rule that "asserted legal authority" – like a police officer's order – can produce a false imprisonment without more in the way of "threats or . . . fear of physical compulsion." Restatement (Second) of Torts § 41 & cmt. b (Am. L. Inst. 1965) (setting out example of police officer's order to "follow me"); *see, e.g.*, *Montgomery Ward*, 664 A.2d at 928 (relying on Restatement provision concerning false imprisonment). Other states have straightforwardly applied this principle – under the same "direct restraint" standard that governs in Maryland – to hold that a false imprisonment may occur when a person is "'told' by . . . [police] officers to accompany them" and acquiesces because "she believe[s] she was required to obey them because of their authority as police officers." *Crutcher v. Wendy's of N. Ala., Inc.*, 857 So. 2d 82, 92 (Ala. 2003); *see also, e.g.*, *Boies v. Raynor*, 361 P.2d 1, 2 (Ariz. 1961) (finding evidence that plaintiff "realized that he was being taken into custody by law officers who seemed capable of enforcing their demands" sufficient to support jury finding of false imprisonment).

[7] We agree with the court in *Amaral* that in some other cases – including some cited by the district court here – Maryland's Court of Special Appeals and federal district courts have "blurred" this distinction, requiring plaintiffs bringing civil cases also to show the use or threat of force. *See Amaral*, 2015 WL 9257028, at *7 (citing *Carter v. Aramark Sports & Ent. Servs., Inc.*, 835 A.2d 262, 285 (Md. Ct. Spec. App. 2003)); *e.g.*, *Lipenga v. Kambalame*, 219 F. Supp. 3d 517, 527–28 (D. Md. 2016). That may help to explain the district court's truncated analysis here. But as *Amaral* convincingly explains, these cases are inconsistent with the Court of Appeals' broader conception of a cognizable "direct restraint" in the civil context. 2015 WL 9257028, at *7–8.

We have no reason to think the Maryland Court of Appeals would reach a different result here.[8] Contrary to the district court's understanding, Scott need not show that police officers used or threatened force against her to establish a deprivation of her liberty. It is enough if Scott acquiesced to "asserted legal authority." And on the evidence here, as construed in Scott's favor – a directive to Scott by armed officers who informed her she was suspected of a crime – a reasonable jury could find an assertion of legal authority sufficient to directly restrain her liberty, with or without the use or threat of force.

We also disagree with the district court in a second and independent respect: Even if Scott were required to show a threat of force to establish a direct restraint on her liberty, as the district court believed, the evidentiary record in this case, construed in the light most favorable to Scott, would allow for such a finding by a jury. Under Maryland law, a qualifying threat of force may be "implicit"; an express threat is not required. *See Manikhi v. Mass Transit Admin.*, 758 A.2d 95, 112–13 (Md. 2000). And on this record, drawing all reasonable inferences in Scott's favor, we have armed officers activating their cruiser's flashing lights and circling Scott's car, accusing her of shoplifting, and then, against that backdrop, instructing her that they "need[ed]" her to return to the store with them. *See*

[8] In applying Maryland law, we are bound "to apply the jurisprudence of [Maryland's] highest court": the Court of Appeals. *Priv. Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 312 (4th Cir. 2002). Where the Court of Appeals has not directly addressed the specific question before us, we "predict how that court would rule" if presented with the issue, turning to the "state's intermediate appellate court" as the "next best indicia" of state law. *Id.* (internal quotation marks omitted). Our prediction also may be informed by such sources as treatises and restatements, *see id.*, and "the practices of other states," *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C.*, 433 F.3d 365, 369 (4th Cir. 2005) (internal quotation marks omitted).

Scott, 2020 WL 510228, at *2. The district court emphasized Scott's testimony that the officers were polite and professional throughout, *id.* at *5, and that is surely to their credit. But however polite the officers were, we think a reasonable jury could find that when Scott, accused of a crime, was ordered to accompany the armed officers back to the store, it went without saying that if she refused to do so on her own volition, some lawful measure of force would have been used to compel that result. *See Manikhi*, 758 A.2d at 112–13; *Amaral*, 2015 WL 9257028, at *7–8; *see also*, *e.g.*, *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (discussing authority of police to use reasonable force to effectuate investigative stops and arrests).[9]

The district court believed that allowing Scott's claim to go forward would be tantamount to a ruling that "the mere presence of . . . officers is . . . enough to demonstrate that they exercised force or threats of force," turning every police encounter into a potential false imprisonment claim. *See Scott*, 2020 WL 510228, at *6 (cleaned up). We disagree. It is true, as the district court noted, that the officers here did not expressly threaten Scott with force or formal arrest, and did not brandish their guns or handcuffs. *Id.* at *5–6. But this also is not, as Old Navy would have it, a routine police encounter, in which Scott

[9] At oral argument, Old Navy relied for the first time on a decision by the Maryland Court of Special Appeals for the proposition that a directive from an employer, absent a threat of force, does not qualify as a direct restraint on liberty. *See Carter*, 835 A.2d at 285. As we already have discussed, Maryland law is better understood not to require the use or threat of force to show a deprivation of liberty. But even assuming a threat of force is required, we think the likely effect of an *employer's* order is materially different from the likely effect of an armed *police officer's* order coming after an accusation of criminal conduct. *See* Restatement (Second) of Torts § 41 cmt. b (discussing "threats which may be inferred" from an assertion of legal authority to take a person into custody).

simply was "asked" to return to Old Navy and then "voluntarily walked back inside." Br. of Appellees at 10, 23. There is nothing in the record to refute Scott's testimony that she, as the district court recognized, was "order[ed]," not "asked," to accompany the officers back to Old Navy. *Scott*, 2020 WL 510228, at *6 n.7; *see* Scott Tr. at 61 (describing officer's statement that "I need you to go back in the store"). A reasonable jury crediting Scott's testimony that she "wanted desperately to leave" but believed she "had no choice but to return" to the store as instructed, *see* Scott Aff. ¶ 9, could infer an implicit threat of force – not from the police presence alone, but from the full factual record, viewed in the light most favorable to Scott.

Similarly, we cannot agree with the district court's suggestion, set out in a short footnote, that Scott consented to any deprivation of her liberty as a matter of law when she "complied" with the officers' "order" to return to Old Navy. *See Scott*, 2020 WL 510228, at *6 n.7. Old Navy has not defended this theory on appeal, and for the reasons already discussed, a reasonable jury, crediting Scott's evidence and drawing inferences in her favor, would not be required to conclude that Scott, in following the direct order of an armed police officer who had informed her that she was a criminal suspect, voluntarily consented to any restraint on her liberty. *Cf. Varner v. Roane*, 981 F.3d 288, 293 (4th Cir. 2020) ("If a police officer accuses someone of having committed a crime and then asks to speak with that person, that may well suggest a lack of consent.").

In sum, the record here, viewed in the light most favorable to Scott, would allow a reasonable jury to find the requisite direct and non-consensual restraint on her liberty. The district court's grant of summary judgment to Old Navy rested solely on its finding to the

contrary. Accordingly, we vacate that portion of the district court's judgment, expressing no view as to any other element of Scott's claim or any potential Old Navy defense.

B.

We next consider Scott's negligence claim. In Maryland, the elements of a claim for negligence are "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty." *Todd v. Mass Transit Admin.*, 816 A.2d 930, 933 (Md. 2003) (internal quotation marks omitted). The parties do not dispute that Old Navy owed Scott, as an invitee, a "duty to use reasonable and ordinary care to keep the premises safe" and to "protect [her] from injury caused by an unreasonable risk that [she], by exercising ordinary care for [her] own safety, will not discover." *Henley v. Prince George's County*, 503 A.2d 1333, 1343 (Md. 1986). Nor do they dispute that, as the Court of Appeals has recognized, a private party who negligently causes a wrongful arrest may be liable for damages in a negligence action. *Montgomery Ward*, 664 A.2d at 929 (collecting out-of-state cases).

What is contested by the parties is whether a reasonable jury could conclude that Old Navy, through Yost, breached its duty of care by negligently causing Scott's alleged false imprisonment. The district court answered that question in the negative, holding that "Yost's decision to call the police for suspected shoplifting was reasonable under the circumstances such that no reasonable juror could find that Yost breached her duty to Scott." *Scott*, 2020 WL 510228, at *7. Again, we disagree.

We first part ways with the district court in its conclusion that, considering only the facts it deemed material, Yost acted reasonably as a matter of law when she first called the police. *See id.* at *6–7. For this proposition, the district court relied on the following: that Scott picked up several identical dresses in a range of sizes, frequently looked up at the ceiling, asked what Yost viewed as "excessive" questions, and was "startled" when Yost "quietly approached her"; that Yost, for her part, felt "uncomfortable" throughout; and that Yost's coworker agreed with her intuition. *Id.* at *6. Given those circumstances, it may be that a reasonable jury, crediting Yost's account, would find that Yost acted reasonably in calling the police to report Scott for shoplifting, even before Scott left the store with any merchandise. But we do not think a reasonable jury would be *compelled* to do so.

As the district court recognized, a "person may demonstrate the requisite intent of theft" before actually "leaving the store with [] stolen property." *Id.* at *7 (citing *Lee v. State*, 474 A.2d 537, 539 (Md. Ct. Spec. App. 1984)). But few of the factors that Maryland courts have held germane to assessing that intent were present here. *See Lee*, 474 A.2d at 542–43 (listing as factors "concealment of goods," "furtive or unusual behavior," "flee[ing] the scene" upon being accosted, "proximity to the store's exits," and "possession by the customer of a shoplifting device with which to conceal merchandise"); *see also Farrell v. Macy's Retail Holdings, Inc.*, 645 F. App'x 246, 248 (4th Cir. 2016) (unpublished) (per curiam) (applying Maryland law and same factors). Scott did not attempt to conceal the 11 dresses she openly carried around the store, and indeed lacked any bag or other means of concealment. She did not "flee" the store – or even leave in some less conspicuous manner – when Yost came up behind her and startled her. She was

nowhere near an exit when Yost called the police. And the questions she asked Yost – about the price of and payment for the dresses in question – cannot indisputably be characterized as "excessive," and thus "furtive or unusual." Construing these facts in the light most favorable to Scott, we think a jury could find in favor of Scott on the reasonableness question.

It may be, as the district court determined, that the behavior Yost believed suspicious "*could*," taken as a whole, "be described as furtive or unusual" under Maryland law. *Scott*, 2020 WL 510228, at *7 (emphasis added). But at this stage of the proceedings, that is not the question. As we explained long ago, "[s]ummary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy." *Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co.*, 381 F.2d 245, 249 (4th Cir. 1967). Even if we confine ourselves to the facts the district court deemed material to its assessment of Yost's reasonableness, we do not think the record here provides the clarity this standard demands.[10]

[10] In reaching this conclusion, we – like the district court – do not rely on evidence that Yost, in calling the police, knowingly violated Old Navy store policy, which forbids employees from reporting potential shoplifting to the police before a suspect actually has left the store with stolen merchandise. As the district court explained, Maryland courts seem to take the view that whether an employee's actions are consistent with company policy is "not helpful in a determination of what constitutes reasonable care." *Scott*, 2020 WL 510228, at *7 (quoting *Doe v. Prudential Ins. Co. of Am.*, 860 F. Supp. 243, 252–53 (D. Md. 1993)); *see W. Md. Ry. v. Griffis*, 253 A.2d 889, 895 (Md. 1969). By the same token, however, the district court erred in relying on the list of "suspicious behaviors" in Old Navy's store policy to buttress its conclusion that Yost's call to the police constituted "reasonable care" as a matter of law. *See Scott*, 2020 WL 510228, at *7.

The district court erred in a second respect, as well, omitting from its analysis – as immaterial – a key dispute bearing on Yost's reasonableness: whether Scott entered the store with an "accomplice." In finding that Yost acted reasonably as a matter of law when she called the police, the court relied in part on Yost's testimony that she "felt 'uncomfortable.'" *Scott*, 2020 WL 510228, at *6 (quoting Yost Tr. at 32–33). But Yost's discomfort was based first and foremost on her belief that Scott had entered the store with an accomplice – a man who stole several shopping bags that the two would use to return Scott's purportedly stolen goods to another Old Navy store. Yost returned to this "first red flag," Yost Tr. at 28, repeatedly in her deposition, *see, e.g.*, *id.* at 26, 32–38, 46–47, 67, 70, describing the purported accomplice as "the first thing that freaked [her] out," *id.* at 147. But Scott denies having had anything to do with this man, citing record evidence showing, contrary to Yost's description, that the two had no contact with one another in the store. And Old Navy, for its part, has produced no evidence beyond Yost's speculation to indicate that the two indeed were working together.

We thus agree with the district court that the parties' accounts "differ significantly on this point." *Scott*, 2020 WL 510228, at *3. But we cannot agree that this dispute of fact is immaterial to Scott's negligence claim. *See id.* The precise circumstances that led Yost to assume that Scott was working alongside the unidentified man bear on the reasonableness of that assumption, and if a jury found that Yost's assumption was not reasonable, then it also could conclude that her suspicion of Scott – stemming crucially from this "first red flag," Yost Tr. at 28 – likewise was unjustified. Or, as Scott argued to the district court, a jury might find that certain alleged fault lines in this part of Yost's

account cast broader doubt on Yost's credibility, and thus her proffered reasons for suspecting Scott in the first place. *See Scott*, 2020 WL 510228, at *3 (summarizing inconsistencies identified by Scott in Yost's account). One way or another, resolution of the "accomplice" dispute could prove material – and perhaps even central – to a jury's assessment of Yost's reasonableness in calling the police.

Finally, the district court failed to address a key aspect of Yost's conduct in evaluating its reasonableness: Yost's conduct *after* she called the police. Scott's negligence claim, as she presented it to the district court, turned not only on Yost's initial call to the police, but also on Yost's allegedly unreasonable failure to correct the situation and avert, or at least cut short, Scott's detention once it became clear that Scott did not intend to shoplift and had paid for the dresses in question. Before us, Scott presses the same theory, arguing that the "red flags" cited by Yost were "[o]bviated" by the time Scott paid for her purchases. Br. of Appellant at 21–22. But the district court never addressed this argument, and we agree with Scott that it was error to ignore this important aspect of her claim.

Even if we assume, for the sake of argument, that Yost acted reasonably as a matter of law when she first called the police, on this record as construed in Scott's favor, we think a jury could find Yost's subsequent action – more precisely, her inaction – unreasonable. Whatever suspicions Yost may have had about Scott before her report to the police, after that call, Yost watched as Scott proceeded to the cash register, discussed payment options with Scott, and then saw Scott pay for her purchases and leave. At no point did Yost try to contact the police to tell them that her prior report had proven wrong or at least manifestly

incomplete, and at no point did she seek to prevent or shorten the officers' detention of Scott once they arrived. From this, a jury could conclude that even if Yost's initial call to the police was justified, it was unreasonable for her not to take any ameliorative action once it became clear that Scott was not a shoplifter. *See, e.g.*, *Oden & Sims Used Cars, Inc. v. Thurman*, 301 S.E.2d 673, 675–76 (Ga. Ct. App. 1983) (cited by *Montgomery Ward*, 664 A.2d at 929) (dismissal of negligence claim against car dealer improper where dealer reported stolen car to police and, after learning report was wrong, failed to notify police, leading to arrest of plaintiff who lawfully had purchased car).

As with Scott's false imprisonment claim, the district court relied on one ground alone to grant summary judgment on Scott's negligence claim – here, that that the record evidence, viewed in the light most favorable to Scott, would not allow a jury to find that Yost had acted unreasonably. For the reasons given, we disagree with that determination, and therefore vacate the court's grant of summary judgment on this claim. As with the false imprisonment claim, we express no view on any other element of Scott's negligence claim.

C.

Last, we turn to Scott's claims of secondary liability. On this point we can be brief. In her amended complaint, Scott brought claims against Old Navy for negligent hiring, negligent retention/training, and respondeat superior. Under Maryland law, these are "three distinct theories" for holding employers, like Old Navy, "responsible for the torts of [their] employee[s]," like Yost. *E.g.*, *Henley v. Prince George's County*, 479 A.2d 1375, 1381 (Md. Ct. Spec. App. 1984), *aff'd in relevant part*, 503 A.2d 1333. Consequently, the

district court dismissed each claim on the same ground: Because all of Scott's claims against Yost had failed, there was no employee misconduct to be attributed vicariously to Old Navy under any theory. *See Scott*, 2020 WL 510228, at *9.

We agree with the district court's major premise: None of the theories of liability under which Scott has sued Old Navy presents a standalone claim for relief; rather, each requires Scott first to establish the "tortious conduct of an employee" before that conduct may be imputed to an employer. *E.g.*, *Antonio v. SSA Sec., Inc.*, 110 A.3d 654, 658 (Md. 2015) (cleaned up); *Henley*, 479 A.2d at 1381–82. But as we have explained, the district court erred in granting summary judgment against Scott on her false imprisonment and negligence claims. And with those claims back on the table, the district court's conclusion no longer follows: It may turn out that Scott *can* establish the requisite tortious conduct by an employee. We of course express no view on the ultimate merits of Scott's claims. We hold only that with the district court's dismissal of Scott's false imprisonment and negligence claims vacated, the sole reason the court gave for dismissing each theory of secondary liability – that "there is no underlying tort" by an Old Navy employee, *Scott*, 2020 WL 510228, at *9 – no longer holds. As a result, we also vacate this portion of the district court's judgment.

* * *

In closing, we emphasize again the narrowness of our holding. Viewing all of the evidence in the best light for Scott, and drawing all reasonable inferences in her favor, a reasonable jury could find for her on the two issues addressed by the district court in granting summary judgment to Old Navy. We have no occasion to address any other

elements of Scott's claims, and we express no view as to the relative strength of her overall case. But at this relatively early stage of Scott's case, the grounds upon which the district court relied in granting summary judgment against her, and the reasons Old Navy offers for affirming, cannot sustain that result.

III.

For the foregoing reasons, we vacate the district court's grant of summary judgment to Old Navy on Scott's claims for false imprisonment and negligence and remand for further proceedings consistent with this opinion.

VACATED IN PART AND REMANDED

NIEMEYER, Circuit Judge, dissenting:

I most respectfully dissent. I believe that Megan Yost, an employee of Old Navy, LLC, had a suspicion that Saudia Scott was shoplifting and that that suspicion entitled her to call the police. There were a number of indicators that she identified to create the suspicion, although those indicators proved to be wrong. The police came, questioned Scott, found no evidence that she had shoplifted, and ended the encounter with her. While Scott was justifiably upset by the incident — having been investigated for something she didn't do — Old Navy did not breach a duty recognized by common law, nor is it liable for falsely imprisoning Scott.

Old Navy owed Scott, as a business invitee, "a duty to use reasonable and ordinary care to keep the premises safe and to protect [her] from injury caused by an unreasonable risk which [she], by exercising ordinary care for [her] own safety, [would] not discover." *Rhaney v. Univ. of Md. E. Shore*, 880 A.2d 357, 366–67 (Md. 2005) (citation omitted). That standard is not disputed. But calling the police based on suspicion is not conduct that subjects the customer to an unreasonable risk of injury. *Cf. Southland Corp. v. Griffith*, 633 A.2d 84, 91 (Md. 1993) (holding that business had legal duty to call the police to protect business invitee when latter requested assistance). To the contrary, it is the orderly way to allay suspicion, avoiding potentially direct contact with the customer that could increase the risk of injury for store employees, the suspected shoplifter, and other customers. *See Giant Food, Inc. v. Mitchell*, 640 A.2d 1134, 1139–41 (Md. 1994) (compiling cases involving physical injuries resulting from storekeepers confronting shoplifters). Tellingly, Scott has identified no case where a court has held that calling the

police breaches a common law duty of care. *But see, e.g.*, *Chapman v. Wal-Mart Stores E., LP*, No. 2:17cv283, 2018 WL 2144489, at *6 (E.D. Va. May 9, 2018) (holding that business did not breach duty to invitee when it "call[ed] the police for alleged shoplifting").

Moreover, after the police were called, it was up to them to end their investigation, even though Yost could have caused it to end sooner. But even so, Scott would have been subject to a police encounter of some duration because the police met her in the parking lot before they invited her into the store. More importantly, Yost's failure to cause an earlier end to the police encounter did not violate a duty recognized at law. And in the absence of a *duty*, there cannot be a cause of action for negligence.

As to the false imprisonment claim, it too should fail. Once the police were called in this case, any restraint that was imposed by them was not Old Navy's or Yost's conduct but the conduct of the police. Yost could be responsible for the false imprisonment *if she had falsely informed the police* of her suspicion, knowing that her statements were "*without foundation*." *Montgomery Ward v. Wilson*, 664 A.2d 916, 926 (Md. 1995) (emphasis added) (citation omitted). But there is no evidence in this case that Yost knowingly provided false information to the police, fatally undermining Scott's false imprisonment claim against Old Navy.

Moreover, with respect to false imprisonment, I agree with the district court that Scott's encounter with the police — who Scott, in her deposition testimony, acknowledged were "polite" and "professional," did not threaten her, and did not intimidate her beyond their mere presence and questioning, *see* Dkt. No. 62-2 at 101–02 — did not entail the

"direct restraint" necessary to succeed in a false imprisonment claim under Maryland law, *see Mason v. Wrightson*, 109 A.2d 128, 131 (Md. 1954) (citation omitted).

While Yost might have handled the situation better, she did not, in my judgment, breach Old Navy's duty of care, nor did she act to falsely imprison Scott under Maryland law. Accordingly, I would affirm the district court.