IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

No. 1041 September Term 2022 CSA-REG-1041-2022
Circuit Court No. C-17-CV-20-000140

GORDANA SCHIFANELLI,

Appellant
v.

MARY ELLA JOURDAK,

Appellee

On Appeal from
the Circuit Court of Queen Anne's County, Maryland
(Hon. Lynn Knight, Judge)

BRIEF OF APPELLANT

/s/ Marc D Schifanelli
Marc D. Schifanelli, Esq.
CPF # 0412150261
P.O. Box 1023
Stevensville, MD 21666
240-882-2402
Marc@Schiflaw.com
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF THE CASE

Appellant, Gordana Schifanelli, brings this appeal as to her underlying claims for Defamation. A jury in the lower court did determine that the Appellee published false and derogatory statements to a third party and thus defamed Appellant. However, Appellant seeks, *inter alia*, reversal of the lower court's decision to apply Maryland's fair comment privilege to the Appellee's defamatory statements, thus requiring Appellant to prove Appellee's actual knowledge of falsity coupled with intent to deceive a recipient (i.e., malice). She argues that 1) the statements were not statements of *pure opinion* that would support a determination, as a matter of law, that fair comment privilege applied; and 2) she was prejudiced procedurally when the lower court, after denying Appellee's request for fair comment privilege, as a matter of law, during summary judgment and other pretrial motions, reversed its decisions post-trial, *after* all witnesses had testified and the parties had rested. Appellant argues lastly that the lower court's decision to withhold two of the several defamatory statements from jury consideration was reversible error since these statements met the elements of simple defamation and specifically could have showed the required knowledge of falsity and intent to deceive.

She respectfully asks the Court to remand the matter back to the Circuit Court on the issue of damages only, the jury having found that the Appellee's statements were in fact defamatory.

QUESTIONS PRESENTED

I. DID THE LOWER COURT COMMIT REVERSABLE ERROR WHEN IT APPLIED FAIR COMMENT PRIVILEGE TO EACH OF THE APPELLEE'S DEFAMATORY REMARKS?

II. DID THE LOWER COURT COMMIT REVERSABLE ERROR WHEN IT REVERSED AFTER TRIAL ITS PRE-TRIAL DECISION FINDING THAT FAIR COMMENT PRIVILEGE DID NOT APPLY, THEREBY PREJUDICING APPELLANT?

III. DID THE LOWER COURT COMMIT REVERSIBLE ERROR WHEN IT DENIED JURY CONSIDERATION OF THE "VIOLENCE TWEETS?"

STATEMENT OF FACTS

I. Events Leading to the Defamatory Statements

On August 2, 2020, the Appellant, Gordana Schifanelli, sued Appellee, Mary Ella Jourdak, for Intentional Infliction of Emotional Distress, Defamation and Defamation Per Se. These claims were based on Appellee's publication between July 23rd through July 31st, 2020, of several statements made on her Twitter account. When she published the statements, Appellee specifically "tagged" the Twitter accounts maintained by the U.S. Navy, the U.S. Naval Academy Alumni Association, and the U.S. Naval Academy ("USNA"), thus specifically including them, along with others, as recipients.

During the relevant period, Appellant was an attorney and an adjunct professor of Law and Economics at the USNA. [E130] As a practical matter and as a matter of law

determined by the lower court, Appellant was a private, non-public person.[1] [E147] She was also the mother of school-aged children in the Queen Anne's County, Maryland Public Schools system. [E129]

Appellee Jourdak was also private person. She also served as a member of a subcommittee of the Queen Anne's County Local Management Board. [E135].

During the month preceding the Appellee's defamatory publications, the then superintendent of the Queen Anne's County Public Schools issued a formal letter urging parental support for the Black Lives Matter organization/movement that caused much dismay among county residents and parents. [138]

The Appellant too was critical of the superintendent's behavior and attended a meeting of several residents and parents who jointly decided to create a Facebook page called *Kent Island Patriots*. [143] All agreed to simultaneously serve, and in July 2020 did serve, as the Facebook page's administrators in promoting patriotism, the rule of law, love of country and the Constitution, and other such ideas throughout Queen Anne's County. [143]. The group grew "overnight" to more than two thousand community members. [145] Discussions on the Facebook page included open criticism of the school superintendent and the local school system in general. [138]

The Appellee, on the other hand, was a strong supporter of the school superintendent. [138]. In response to Appellant's outspoken criticism, Appellee engaged with others on social media to disrupt Appellant's criticism of the local superintendent, deciding to "become her worst nightmare" and determining that the USNA was "a good

[1] All of Appellee's requests that Appellant be deemed a public or semi-public figure were denied by the lower court. Those decisions have not been challenged here on appeal.

shot." [E033/034]

On July 24th, 2020, Appellee attended an official meeting of a subcommittee of the Queen Anne's County Local Management Board (the "Sunday Supper Committee") where she discussed with other attendees the Appellant's association with Patriots Facebook page and her employment as an adjunct professor at the USNA. [E035, 135, 136] She shared with others several email addresses and telephone numbers for various USNA offices [E035] and told members that she had already contacted the USNA regarding "the leader of the Kent Island Patriots" and "encourage[d] others to do the same." [E036]

II. Appellee's July 2020 Defamatory Statements

A. *The "Smear Campaign Tweet"*

The Appellee's first defamatory statement was published on 7/23/2020 at 2:06 a.m. to her Twitter followers and specifically addressing it to and "tagging" for receipt the U.S. Navy, USNA, the USNA Alumni Association, and the Admissions Office:

> "a local woman running a misinformation/smear campaign against our county's school superintendent is employed by the @USNavy at the @NavalAcademy as an adjunct professor…what say y'all, @USNAAlumi @AdmmissionsUsna? Is this standard representation of the USNA??" [E016]

Attached to this tweet (hereinafter the "smear campaign tweet"), Appellee included only four pictures (i.e., "screenshots"):

a. A picture Appellant Schifanelli in front of some law books,

b. A post about a then unknown person,

c. An incomplete conversation between the Appellant and a "Kel Ann," and

d. An exchange of opinions and a rhetorical question [E017 – E020]

None of the attached pictures contained statements subject to true or false determinations.

B. ***The "Violence Tweets"***

Later that same day, Appellee again tweeted on the same Twitter chain that she had started earlier:

> "now, I'm no lawyer, but I'm *pretty* sure that sort of defamatory statement is libelous. especially when it becomes inflammatory to the point where violence was threatened." (sic.) [E021]

Attached to this first of two tweets (hereinafter the "violence tweets") Appellee included only a screenshot of her own conversation with two unknown persons messaging *each other*. One of the persons wrote, "*one of them needs to get the shit beat out of HIM*." [Id.]

Appellee admitted that this rhetorical conversation did *not* take place on the Kent Island Patriots Facebook page where Appellant Schifanelli served as one moderator, but on a page of which Appellee Jourdak, and *not* Appellant, was a member. [E139]

Appellee also admitted that the U.S. Navy recipients could view this particular tweet. [E141]

Appellee then tagged the U.S. Navy, the Naval Academy, the Alumni Association and the Admission office, right below this tweet, now asking for action on their part:

> "so I'll ask again what y'all will do about this, because I really and truly hope that this behavior is not representative of the

values that the USNA upholds." [E021].

C. *The "Racist Tweets"*

After having heard no response from the U.S. Navy or USNA regarding the above four tweets, Appellee published her "racist tweets." The first was made on 7/25/2020, tagging the U.S. Navy and the USNA for receipt:

> "for the viewing pleasure of the @NavalAcademy and @USNavy, here are a collection of comments that Gordana Schifanelli has both published and let flourish under her moderation…" [E022 (emphasis added)]

Appellee had again attached to this statement several screenshots of Facebook posts, two of which contained Appellant's opinions critical of local county teachers or officials, the balance showing commentary between unknown persons. One post contained a meme (i.e., picture) referring derogatorily to the Black Lives Matter organization. [E023, et. seq.]

The following day and in the same Twitter feed, Defendant again tagged the Naval Academy, writing,

> "another day, another load of posts that @NavalAcademy adjunct professor Gordana Schifanelli let's fly in her "Patriots" group. Does the @USNavy find racism patriotic, too?" [E027] (emphasis added).

Testimony and documentation show that Appellant Schifanelli was in July 2020 only one of several administrators on the "Kent Island Patriots" Facebook page who had authority to approve posts made by page members. [E143]. They also shared equal authority to *remove* any posts that they found inappropriate for whatever reason. [E145]

Appellant testified that she did not approve for publication the Black Lives Matter meme or any other racially offensive posts, and to the contrary, Appellant testified that, after having been made aware that the meme and other racially charged posts were appearing on the Patriot's page, she removed them and issued a lengthy message to the page members, admonishing those posting "racist and abhorrent comments." [E032, E145].

III. Appellee's Multiple Requests for Fair Comment Protection

A. Appellee Moves for Fair Comment Privilege in Her Motion for Summary Judgment

On June 2nd, 2021, Appellee filed a Motion for Summary Judgment in which she prayed and argued for application of the Fair Comment Privilege. [E049-E051] A hearing on the motion was held on July 27th, 2021, and Appellee argued in open court for application of the privilege. [E056-E057] The Honorable Judge Knight denied the Motion for Summary Judgment in its entirety and without a written memorandum opinion.[2]

B. Appellee Moves the Court to Designate Her Defamatory Statements as Pure Opinions Not Actionable in Defamation Claims.

On February 18, 2022, Appellee filed a *Motion for Pre-Trial Hearing on Matters of Law and Statement of Points and Authorities in Support Thereof.* [E089] In this

[2] During nearly two years of litigation leading up to the trial, the Honorable Judge Knight adjudicated various written motions, including to dismiss, for summary judgment, requests to exclude the statements as opinions, for "contempt," and so forth. None of her orders contained memorandums of opinion or elaborations of her reasoning.

motion, Appellee again raised the issue of fair comment privilege, argued the elements required for that privilege and to designate all the Appellee's defamatory statements as protected opinions:

> "Maryland's fair comment privilege also applies here; it protects 'opinions or comments regarding matters of legitimate public interest.' Piscatelli, 424 Md. 294 at 307. The fact that the statements at issue were about matters of legitimate public interest cannot be seriously disputed. [E103 (emphasis added)]

****

> "Because the statements relate to a matter of public interest, the next question for the Court to decide is whether the statements were statements of opinion or fact. The law provides that all were statements of opinion…The law establishes indisputably that each is a statement of opinion." [E104].

Referencing the "racist tweets," Appellee argued that,

> "…the public has an interest in ensuring that those affiliated with those important public institutions behave in a manner consistent with the ideals each institution expresses, including with respect to diversity and inclusion." [E103]

Appellant Schifanelli opposed the motion, specifically noting that the application of fair comment privilege had already been decided in Appellee's motion for summary judgment:

> "The Defendant is asking that this Court rehear and re-adjudicate two questions of law that the Defendant has already raised and argued in its previous Rule 2-501 Motion for Summary Judgment and/or raised in open Court during the 7/27/2021 hearing on that motion, and which this Court has already decided by its Order denying…" [E078-E080]

This motion was denied without a written memorandum.

C. Appellee Again Moves the Court to Designate the Statements of Opinions Citing *Piscatelli*

Appellee subsequently submitted a *Motion in Limine to Exclude Certain Statements of Opinion and Request for Hearing* [E109] in which she again prayed that the court determine that all of the Appellee's defamatory statements were, as a matter of law, pure opinions. [E110] She used a *Piscatelli* type analysis of the considerations in a fair comment privilege determination:

> "All three statements at issue here should be deemed to be statements of opinion." [E116]
>
> ******
>
> "As statements of opinion, these statements are inactionable because the facts upon which Jourdak based her opinions were given or readily available and thus Jourdak cannot be subject to liability for them." "see also Piscatelli v. Smith, 424 Md. 294, 35 A.3d 1140, 1152 (2012) (affirming summary judgment in favor of defendant because his statements were simple or pure opinions)" [E112].

The Appellant again argued, inter alia, that the matter of fair comment and opinion determinations had already been decided. [E122 – E125]

The Court held a hearing on Appellee's Motion in Limine, after which the Honorable Judge Ross denied the motion [E126, et. seq.] noting that the Court had already addressed these claims for fair comment privilege and opinion status and had denied them:

> "On June 2, 2021, Jourdak filed a motion for summary judgment…[and]…directed the Court to purported defamatory statements related to a 'smear campaign,' claiming Schifanelli was 'racist,' and that she has made statements "inciting violence'…the motion was denied. On February 18, 2022, Jourdak filed a motion

> requesting a pretrial hearing on matters of law, specifically relating to whether Schifanelli was a "limited public figure" and whether the "fair comment privilege" applies to Defendant's allegedly defamatory statements. That motion was denied... [E127]
>
> "It is clear that Jourdak's claims have been addressed in prior motions and orders…" [Id. (emphasis added)].

D. Jury Trial and Post-Trial Motion for Fair Comment Privilege

A jury trial was held between July 19th and July 21st.

Before closing arguments, the Appellee moved for summary judgment to, *inter alia*, to strike or prevent the jury from considering any/all of the Defendant's statements since they were statements of opinion, that Appellant be deemed a limited public figure, and again requested application of fair comment privilege. Appellant opposed all points of the Appellee's post-trial motions.

The Court ruled that Appellant was not a public figure, that the "violence tweets" would not be presented to the jury for consideration, and granted fair comment privilege to *all* the remaining defamatory statements. Honorable Judge Knight reasoned only that "this is a case where there is lots of public interest and comment about what was happening…" [E147]

E. The Jury Finds the Defendant's Statement(s) Were False and Defamatory

Because the Appellee had been afforded fair comment privilege, the jury was required to not only answer whether Appellee's published statements false and derogatory (i.e., defamatory) but also whether she made them with actual knowledge

coupled intent to deceive. The jury found the statements to be defamatory, but that Appellee did not have the requisite knowledge and intent to overcome fair comment privilege. [e149]

STATEMENT OF LAW

A. Defamation

The elements of defamation are: "(1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered harm." *Piscatelli v. Van Smith*, 424 Md. 294, 307, 35 A.3d 1140 (2012) (emphasis added).

B. The Fair Comment Privilege

Maryland recognizes several common law conditional privileges, including the fair comment privilege. *Gohari v. Darvish*, 363 Md. 42. (Md. 2016) (internal citations omitted; emphasis added). Under fair comment privilege, "any member of a community may, without liability, honestly express a fair and reasonable opinion or comment on matters of legitimate public interest. The reason given is that such discussion is in the furtherance of an interest of social importance, and therefore it is held entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation. Thus, the fair comment privilege is available for opinions or comments regarding matters of legitimate public interest." *Piscatelli v. Van Smith*, 424 Md. 294 (2012) (emphasis added).

Hence, determining whether the privilege applies here is a two part analysis: 1)

whether the Appellee's defamatory statements were, as a matter of law, statements of opinion and not statements of fact, and 2) whether they pertained to a matter of legitimate public interest.

1. Misstatements of Fact Distinguished from Statements of Simple Opinion

Fair comment privilege does *not* protect:

a) defamatory (i.e., false and derogatory) statements of fact;

b) defamatory opinions asserted as having a factual basis; or

c) derogatory opinions not published with the true facts upon which the speaker relied in forming the derogatory opinion (called "mixed opinions"). *Piscatelli,* supra.

"Whether a particular publication comes within the purview of this privilege 'often turns on whether or not it contains misstatements of fact as distinguished from expression of opinion.'" Id., citing *A.S. Abell Co. v. Kirby*, 227 Md. 267 (Md. 1983) (emphasis added).

"[M]isstatement of fact cannot be defended successfully as fair comment." *A.S. Abell Co. v. Kirby*, supra, at 273.

"The distinction between 'fact' and 'opinion,' although theoretically and logically hard to draw, is usually reasonably determinable as a practical matter: Would an ordinary person, reading the matter complained of, be likely to understand it as an expression of the writer's opinion or as a declaration of an existing fact? An opinion may be so stated as to raise directly the inference of a factual basis, and the defense of fair comment

usually has been held not to cover an opinion so stated." Id. (emphasis added)

"Derogatory opinions based on false and defamatory or undisclosed facts are not privileged. These are called mixed opinions." *Piscatelli*, (citing Restatement (Second) of Torts § 566 cmt. b., other citations omitted (emphasis added).

"Thus, under Maryland law, the fair comment privilege protects simple opinions from being defamatory, but does not protect mixed opinions." *Piscatelli*, (emphasis added).

2. Simple Opinions Must be Supported with True, Known or Readily Available Facts

The fair comment privilege protects an opinion only where "'the facts on which it is based are truly stated or privileged or otherwise known either because the facts are of common knowledge or because, though perhaps unknown to a particular recipient of the communication, they are readily accessible to him.'" *Piscatelli*, (emphasis added, internal citations omitted).

3. Imputation of a Corrupt Motive is Not Within the Defense of Fair Comment

"The greater number of Courts have held that the imputation of a corrupt or dishonorable motive in connection with established facts is itself to be classified as a statement of fact and as such not to be within the defense of fair comment. *A.S. Abell Co.*, supra, (internal cites omitted)(emphasis added).

4. Legitimate Public Interest

The "fair comment privilege is available for opinions or comments regarding matters of legitimate public interest." *Piscatelli v. Van Smith*, 424 Md. 294 (2012), at 314. (emphasis added). Examples include a widely known "review hearing of a Baltimore police commissioner;" local matters of concern such as "the performance ratings of high-school principals;" the "the occurrence or prosecution of crimes, and murder specifically, are matters of legitimate public interest," as are prosecutions/occurrences of "drug trafficking" and "rape." (*Piscatelli*, at 315; internal citations omitted).

5. Whether the Privilege Exists is a Question of Law Properly Disposed of in Summary Judgment

"Whether a conditional privilege exists is a question of law, and the defendant bears the burden of proof to establish the privilege. *Piscatelli* at 307 (internal citations omitted)

"Where a defendant asserts a privilege in a motion for summary judgment in a defamation action, we consider first whether the asserted privilege applies." *Piscatelli*, at 306 (internal citations omitted). "Thus, we assume that the plaintiff's allegations of defamation are true for purposes of evaluating whether the privilege exists." Id.

"The Circuit Court and the Court of Special Appeals were correct that summary judgment was a proper disposition of the fair comment privilege defense." Id., at 317.

As summary judgment, if "a prima facie case for a privilege is adduced, the

plaintiff must produce facts, admissible in evidence, demonstrating the defendant abused the privilege, in order to generate a triable issue for the fact-finder." Id. (emphasis added).

To demonstrate abuse of the privilege, the plaintiff must demonstrate that the defendant made his or her statements with malice, defined as 'a person's actual knowledge that his [or her] statement is false, coupled with his [or her] intent to deceive another by means of that statement.' Id., at 308 (internal citations omitted).

STANDARD OF REVIEW

The court reviews "the contentions that the circuit court erred as to matter of law on a *de novo* basis." *Guidash v. Tome*, 211 Md. App. 725, 735 (Md. Ct. Spec. App. 2013). "When the trial court's decision involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are legally correct." *Maddox*, 174 Md. App., at 502 (Md. Ct. Spec. App. 2007). Cases involving mixed questions of law and fact will be reviewed applying the appropriate standard in each instance. *Id*.

SUMMARY OF ARGUMENT IN SUPPORT

The Appellee's defamatory statements were made on separate dates and concerned three separate defamatory imputations directed at the U.S. Navy, et. al.: that Appellant was "running a smear/misinformation campaign," was inciting violence, and was "letting fly" and "flourish" racially charged material on a group Facebook page. Each of

these required separate analysis in determining whether fair comment privilege applied.

None of these statements were pure or simple opinions, they each "raise directly the inference of a factual basis," and none provide true, non-defamatory facts stated explicitly, or of which the U.S. Navy and other recipients would have had direct knowledge (or which were readily accessible to them if they did not have direct knowledge) thus allowing the recipients to understand them as pure opinions in the spirit of fair comment privilege. Rather, the statements are only supported by pictures and/or screenshots that are not subject to any true of false determinations and they are therefore not facts in the first instance. They cannot satisfy the "factual basis" elements of fair comment privilege. At best, each defamatory statement is a "mixed opinion" and thus not entitled to privilege.

Furthermore, Appellant's criticism of a local school board superintendent is not a matter of "legitimate public interest" to the U.S. Navy or USNA as that term is used in privilege determinations. It is unreasonable to conclude that the U.S. Navy would have a legitimate interest in knowing that one of its adjuncts was allegedly "running a misinformation/smear campaign against a local superintendent."

It was arbitrary, capricious, and prejudicial that before trial the court should find that, as a matter of law, Appellee's statements were *not* opinions and she had not met her burden to establish a prima facie case for privilege - starting at summary judgment – only to suddenly reverse that decision just before closing arguments. Denying each and every pretrial motion that argued for fair comment privilege created the reasonable expectation on the part of Appellant that she was entering a trial with the burden to

prove to the jury a negligence standard of defamation, only to be informed after resting that actually "this is a case where there is lots of public interest and comment about what was happening…" and therefore she must now prove element of knowledge of falsity and intent to deceive.

The lower court also erred when it ruled the "violence tweet" could not be considered by the jury because it did not specifically "tag" any U.S. Navy recipient. Defamation does not require that a specific party be "tagged" on a statement that was otherwise made to the public at large. Further, the Appellee herself testified hat the U.S. Navy or its affiliates could see the tweet it if they just "scrolled down." This Tweet could have instrumental in showing knowledge and intent since it allegedly was based on the screenshots accompanying it – screenshots that contained nothing about Appellant or the Patriots Facebook page but rather on some other page.

ARGUMENT

I. THE LOWER COURT SHOULD NOT HAVE APPLIED FAIR COMMENT PRIVILEGE TO ANY OF THE APPELLEE'S DEFAMATORY STATEMENTS.

A. Each Defamatory Statement Required a Separate Privilege Analysis

The Appellee published six separate defamatory statements over a period of several days. This was unlike a single newspaper or periodical article. Each defamatory statement deserved separate fair comment privilege analysis since they were published separately, and not a simple, broad-brush determination that there was "lots of public

interest and comment about what was happening…"

B. Each Defamatory Statement Was a Statement of Fact, Implied a Factual Basis, or Was a Derogatory Opinion Not Supported by True or Known Facts

1. The Three-Step Analysis to Categorize a Defamatory Statement

Considering Maryland case law, determining whether a statement is, as a matter of law and privilege, a statement of fact or a protected/unprotected opinion involves three analytical and sequential steps:

a. would a recipient view the defamatory statement as an expression of opinion or a statement of fact? If as a statement of fact, then it is not privileged; but,

b. if it can be reasonably viewed as an expression of opinion, is it stated in a manner that "raise[s] directly the inference of a factual basis?" If it does, then privilege has been "held not to cover an opinion so stated;" but

c. if viewed as an expression of opinion that does not directly raise the inference of a factual basis, is it still a derogatory opinion? If so, then Piscatelli and the other cases, require that the speaker provide at publication true, nondefamatory facts, or the facts must be known to both the speaker and the recipient, or if not known, then readily available to the recipient. If the speaker fails in this respect, the privilege must be denied.

The Appellee's defamatory statements fail at each step.

2. *The "Smear Campaign" Tweet*

The false and derogatory statement that Appellant was "running a misinformation/smear campaign…" is objectively not an expression of opinion but a statement of fact as contemplated under *A.S. Abell, et. seq*. analysis. That is, a recipient is "likely to understand [it]…as a declaration of an existing fact."

It is not prefaced with, for example, "in my opinion," or "it seems like" which would identify it as clearly opinion. Neither is it of the variety of statements that may not be provable and therefore implicitly opinion, such as "Appellant I s a *lousy* professor;" or "Appellant is saying *hurtful* and things online." These are clearly subjective appraisals of a person's behavior that cannot really be objectively determined as fact.

On the other hand, saying that someone is "running a misinformation/smear campaign" can only be reasonably regarded as a statement of fact of the variety "A is doing X." It is synonymous with saying that "Appellant is laundering money," or "Appellant is liar." It is as factual appearing as saying the non-defamatory "Appellant sells insurance," or "Appellant runs marathons." Whether true or not, they are clearly meant to be, and are likely to be regarded as, fact. Period. Legally a statement of fact, it is not protected by fair comment privilege.

However, assuming *arguendo* that it *is* an expression of opinion, it is certainly stated in a manner that "raise[es] directly the inference of a factual basis." According to *A.S. Abell* and *Piscatelli*, "the defense of fair comment usually has been held not to

cover an opinion so stated." A recipient of the opinion is certain to believe that there must have been some factual basis upon which the Appellee relied to come to opine that Appellant was running a smear campaign against a school superintendent. Therefore, her opinion raises the inference of an underlying factual basis. Therefore, according to our case law, it is in the same category as a statement of fact and is not afforded fair comment privilege.

However, again assuming, *arguendo*, that it is an expression of opinion *not* raising the inference of a factual basis, "running a misinformation/smear campaign" is still a clearly derogatory act. It implies a "corrupt motive." For that reason alone, this statement should not be afforded protection since "[t]he greater number of Courts have held that the imputation of a corrupt or dishonorable motive in connection with established facts is itself to be classified as a statement of fact and as such not to be within the defense of fair comment." *A.S. Abell Co.,* supra.

In any case, the statement is clearly derogatory, and to the extent it can be viewed as opinion, derogatory opinions are required, according to *Piscatelli*, *et. al.,* to be based on facts "truly stated or privileged or otherwise known either because the facts are of common knowledge or because, though perhaps unknown to a particular recipient of the communication, they are readily accessible to him." Derogatory opinions "based on false and defamatory or undisclosed facts are not privileged. These are called mixed opinions." Id.

Having published a clearly derogatory opinion, Appellee was required to include with her defamatory statement true facts, since it is unreasonable to believe that the U.S.

Navy had "common knowledge" of, or could "readily access," the facts about the local school superintendent's controversy in Queen Anne's County and Appellant's criticisms of her, or whether what Appellant was saying elsewhere was misinformation or smear.

This Appellee did not do. The pictures ("screenshots") that she included (a picture of the Plaintiff standing in her law office, incomplete conversations between unknown persons and opinions) cannot fairly be considered as statements asserting something that can be proven true or false, i.e., *fact*. Hence, they could not serve as the required "factual basis" of the derogatory opinion to satisfy the requirements for privilege. The U.S. Navy, et. al, recipients of this statement would have had no ready access to other "facts" upon which Appellee appeared to rely.

Consequently, Appellee's defamatory "smear campaign" tweet was a statement of fact or a statement of mixed opinion, both of which are non-privileged and should not have been afforded privilege protection.

2. *The "Violence Tweets" and the "Racist Tweets"*

For brevity, Appellant will not reiterate the above analysis for each of Appellee's subsequent defamatory statements. However, by process of substitution with the "smear campaign" tweet, the same principles of law and fact apply to the Appellee's statements connected to the "violence tweets" and "racist tweets" as well. That is, they were statements of fact, or were opinions that raised the inference of a factual basis, or were derogatory opinions that had to be, and were not, supported by factual statements that could be regarded as true or false. Appellee disclosed no such facts.

All four of these statements included only incomplete conversations expressing

opinions about local issues, and in the case of the latter statements, a meme – by definition a picture meant by the creator to be funny – regarding Black Lives Matter and posted by someone other than the Appellant (and according to testimony taken down by her).

Consequently, all of these latter defamatory statements, individually, were statements of fact, statements of opinion inferring a factual basis, or derogatory opinions unsupported by the facts necessary for fair comment privilege protection.

It was error for the lower court to consider each and every defamatory remark as anything other than unprotected statements of fact or unprotected mixed opinions.

C. Appellee's Statements were not Fair and Reasonable or Regarding a Matter of Legitimate Public Interest

Even if, *arguendo*, any or all of the statements could be considered statements of pure opinion, none of them were "fair and reasonable" and/or they did not concern a matter of "legitimate public interest."

Contrary to Appellee's arguments below, her entire campaign was clearly not an altruistic attempt to apprise the U.S. Navy, USNA, et. al., of her opinion on a matter of legitimate public interest, i.e., "racism and "inclusion." As the court below ruled, the Appellant was not a public figure but was, on the contrary, criticizing a public-school figure in what was a local tempest in a teacup. Appellee's motive was clearly part of a coordinated effort to frighten the Appellant by threatening her employment as a professor and thus stop her open criticisms of the local superintendent.

Piscatelli is clear that the breadth of "legitimate public interest" is qualified by

the noting that the speaker must be "any member of *a* community" (emphasis on the indefinite article added). The "community" in the underlying school board issue consisted of the local residents and school parents of a rural Maryland county. While the Parties were part of that community, the U.S. Navy, USNA, etc. clearly were not, no matter how much the Appellee argues that these federal entities are part of the Queen Anne's County family. It is unreasonable to believe that the U.S. Navy or USNA would have had any knowledge of or interest in a local dispute between parents and a school superintendent.

Simply because a community member falsely accuses another of "letting fly" racist comments or Black Lives Matter memes does not make the statement one of "legitimate public interest" for protection under fair comment. Other issues are of public importance as well. Prostitution, drug dealing, and narcotics overdoses are also legitimate matters of public concern and are surely not condoned by any Federal institution. That does not, however, grant *carte blanche* liberty for a person to falsely accuse a federal employee of being a prostitute, a drug dealer, or an addict. The legitimate public interest threshold requirement is not met in these examples, and it is not met in the case at bar.

Although Appellee argued throughout the case below that "racism" was a matter of legitimate public interest - and as a general proposition this is correct - the "smear campaign" issue was not. It was neither a "fair" comment to direct at the U.S. Navy or USNA, and neither can it reasonably be a matter of legitimate public interest to those federal government recipients.

That none of the statements were not of legitimate public interest to the U.S. Navy becomes clearer when considered with their timing and chronology. The very first tweet on 7/23/2020 had nothing to do with racism: only that Appellant was waging a "smear campaign." This tweet sat for two days, and only after Appellee saw no action taken by USNA against the Appellant did she tag them again and asking "what ya'll do about this?" and attempting to (again falsely) show that the Plaintiff was making posts inciting threats of violence. Only after still receiving no response did she turn to the false accusations that Appellant was posting or condoning racist material and "racism."

Even if, arguendo, the U.S. Navy recipients had a legitimate interest in knowing whether an employee was a racist or was "publish[ing] and let[ing] flourish" racist posts or comments online, it did not have a legitimate interest whether or not Plaintiff was a running a "smear campaign against our local county school superintendent" – the Appellee's first defamatory statement. That an employee may be running a smear campaign against a local school superintendent (with its inherent inference of dishonesty and lying) is not a legitimate matter of public concern to the U.S. Navy or the Naval Academy, et.al. and for all of the above reasons, the Court should not have granted that statement or any other fair comment privilege.

II. THE LOWER COURT PREJUDICED APPELLANT WHEN IT REVERSED ITS DENIAL OF APPELLEE'S PRE-TRIAL MOTION FOR FAIR COMMENT PRIVILEGE AND ITS PRE-TRIAL DETERMINATION THAT THE APPELLEE'S DEFAMATORY STATEMENTS WERE NOT OPINIONS.

Case law, including in *Piscatelli,* is clear that a defendant's request for application

of fair comment privilege to defamatory statements is properly raised in summary judgment, and the court will determine whether, as a matter of law, the privilege applies to the statements.

The Appellee requested application of fair comment privilege when she moved for summary judgment in 2021, and she had opportunity to, and did, argue for application of the privilege during a hearing on the motion. She subsequently argued in two further motions for fair comment privilege, both explicitly and indirectly by asking the lower court to determine that, as a matter of law, the defamatory statements were statements of opinion. Had the court decided these latter two motions, it would have been a reversal of its request for privilege advanced in her motion for summary judgment.

Appellant reasonably relied on the court's rulings, even though the honorable Judge Knight never – in any of her orders/decisions throughout the conduct of the case – issued a written memorandum explaining her findings. This was true at summary judgment as well as when she denied the Appellee's request for pretrial hearing on matters of law that contained a request for privilege.

It was not until after the honorable Judge Ross convened a hearing on the last of Appellee's pretrial motions that made a claim for her defamatory statements to be ruled opinions protected by privilege did the court elaborate on its findings. Judge Ross' order clearly indicated that all of Appellee's claims "have been addressed in prior motions and orders," and on that basis, he denied the last motion as well.

It was therefore reasonable that the Appellant relied on the conclusion that the matter of privilege had been raised, denied, raised and denied twice more. Further, that

the court had decided that the statements were *not* opinions and therefore, by definition, fair comment did not apply. This is made clear in her responses to Appellee's post summary judgment motions, to wit: that the issue of privilege has been argued and denied on several occasions.

Appellant was therefore prejudiced by having the reasonable expectation imputed by the court that the matter was settled, prosecuted her case for simple defamation, only to close and have the court reverse its decision, arbitrarily, and require the higher burden accompanying privilege protection.

Thus, the Honorable Judge Knight's post-trial statement that Judge Ross' was not going to "touch it" (i.e., privilege) because Judge Knight wanted to make a decision after trial seems the result of some misunderstanding for which Appellant should not have to suffer prejudice.

III. THE LOWER COURT ERRED WHEN IT DENIED JURY CONSIDERATION OF THE "VIOLENCE TWEET."

The lower court dismissed without clear reason the "violence tweets," but to information and belief, it was because these did not specifically "tag" the U.S. Navy, et. al., as recipients – which is not correct. As noted in the above Statement of Facts, Appellee testified that the statement was made on the same Twitter chain as her other defamatory statements, and they could just "scroll down" to view it. The second of the set did, however, specifically tag the U.S. Navy as recipients. Whether either or both were directed to the U.S. Navy or not, any reader "following" Appellee's twitter feed could see it, and for purposes of Defamation, it satisfies the element of publication.

These "violence tweets" are critical when the questions of knowledge and intent are at issue pursuant to a grant of privilege, because having attempted to pass off her own conversation on a Facebook page with which the Appellant was not connected, could have convinced the jury of those two elements showing malice, and therefore rebutting the fair comment privilege protection, thus changing the outcome of the trial and allowing the jury to consider damages. That the Appellee was implying to the U.S. Navy that Appellant was threatening violence or inciting violence – by using clips of her own non-factual conversations - could have at least served as proof that the Appellee knew that the defamatory statement was false at the time she made it, and that having had no response regarding the "smear campaign" tweets her intent was to "up the ante" by falsely calling "incitement of violence" in order to get disciplinary action on the part of the Navy against the Appellant.

CONCLUSION

For the foregoing reasons, Appellant prays that this Honorable Court remand the matter back to the circuit court on the issue of damages only.

Respectfully Submitted,

/s/ *Marc D Schifanelli*
Marc D. Schifanelli, Esq.
CPF # 0412150261
P.O. Box 1023
Stevensville, MD 21666
240-882-2402
Marc@Schiflaw.com
Attorney for Appellant

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 7007 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

Respectfully Submitted,

/s/ *Marc D Schifanelli*
Marc D. Schifanelli, Esq.
CPF # 0412150261
P.O. Box 1023
Stevensville, MD 21666
240-882-2402
Marc@Schiflaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of December 2022, a copy of the foregoing Brief of Appellant was delivered via MDEC to all counsel of record and two copies of the foregoing were mailed, postage pre-paid to counsel of record.

Marc D Schifanelli
Marc D. Schifanelli, Esq.
CPF # 0412150261
P.O. Box 1023
Stevensville, MD 21666
240-882-2402
Marc@Schiflaw.com
Attorney for Appellant