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.

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[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.").