Circuit Court for Queen Anne's County
Case No. C-17-CV-20-000140

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1041

September Term, 2022

GORDANA SCHIFANELLI

v.

MARY E. JOURDAK

Shaw,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.
Concurring Opinion by Raker, Irma S.

Filed: July 28, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellant, Gordana Schifanelli ("Schifanelli"), filed an action in the Circuit Court for Queen Anne's County against Appellee, Mary Ella M. Jourdak ("Jourdak"), alleging that Jourdak published several defamatory statements about Schifanelli on Twitter.[1] A jury trial was held on Schifanelli's third amended complaint, which stated causes of action for defamation, defamation *per se*, and intentional infliction of emotional distress.

At the conclusion of the evidentiary portion of trial, the court granted Jourdak's motion for judgment on the claim for intentional infliction of emotional distress. On the defamation claims, the court ruled, as a matter of law, that two of Jourdak's statements were not defamatory to Schifanelli. The court further ruled that the remaining statements were protected by the fair comment privilege, a conditional privilege that applies to an expression of "a fair and reasonable opinion or comment on matters of legitimate public interest." *A.S. Abell Co. v. Kirby*, 227 Md. 267, 272 (1961). The case was then submitted to the jury.

Guided by the verdict sheet and the instructions provided by the court, the jury found that Jourdak published a defamatory statement about Schifanelli but that she had not done so with actual malice, i.e., "with actual knowledge that it was false, coupled with her intent to deceive another by means of that statement[.]" In accordance with the verdict, the court entered an order in Jourdak's favor.

Schifanelli filed a motion for a new trial, asserting that the court erred in ruling that

[1] "Twitter is a social networking platform that allows a person to post and read short messages called 'tweets.' Tweets can be up to 280 characters long and can include links to websites and other resources." *United States v. Loughry*, 983 F.3d 698, 702 (4th Cir. 2020).

Jourdak's statements were privileged. The court denied the motion. Schifanelli filed this timely appeal.

ISSUES PRESENTED FOR REVIEW

Schifanelli presents three questions for our review, which we have reordered:[2]

I. Whether the circuit court erred by ruling that two of Jourdak's statements did not support a claim for defamation.

II. Whether the circuit court erred by ruling that the fair comment privilege applied to the remainder of Jourdak's statements.

III. Whether the circuit court erred by ruling on the fair comment privilege after the evidentiary portion of the trial had concluded.

For the following reasons, we answer the above questions in the negative. We shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The facts giving rise to the defamation action that is the subject of this appeal illustrate how social media has transformed the way in which we communicate in the modern world. Social media has become a significant part of the fabric of society today and offers many benefits, including an increased ability to stay connected with family and friends worldwide and to access and share information. However, as this case

[2] Rephrased from:

I. Did the [circuit] court commit reversible error when it denied jury consideration of the "violence tweets["]?

II. Did the [circuit] court commit revers[i]ble error when it applied fair comment privilege to each of the appellee's defamatory remarks?

III. Did the [circuit] court commit revers[i]ble error when it reversed after trial its pre-trial decision finding that fair comment privilege did not apply, thereby prejudicing appellant?

demonstrates, social media platforms have also become a breeding ground for conflict and disagreement.

A. Underlying Controversy and Related Facebook Posts

On June 5, 2020, just before the school year had concluded, Dr. Andrea M. Kane ("Dr. Kane"), who was then Superintendent of Schools for Queen Anne's County Public Schools, distributed a letter addressed to "Parents and Caregivers." The letter focused on several topics, including "Green School" certifications earned by the county's schools, the summer meals program, online summer learning opportunities, and a survey to address distance learning and considerations for the re-opening of schools in the fall. Dr. Kane's letter included the following comments:

> Despite all the business of closing out one school year and preparing for the next, I must stop and acknowledge what is happening in our country and across the world right now. The deaths of Breonna Taylor, Ahmaud Arbery, and George Floyd have spun our country into what has been called "a national outrage". There is no denying that police brutality and racism exist in our country. There is no denying that in many communities, racism and biased behavior are the norms. Racism is learned at an early age and can be passed on from one generation to the next. Trayvon Martin, Micha[e]l Brown, Eric Garner, Freddie Gray, Sandra Bland, and countless other Black people have been victims of systemic racism. Racism is alive in our country, our state, in Queen Anne's County, and our schools.
>
> It's encouraging to see Black and White people coming together in nonviolent protests against the mistreatment of and discrimination against Black people and people of color. More than ever, I hope that we can listen more and pass judgment less; be slow to anger and extend grace to one another generously. As a Black woman with two Black sons (whom I worry about in ways that only a mother of Black sons in America can understand), when I say "Black Lives Matter" it is not meant to disparage any other race. It is an acknowledgment of the disparate brutality and overt racism [that is] only experienced by Black people in America[,] including me. For the record, I value all lives and do not want to be misunderstood so I will share an analogy that a friend explained earlier this week. If a house was on fire and the fire department came to put out the fire, would it make sense if firefighters

> sprayed water on every house on that street or just the one on fire? All of the houses have value but only one is in danger of being destroyed.
>
> The marginalization of Black people and dehumanizing images that our children are exposed to require conversation[,] but where do we start? Tyrone Howard, an expert in the study of black males and professor at UCLA suggests that we refrain from diluting the issue, name anti-Black racism for what it is; believe Black students when they say they've been subjected to racism and discrimination; stop challenging Black Lives Matter, it only exacerbates the marginalization; and identify and speak about Black excellence to stop the narrative about the inferiority of Black people. The Reverend Dr. Martin Luther King, Jr. said, "We must learn to live together as brothers or perish together as fools."

On June 15, 2020, Schifanelli, a Queen Anne's County resident whose children attended public schools in the county, posted the following comments on Facebook:[3]

> What are Queen Anne's County Commissioner[]s doing when a [County School] Superintendent sends this kind of letter to parents? I am furious over this. Let me remind everyone that this Black Superintendent was dragged to Queen Anne's County to be Superintendent from Richmond, [Virginia] because of her race – we – the parents- were told that our Queen Anne's County is not diverse enough so we had to bring [Dr. Kane] to be in charge of our children's education?!
>
> She actually told us how she got the job! Because we as a country [sic] were not diverse enough- she was offered to move to our country [sic] because of her race!
>
> And we all welcomed her with open arms- and now she is telling us that there is systemic racism?
>
> Here is the fact:
>
> Black Americans commit 52% of all murders and 54% of all robberies in the US year after year- while they represent only 14% of the total US population!

[3] Facebook is a social networking website and social media platform, where users can virtually interact with other users by creating online profiles to share information about themselves. *Sublet v. State*, 442 Md. 632, 636 n.1–2, 637 n.5 (2015); *Griffin v. State*, 419 Md. 343, 353–54 n.9 (2011).

> Let this sink in.

On or about July 7, 2020, subscribers to the Queen Anne's County Public Schools' messenger system received the following email:

> Middle and High school students from Kent, QA [Queen Anne's], Talbot, Caroline, and Dorchester counties are invited to join this informal discussion to learn how to open dialogue and self reflection around racism in our schools and community. Facilitated by Paul Tue and Barbie Glenn, co founders of Students Talking About Race.

The email included a link to a web page for "STAR [Students Talking About Race]-Clutch-Conversations."

Schifanelli, who was one of the founders and administrators[4] of a Facebook group[5] named "Kent Island Patriots," posted the following message in that group:

> Today, July 7, 2020, the Children and Parents have been targeted by the militant Black Lives Matter Group which operates in Maryland['s] Eastern Shore.
>
> Attached is the information of its leader Paul la Tue and his intention.
>
> Children of Middle and High School were directly targeted. Their parents also received the message.
>
> This Group and these individuals have utilized Queen Anne's County Public [S]chool Messenger system.

[4] At trial, Schifanelli explained there were several administrators of the Kent Island Patriots Facebook group. Administrators of Facebook groups have authority to approve posts made by Facebook group members. According to Schifannelli, the administrators of the Facebook group shared equal authority to make changes to the page and "do whatever they want[ed] to the page."

[5] Within Facebook, users can "create groups of people with similar interests[.]" *Griffin*, 419 Md. at 353 n.9; *see, e.g.*, *Vigna v. State*, 470 Md. 418, 430 (2020) (discussing a Facebook group for a school's alumni).

> This access to students' and parent[]s' personal information to propagate political, and especially racial propaganda is [a] colossal breach of public trust, confidence[,] and Queen Anne['s] County's Board of Education['s] promise not to use the children's and parents'[] information for political or commercial gains.
>
> Call your School Board Commissioners and send them what your children received and what you received. I attached one copy on this post and information about the person behind this []training of our kids on race!
>
> Absurd.

Jourdak, a Queen Anne's County resident and a graduate of the county's school system, voiced an opposing view in a different Facebook group:[6]

> Honestly, the hateful reaction to a voluntary program discussing racism in our community really highlights why we so truly need it. We have ALWAYS had these issues, whether y'all want to purposefully ignore the voices of your Black and Brown neighbors or not. As a lifelong [Queen Anne's County] resident who went through [the county's school system], these discussions are long overdue and of vital importance if we want to make our community a kinder, smarter, safer place for everyone.
>
> Talking about race may be uncomfortable or scary for you, so try to extend your empathy to the people who live it every day of their lives.

(Emphasis in original). Schifanelli posted two responses:

> **Mary Ella Jourdak** fake news. No one has ever had any issues in [Kent Island] or anywhere regarding their race. This Marxist organization has no place in our community. You will get nowhere trying to divide people based on race. Segregation is over. All lives matter. No one has ever filed a law suit[] claiming they were denied ANYTHING in this County because of their race!!!! No[t] one person! So you have zero

[6] The majority of the Facebook posts that appear in the record are undated, and it is not clear in which Facebook group Jourdak's post appeared.

> facts to support this division and it's political and we will not allow you to Target our children!

(Emphasis in original).

> **Mary Ella Jourdak** we do not have these issues and we will not allow anyone creating an issue! Not one person filed a law suit[] claiming violation of their civil rights or discrimination based o[n] race! NOT ONE PERSON. Not one person was denied due process or access to benefits based on their race! Not one person has been denied access to hotels or restaurants based on their race. So NO. This is Political Agenda of the radical Marxists and they will not have their hands on our children!

(Emphasis in original).

In another post, Schifanelli asserted that Dr. Kane had abused her office by giving a convicted criminal "access" to children to advance a "political agenda":

> Dr. Kane has allowed a convicted criminal to gain access to our middle and high school children by using [the] public school system!
>
> This "discussion about race" is [a] BLM tool for political discourse to advance their Self Proclaimed Marxist Agenda! They are using teachers and our kids for that purpose!
>
> Bottom line: Dr. Kane used her public office to advance BLM political agenda!

Schifanelli repeated these claims in a separate post:

> Yes - it is TRUE that Paul Tue is the same Paul Tue III[7] who has [a] 2 page long record on Maryland Judiciary and who is now a leader of the self proclaimed Marxist organization BLM.
> Yes it is True that he is the "moderator" of [the] July 13 call in to your children.
> Yes it is also True that Queen Anne's County Board of

[7] It is unclear from the record whether "Paul Tue" is the same individual as "Paul Tue III." *See infra* note 18.

> Education did not know what [Dr. Kane] our Superintendent was mailing and sending to parents and their children.
> I cannot confirm that [Dr. Kane] gave to this guy our children's and parents'[] emails but he's got it and our privacy was leaked and given to this group who wants to run "race card with our children"!
>
> WE DO NOT HAVE RACISM IN OUR COUNTY OR MARYLAND EASTERN SHORE. PERIOD.
>
> NO ONE HATES ANYONE. PERIOD.
> NO ONE CARES ABOUT ANYONE'S SKIN COLOR IN OUR COMMUNITIES.
>
> But we do care about America, our core values that ALL PEOPLE ARE CREATED EQUAL, LAW AND ORDER AND WE ALL WANT POLITICS OUT OF OUR SCHOOLS!

(Emphasis in original).

A petition calling for Dr. Kane's termination began circulating. Schifanelli promoted the petition on social media.

Christine Betley ("Betley"), who was a teacher in one of the county's middle schools at the time, addressed the controversy in a Facebook group named "QACPS [Queen Anne's County Public Schools] Educators – COVID-19 Support and Information" ("Educator's Support Group"). Betley stated:

> In addition to negotiating school reopening, we appear to have an escalating hostility towards Dr. Kane's willingness to allow conversations about race relations in the community.
>
> I reached out to Paul Tue and Barbie Glenn of the STAR (Students Talking About Race) group and learned that the email we (and students) received was sent by the Board with the support of Matt Evans,[8] as a result of a request STAR had received from our [Kent Island High School] students for support in engaging and

[8] Matt Evans was Betley's immediate supervisor.

> facilitating conversations about racism with students.
>
> I know this group is centered on the COVID-19 crisis and do not wish to hijack it with shifting the focus towards what I see as another crisis our community is facing. If it's not appropriate to bring this conversation here let me know, and if that is the case and others would like to join me in a separate group I'd be happy to start one. In any case, my position is that both Dr. Kane and the efforts to oppose racism in our community need our support. Are there people in (or out) of our education community already working towards this you could direct me[ ] to[ ]? And is anyone interested in collaborating with me in the community to create and/or expand such a network?

Betley's post drew responses from three different members of the Educators Support Group. The first response expressed agreement with Betley:

> I'm with you. I support promoting open dialogue, race relations and Dr. Kane on this. I was appalled to read that. Thank you for bringing this up and add my name and support.

A second member commented:

> SMH[9] . . . absolutely ridiculous . . . who are these guys?

In response to that question, a third member stated:

> I don't know who they are, but they appear to be a group of white supremacists, who aim to prevent teenagers from engaging in a community dialogue

[9] SMH "stands for 'shaking my head'" and "often is used to impart a sense of bemused incredulity." *SMH*, Merriam-Webster, https://www.merriam-webster.com/words-at-play/what-does-smh-mean-shaking-my-head (last visited July 18, 2023).

> to discuss their[.][10]

Schifanelli took screenshots[11] of Betley's post and the three responses and posted them on the Kent Island Patriots group, along with the following comments:

> These are the individuals who call us white supremacists and who are our children's educators! Take a notice! [sic]
> Dwelling about race in our County and among innocent children is unacceptable! Our children deserve better education than this!!!
> I am saddened to see some of the teachers in this group promoting Political brainwashing of our children by using race!
>
> We must stand against anyone and everyone who wants to use our children to "discuss" OUR CHILDREN'S PHYSICAL APPEARANCES!!!! WHICH INCLUDES THEIR RACE OR GENDER!

(Emphasis in original).

A. Alleged Defamatory Statements

Schifanelli's claims were based on six separate statements, or "tweets," that Jourdak posted on Twitter between July 23, 2020, and July 26, 2020. The issues on appeal concern five of the statements.[12]

Statement One

> a local woman running a misinformation/smear campaign against our county's school superintendent is employed by the @USNavy at the

[10] No text appears after the word "their" in the record on appeal.

[11] A "screenshot" is an image that depicts the content of a computer or cell phone screen. *Sublet*, 442 Md. at 637 n.3.

[12] At trial, Schifanelli introduced into evidence, as Plaintiff's Exhibit 3, a statement that Jourdak posted on Twitter on July 9, 2020. That statement was stricken from evidence at the close of the evidentiary portion of the trial and was not considered by the jury. Schifanelli does not challenge that ruling on appeal.

> @NavalAcademy as an adjunct professor.
>
> what say y'all, @USNAAlumni @AdmissionsUsna? is this standard representation of the USNA??"

Attached to Statement One were screenshots of three of Schifanelli's Facebook posts:[13] the post suggesting that Dr. Kane gave a convicted criminal access to parents' and children's email addresses, without the knowledge of the Board of Education; and Schifanelli's responses to Jourdak, in which Schifanelli argued that claims of current racial division and racial discrimination in Queen Anne's County were "fake news" and "Marxist" propaganda. Statement One also included a screenshot of Schifanelli's profile page on LinkedIn,[14] which identifies her as being associated with the United States Naval Academy.

Statement Two

> 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 is threatened.

Attached to Statement Two were screenshots of an exchange that took place on Facebook, between Jourdak and two other individuals, whom we shall refer to as Mr. R. and Mr. S. It appears, from context, that the discussion relates to the email regarding the STAR

[13] At trial, Jourdak explained that a randomly selected segment of the screenshots appeared with the tweet, but that a Twitter user would be able to see the image in its entirety by clicking on the image.

[14] LinkedIn is a "business-oriented social networking Web site" that "allows users to further their careers by searching for jobs, finding connections . . . at a particular company, and receiving recommendations from other users." Erik Gregersen, *LinkedIn*, Encyclopedia Britannica, https://www.britannica.com/topic/LinkedIn (last visited July 18, 2023).

discussion about racism. Mr. R. commented: "Totally unethical, the persons responsible should be fired ASAP." Mr. S. responded to Mr. R.: "one of them needs to get the shit beat out of HIM" (emphasis in original). Jourdak then responded to Mr. S.: "dude, you're seriously advocating for violence against someone trying to talk???" Mr. S. replied: "to my son without my permission?!! Absolutely!"

Statement Three

> so I'll ask it 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 [United States Naval Academy] upholds. @USNavy @NavalAcademy @USNAAlumni @AdmissionsUsna[.]

Statement Three was published on the same date and in the same "thread" as Statement Two.[15] No screenshots were attached to Statement Three.

Statement Four

> 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[.]

Attached to Statement Four were screenshots of four Facebook posts. Two of the posts were written by Schifanelli. One of the screenshots was Schifanelli's post urging readers to "take [ ] notice" of certain posts on the Educator's Support Group. In the second screenshot, Schifanelli commented:

> The reason our elected officials – Queen Anne County Commissioners as well as Board of Education do not condemn the BLM brainwashing our children and recruiting our

[15] In this context, a "thread" is "a series of electronic messages (as on a message board or social media website) following a single topic or in response to a single message[.]" *Thread*, Merriam-Webster, https://www.merriam-webster.com/dictionary/thread (last visited July 18, 2023).

> children to be "social justice warriors" in the middle of July when schools are normally closed is that they are all scared if they say something publicly they will be labeled "white supremacists" or "racists" or ultra right conservatives!
>
> Imagine that! BLM organizers calling me or us "white supremacist"! Should we even care what someone who is trying to harm our community and our children by race indoctrination and division call us at all?
>
> Name calling and labeling people who stand for what's right, common sense and just [sic] is the last thing anyone should be worried about.
>
> But name calling of our patriotic Americans by our elected officials who care less about our communities but only about getting our votes[.]

The other two screenshots attached to Statement Four were posted by third parties. One was a "meme"[16] of a cotton field, over which appears the following text: "FREE BLM SHIRTS[.] SOME ASSEMBLY REQUIRED[.]" Another post was an image of what the author of the post claimed was "one of 2+ pages of [Tue's] rap sheet[,]" and the responses to that post. One person stated: "just want to point out that there are different Paul Tues on there[.]" A second person commented: "those aren't all [Tue] and he has a bunch of traffic violations. Just stop with the hate[.]"

Statement Five

> another day, another load of posts that @NavalAcademy adjunct professor Gordana Schifanelli let's [sic] fly in her "Patriots" group.

[16] A "meme" has been defined as "an image or video, that enough people find amusing or interesting, that it is spread widely through sites on the internet," and as "pictures with text over them or pictures of text." *Urbanski v. State*, 256 Md. App. 414, 421 n.1 (2022) (first quoting *Fields v. Commonwealth*, 865 S.E.2d 400, 405 n.4 (Va. Ct. App. 2021); and then quoting *United States v. Alfred*, 982 F.3d 1273, 1276 (10th Cir. 2020)).

does the @USNavy find racism patriotic, too? [thinking face emoji][17]

Attached to Statement Five were screenshots of three Facebook posts, none of which were attributable to Schifanelli, including the "FREE BLM SHIRTS" post and the "rap sheet" post.[18] The third attachment was a post stating that an organization, which the author of the post held in "high respect," had given Tue a "Child and Adolescent Workgroup Community Award." The author of the post asked: "The plot thickens[,] now what? . . . It doesn't change the fact that protocols have been broken by [Queen Anne's County Public Schools] and Dr. K[ane,] but it certainly makes it more difficult when you are backed by an organization like this. [sad face emoji] And given a community award."

B. Schifanelli's Action for Defamation

On July 29, 2020, Schifanelli emailed Jourdak. Schifanelli demanded that Jourdak issue a retraction and apology for her statements, via email, to the United States Naval Academy. Schifanelli further demanded that Jourdak inform the Naval Academy that her statements "were made in error and ou[t] of hate towards [Schifanelli] and [her] beliefs as [a] Kent Island Patriot." Schifanelli stated that she would be forced to take legal action if Jourdak did not issue the retraction by the end of the day. Jourdak declined to retract or

[17] An "emoji" is defined as "any of various small images, symbols, or icons used in text fields in electronic communication (as in text messages, email, and social media) to express the emotional attitude of the writer, convey information succinctly, communicate a message playfully without using words, etc." *Emoji*, Merriam-Webster, https://www.merriam-webster.com/dictionary/emoji (last visited July 18, 2023).

[18] Statement Five also included a screenshot of an enlarged version of the purported "rap sheet." The screenshot that appears in the record before this Court is illegible.

apologize for her statements. In a Facebook post, Jourdak professed that her statements were factually accurate and that she would "not back down."

On August 2, 2020, Schifanelli filed a complaint against Jourdak, alleging one count of defamation and two counts of defamation *per se*. Schifanelli subsequently filed two amended complaints. On January 19, 2021, Schifanelli filed a third amended complaint, which added a count for intentional infliction of emotional distress.

C. Pre-trial Motions

On June 2, 2021, Jourdak filed a motion for summary judgment. Among the grounds for the motion, Jourdak asserted that any allegedly defamatory statements were protected by the fair comment privilege. A hearing was held before the judge who subsequently presided over the trial. The motion was denied upon a general finding that there was a genuine dispute of material fact.

On September 29, 2021, Schifanelli filed for candidacy for the office of Lieutenant Governor of Maryland. On February 18, 2022, Jourdak filed a "Motion for Pre-Trial Hearing on Matters of Law[.]" Jourdak requested that the court hold a hearing and issue a pre-trial ruling as to: (1) whether Schifanelli was a limited public figure, and (2) whether Jourdak's statements were protected by the fair comment privilege. The trial judge subsequently denied the motion without an additional hearing and with no further explanation.

In March of 2022, Jourdak filed a motion for reconsideration of the order denying her motion for a pre-trial hearing. The trial judge also denied that motion without an

additional hearing and with no further explanation.

Prior to trial, Jourdak filed a motion *in limine*, in which she requested an order excluding three of her statements from evidence, on grounds that the statements were inactionable statements of opinion. A hearing was held before a different judge on July 7, 2022, and the matter was taken under advisement. The court subsequently issued an order denying the motion *in limine*. In a memorandum opinion filed along with the order, the court noted that Jourdak's arguments had "been addressed in prior motions and orders," and that "[t]he evidence that Jourdak seeks to exclude may singularly or collectively support Schifanelli's claims for defamation and intentional infliction of emotional distress."

D. Trial

A three-day jury trial was held in July of 2022, at which the preceding facts were introduced into evidence. Following the conclusion of the evidentiary portion of the trial, Jourdak made a motion for judgment on all counts. On the defamation claims, Jourdak argued that both the limited public figure privilege and the fair comment privilege applied. In addition, Jourdak argued that Statement Two and Statement Three could not be construed as defamatory to Schifanelli because they did not mention her by name.

The court granted judgment in favor of Jourdak on the claim for intentional infliction of emotional distress. In addition, the court ruled that Statement Two and Statement Three would not be considered by the jury as there was no evidence to suggest the statements were related to Schifanelli.

On the issue of privilege, the court found that the limited public figure privilege was not applicable because Schifanelli "had not risen yet" to the level of a limited public figure at the time the allegedly defamatory statements were made. The court found, however, that the fair comment privilege did apply, stating that "[c]ertainly this is a case where there is lots of public interest and comment about what was happening[.]"

The court then discussed the jury instructions and verdict sheet with the parties. The verdict sheet provided to the jury posed three questions:[19]

> 1. Do you find that [Jourdak] made a false statement about [Schifanelli] that exposed [Schifanelli] to public scorn, hatred, contempt, or ridicule and discouraged others in the community from having a good opinion of, or from associating or dealing with [Schifanelli]?
>
> 2. If your answer to Question 1 was YES, do you find that [Schifanelli] has proven by [a] preponderance of the evidence that [Jourdak] made any such statement with actual knowledge that it was false, coupled with her intent to deceive another by means of that statement?
>
> 3. If your answer to Question 1 and 2 was YES, do you find that [Schifanelli] has proven by a preponderance of the evidence that she suffered actual harm as a result of any defamatory statement that [Jourdak] made with actual knowledge of its falsity?

The jury answered "yes" to the first question, and "no" to the second question. The court accepted the verdict and entered the following order: "On July 21, 2022, the jury returned a verdict in favor of the Defendant on all counts. Accordingly, it is . . . ORDERED, that no damages are awarded to the Plaintiff."

On July 26, 2022, Schifanelli filed a motion for a new trial. Schifanelli argued that

[19] Neither party objected to the verdict sheet.

the court erred in ruling that the fair comment privilege applied. The court denied the motion. This timely appeal followed.

STANDARD OF REVIEW

To make out a *prima facie* case of defamation, a plaintiff must prove:

> (1) that the defendant made a defamatory communication—i.e., that [the defendant] communicated a statement tending to expose the plaintiff to public scorn, hatred, contempt, or ridicule to a third person who reasonably recognized the statement as being defamatory; (2) that the statement was false; (3) that the defendant was at fault in communicating the statement; and (4) that the plaintiff suffered harm.

Peroutka v. Streng, 116 Md. App. 301, 311 (1997) (quoting *Shapiro v. Massengill*, 105 Md. App. 743, 772 (1995)). "As to the first element, the determination of whether a statement 'is reasonably capable of a defamatory interpretation is for the court upon reviewing the statement as a whole[.]'" *Id.* (quoting *Batson v. Shiflett*, 325 Md. 684, 723 (1992)); *accord Piscatelli v. Van Smith*, 424 Md. 294, 306 (2012).

"In Maryland, as in most jurisdictions, if not abused, privilege is a defense to a defamation action." *Hosmane v. Seley-Radtke*, 227 Md. App. 11, 24 (citing *Piscatelli*, 424 Md. at 306–07), *aff'd*, 450 Md. 468 (2016). "The defense of privilege rests upon the value that sometimes, as a matter of public policy, to foster the free communication of views in certain defined instances, a person is justified in publishing information to others without incurring liability." *Id.* (citing *Miner v. Novotny*, 304 Md. 164, 167 (1985)).

There are two categories of privileged communications: absolute privilege[20] and conditional (or qualified) privilege. *Id.* This case concerns a conditional privilege, which "arises, for example, where a person is seeking to further an interest that society regards as sufficiently important to justify some latitude for making a mistake so that publication of the defamatory statement is deemed to be conditionally or qualifiedly privileged." *Id.* (citing *Gohari v. Darvish*, 363 Md. 42, 55 (2001)). "[T]he question of whether a defamatory communication enjoys a conditional privilege is one of law for the court[.]" *Jacron Sales Co., v. Sindorf*, 276 Md. 580, 600 (1976); *accord Piscatelli*, 424 Md. at 307.

A conditional privilege is forfeited if the defendant "breached the condition to (or, interchangeably, abused) the conditional privilege." *Shirley v. Heckman*, 214 Md. App. 34, 44 (2013) (citing *Piscatelli*, 424 Md. at 307). "Once a prima facie case for a [conditional] 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." *Piscatelli*, 424 Md. at 307 (citing *Hanrahan v. Kelly*, 269 Md. 21, 29 (1973). "Abuse of a conditional privilege is usually a question for the fact-finder, . . . but a court can decide the question as a matter of law if the plaintiff fails to allege or prove facts that would support a finding of abuse." *Shirley*, 214 Md. App. at 44 (citing *Piscatelli*, 424 Md. at 308).

[20] "An absolute privilege provides immunity regardless of the purpose or motive of the defendant or the reasonableness of the conduct[.]" *Hosmane*, 227 Md. App. at 24 (citing *Piscatelli*, 424 Md. at 307). "An example of an absolute privilege would be statements by judges or lawyers in judicial proceedings or legislators in legislative proceedings." *Id.* (citing *Adams v. Peck*, 288 Md. 1, 3 (1980)).

Where, as in this appeal, the challenged rulings involve the interpretation and application of Maryland law, our task is to determine whether the trial court's conclusions are legally correct. *Prince George's Cnty. Off. of Child Support Enf't v. Lovick*, 238 Md. App. 476, 480 (2018). "We will not set aside a circuit court's fact findings unless they are clearly erroneous, . . . but we review questions of law *de novo*." *Id.* (citing *Clickner v. Magothy River*, 424 Md. 253, 266 (2012).

DISCUSSION

I. THE COURT DID NOT ERR IN WITHDRAWING STATEMENTS TWO AND THREE FROM THE JURY'S CONSIDERATION.

Schifanelli claims that the circuit court erred in ruling that Statement Two and Statement Three could not be considered by the jury. The premise for Schifanelli's argument is that the court's ruling was based on the statements "not specifically 'tag [ging]'[21] any U.S. Navy recipient."[22] The record does not support Schifanelli's contention. In moving for judgment at the close of evidence, Jourdak argued that, because neither statement mentioned Schifanelli, they were not defamatory as a matter of law. The court concurred with that argument, explaining that the two statements would not be considered

[21] In this context, to "tag" means "to mention (another person or account) in a social media post in a way that causes the person or account to be notified of the post." *Tag*, Merriam-Webster, https://www.merriam-webster.com/dictionary/tag (last visited July 18, 2023).

[22] To the extent Schifanelli now contends Statements Two and Three were admissible because they showed malice in relationship to the fair comment privilege, Schifanelli did not raise that argument below. Thus, the argument is not preserved for our review.

by the jury because they did not "mention [Schifanelli] at all." The court did not err in so ruling.

"A defamatory statement is one 'which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or from associating or dealing with, that person.'" *Lindenmuth v. McCreer*, 233 Md. App. 343, 357 (2017) (quoting *Hosmane*, 227 Md. App. at 21). "It is not necessary that the plaintiff be designated by name; it is enough that there is such a description of or reference to [the plaintiff] that those who hear or read reasonably understand the plaintiff to be the person intended." Restatement (Second) of Torts § 564 cmt. b (Am. L. Inst. 1977).

As Schifanelli concedes, Statement Two and Statement Three relate to a discussion thread on Facebook in which she did not participate. The Facebook posts attached to Statement Two were not attributable to Schifanelli. Neither Jourdak's statements nor the attached Facebook posts mentioned Schifanelli by name or otherwise described or referred to her. Contrary to Schifanelli's claim that the statements tended to show her "making posts inciting threats of violence[,]" Jourdak's statement about an "inflammatory" post that elicited a threat of violence appears to be directed at Mr. R.'s post, in which he stated that the "persons responsible" for promoting discussions on race in schools were "totally unethical" and should be fired. It was in response to Mr. R's post that Mr. S. proposed: "one of them needs to get the shit beat out of HIM" (emphasis in original).

The evidence at trial did not support a finding that Statement Two or Statement

Three tended to expose Schifanelli to "public scorn, hatred, contempt[,] or ridicule[.]" *Lindenmuth*, 233 Md. App. at 357. The court did not err in withdrawing Statement Two and Statement Three from the jury's consideration.

II. THE COURT DID NOT ERR IN RULING THAT THE FAIR COMMENT PRIVILEGE APPLIED, AND THERE IS AN ALTERNATE BASIS ON WHICH TO AFFIRM THE JUDGMENT.

Schifanelli contends that the court erred in ruling that Jourdak's statements were protected by the fair comment privilege. She argues that each statement was (1) a statement of fact; (2) an opinion that implied a factual basis; or (3) an opinion that was not supported by true or known facts. Alternatively, Schifanelli contends that, even if each of the statements at issue could be considered an opinion, the statements did not concern a matter of legitimate public interest.

Jourdak maintains that the three statements that were submitted to the jury were statements of opinion regarding matters of legitimate public interest and thus were protected by the fair comment privilege. She further asserts that the facts upon which any opinions were based were disclosed as well as true. Jourdak claims that, therefore, the statements should not have been submitted for the jury's consideration at all.

Jourdak also argues that judgment in her favor can be affirmed on alternate grounds and urges this Court to conclude the circuit court incorrectly determined that the limited public figure privilege was inapplicable. In reply, Schifanelli contends that she was not a limited public figure during the relevant time frame in which Jourdak published her alleged defamatory statements.

We agree with Jourdak that the circuit court correctly applied the fair comment privilege. However, we disagree with Jourdak's position that Statements One, Four, and Five should not have been submitted for the jury's consideration. As we explain, we interpret the court's questions to the jury regarding whether the statements were defamatory and whether they were made with knowledge of falsity and intent to deceive as addressing the question of whether Jourdak abused the fair comment privilege by acting with malice. Finally, we agree with Jourdak that, even if the fair comment privilege had not been applicable, the limited public figure privilege, contrary to the ruling of the circuit court, would have applied and, therefore, the case would have been correctly submitted to the jury in the context of that privilege as well.

A. Fair Comment Privilege

Pursuant to the fair comment privilege, "a newspaper [or] any member of the community may, without liability, honestly express a fair and reasonable opinion or comment on matters of legitimate public interest." *Kirby*, 227 Md. at 272. The underlying policy for the privilege 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." *Id.*; *see also Peroutka*, 116 Md. App. at 316 ("We preserve the distinction between assertions of fact on one hand and opinions, comments and criticism on the other hand because fair and honest commentary, by its very nature, deserves special protection in a free society." (quoting *Kapiloff v. Dunn*, 27 Md. App. 514, 531 n.19 (1975))).

As the Supreme Court of Maryland[23] has recognized, "[t]he distinction between 'fact' and 'opinion,'" is "theoretically and logically hard to draw[.]" *Kirby*, 227 Md. at 274; *accord Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) ("It is a fitting illustration of the complexity of language and communication that many statements from which actions for defamation arise do not clearly fit into either category."). The Supreme Court has articulated the following test to distinguish between fact and opinion: "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?" *Kirby*, 227 Md. at 274.

1. The statements at issue relate to a matter of legitimate public interest.

As an initial matter, it is clear that all three of the statements at issue relate to a matter of legitimate public interest. In the context of an action for defamation,

> a matter of "public concern"[24] means "'fairly considered as relating to any matter of political, social, or other concern to the community,'" *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)), "or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,'" *id*. (quoting *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004))[.]

[23] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

[24] This Court has previously noted that the United States Supreme Court "has used the terms 'public or general interest' and 'public or general concern' synonymously." *Gen. Motors Corp. v. Piskor*, 27 Md. App. 95, 107 n.7 (1975) (citing *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)), *aff'd in part, rev'd in part*, 277 Md. 165 (1976).

MCB Woodberry Dev., LLC v. Council of Owners of Millrace Condo., Inc., 253 Md. App. 279, 304 (2021). We have no difficulty stating that allegations of misconduct on the part of a county school superintendent, the much broader, national debate about systemic or institutional racism, and whether racism should be discussed in schools are matters of legitimate public interest. *See Kapiloff*, 27 Md. App. at 524 (high school principal's approval rating is "a matter of public or general interest or concern"); *Kirby*, 227 Md. at 282–83 (inferring that a review hearing of a Baltimore police commissioner involves a matter of public interest); *Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 383 (2d Cir. 2003) (allegations of systemic racism and anti-Semitism within police department is a matter of public concern); *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 777 (9th Cir. 2022) ("[I]ssues such as immigration, racism, and bigotry . . . are all matters of public concern."); *Mitchell v. Univ. of N.C. Bd. of Governors*, 886 S.E.2d 523, 533 (N.C. Ct. App. 2023) (Murphy, J., concurring in part and dissenting in part) ("[T]he way race is taught in schools has become one of the defining political issues of this decade" and "academia's relationship with race has long been acknowledged as a subject of public concern[.]"); *Cox v. Civ. Serv. Comm'r of Douglas Cnty.*, 614 N.W.2d 273, 285 (Neb. 2000) ("[A]llegations of racism in a public agency are of concern to the community at large.").

Schifanelli argues that the subject of the statements could not reasonably be considered of interest to the United States Navy or the United States Naval Academy. This argument is misplaced. As Jourdak correctly notes, the question is whether the allegedly

defamatory statement relates to a legitimate matter of public interest, not whether a recipient of the communication has a subjective interest in the matter.

2. The statements are opinions.

Examining each of the statements in turn, we conclude that the court correctly applied the fair comment privilege.

Statement One

> 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, @USNAAlumni @AdmissionsUsna? is this standard representation of the USNA??"

The part of Statement One regarding Schifanelli's employment is a true assertion of fact; therefore, it is not defamatory at the outset. The rest of the statement would likely be understood by an ordinary person to be Jourdak's personal feelings about Schifanelli's criticism of Dr. Kane. As the facts of this case demonstrate, what one person characterizes as a "misinformation" or a "smear campaign" against a public official, such as a school superintendent, is, to others, an expression of legitimate concern about the official's use of office.[25]

[25] Jourdak submits that, in a related federal case, the United States District Court for the District of Maryland previously found the same statements at issue here to be opinion. In that case, Schifanelli sued the Queen Anne's County Board of Commissioners, alleging several causes of action, including defamation. The U.S. District Court dismissed Schifanelli's claims, noting that "one's personal belief that another is a 'racist' or 'liar' who is guilty of 'inciting violence' or engaging in a 'smear campaign' is fairly construed as statement of opinion that is incapable of being proven true or false." *Schifanelli v. Queen Anne's Cty. Bd. of Comm'rs*, No. GLR-20-2906, 2021 WL 3681157, at *7 (D. Md. Aug. 18, 2021) (citing *McReady v. O'Malley*, 804 F. Supp. 2d 427, 442 (D. Md. 2011)).

Schifanelli argues that, even if stating that she was "running a misinformation/smear campaign" is an expression of opinion, it is not protected by the fair comment privilege because it "implies a 'corrupt motive.'" Schifanelli relies on *Kirby*, in which the Supreme Court of Maryland observed that "[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." *Kirby*, 227 Md. at 274. However, Schifanelli's argument is misplaced.

In general, abuse of a common law conditional privilege is couched in terms of "malice" or "actual malice," which, in the context of a purely private defamation action, is "knowledge that [one's] statement is false, coupled with [one's] intent to deceive another by means of that statement." *Shirley*, 214 Md. App. at 45 (quoting *Piscatelli*, 424 Md. at 307–08); *see, e.g.*, *Piscatelli*, 424 Md. at 307 (stating, generally, that a qualified privilege "is conditioned upon the absence of malice and is forfeited if it is abused" (quoting *Smith v. Danielczyk*, 400 Md. 98, 117 (2007))); *Kirby*, 227 Md. at 272 ("[F]air comment" may be considered a qualified privilege because of "the fact that actual malice, as in the case of concededly qualified privileges, destroys the otherwise existing immunity[.]"); *Shirley*, 214 Md. App. at 42 (stating that there are four qualified or conditional privileges, including fair comment, that are "conditioned upon the absence of malice" (quoting *Piscatelli*, 424 Md. at 307)). As previously stated, "[a]buse of a conditional privilege is usually a question for the fact-finder[.]" *Id.* at 44 (citing *Piscatelli*, 424 Md. at 308).

Therefore, whether Jourdak acted with a "corrupt motive" or, in other words,

whether she acted with "actual malice" was a question aptly presented to the jury and is irrelevant to our review of the court's finding that the fair comment privilege existed under the facts presented.

Statement Four

> 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[.]

It is not disputed that Schifanelli published two of the four Facebook posts that were attached to Statement Four; therefore, that part of the statement is not defamatory at the outset. The remainder of the statement, i.e., that Schifanelli let comments "flourish," is too vague to be understood as a "declaration of an existing fact." *Kirby*, 227 Md. at 274. As the United States Court of Appeals for the District of Columbia Circuit has noted, "[r]eaders are . . . considerably less likely to infer facts from an indefinite or ambiguous statement than one with a commonly understood meaning." *Ollman*, 750 F.2d at 979; *accord Peroutka*, 116 Md. App. at 312 n.7 (commenting that a statement which implied that plaintiff subjected his spouse to "emotional abuse" is not necessarily defamatory because of the difficulty in ascertaining a precise meaning of the term); *see also Milkovich v. Lorain J. Co.*, 497 U.S. 1, 2 (1990) (citing *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970)) ("[S]tatements that cannot reasonably be interpreted as stating actual facts about an individual are protected . . . thus assuring that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of this Nation.").

Reading Statement Four as a whole, we are not convinced that the phrase "let

flourish" has a sufficiently definite meaning such that an ordinary person would likely understand it to be a factual statement. Instead, the phrase "let flourish" is an example of "loose, figurative[,] or hyperbolic language which would negate the impression" that the author is stating a fact. *See Batson*, 325 Md. at 725 (quoting *Milkovich*, 497 U.S. at 21).

Statement Five

> another day, another load of posts that @NavalAcademy adjunct professor Gordana Schifanelli let's [sic] fly in her "Patriots" group.
>
> does the @USNavy find racism patriotic, too? [thinking face emoji]

An ordinary person would likely understand Statement Five to be an opinion that the attached Facebook posts, none of which were authored by Schifanelli, were racist in tone. Similar to the phrase "let flourish", the statement that Schifanelli let comments "fly" is loose or figurative language with an insufficiently definite meaning to be understood by an ordinary person as an assertion of fact.

In sum, we hold that the court did not err in ruling that the fair comment privilege applied to Statements One, Four, and Five. Consequently, Jourdak was entitled to judgment as a matter of law, unless there was a factual issue for the jury to decide as to whether the privilege had been abused. As we shall explain, the court properly submitted the case to the jury to decide the factual issue of whether the privilege was abused.

3. The court properly submitted the case to the jury to determine whether the privilege was abused.

As indicated *supra*, "[a]buse of a conditional privilege is usually a question for the fact-finder[.]" *Shirley*, 214 Md. App. at 44 (citing *Piscatelli*, 424 Md. at 308). "Once a judge determines that a privilege exists," here, the fair comment privilege, "the question of

whether the privilege was abused is for the jury[.]" *Piscatelli*, 425 Md. at 308 (quoting *Woodruff v. Trepal*, 125 Md. App. 381, 402 (1999)). We reiterate that abuse of a common law conditional privilege is generally described in terms of "malice" or "actual malice." *Shirley*, 214 Md. App. at 45. In the context of a defamation action, malice is "a person's actual knowledge that [one's] statement is false, coupled with [one's] intent to deceive another by means of that statement." *Id.*

The jury was charged with answering two questions: (1) whether Jourdak had made a defamatory statement, and (2) whether the statement was made with knowledge of falsity and intent to deceive. As a preliminary matter, we note that the court's second question to the jury was functionally equivalent to charging the jury with answering whether Jourdak made the statements with actual malice. Therefore, although the court might have considered framing the questions to the jury in terms of "actual malice," the court charged the jury with answering whether Jourdak acted with actual malice by couching the question in terms of the definition of "actual malice" instead.[26] That is, whether the statements were made with knowledge of falsity resulting in an abuse of the privilege.

Here, while Jourdak presented sufficient evidence to establish the existence of the fair comment privilege, Schifanelli, in response, presented sufficient evidence for the jury to consider whether the privilege was abused. Schifanelli did offer evidence by which the

[26] We also note that best practices would have included a verdict sheet with each of the statements at issue for the jury's consideration and an instruction regarding actual malice. However, neither party made such a request regarding the verdict sheet or jury instructions, nor did the parties object to the verdict sheet or jury instructions. Moreover, this issue has not been raised on appeal and therefore, it is not preserved for our review.

jury could have found malice if it had been so persuaded. For example, Jourdak tagged various recipients associated with Schifanelli's employer, the United States Naval Academy, and requested action on their part ("so I'll ask again what y'all will do with this . . ."). With this evidence and judging the credibility of the witnesses, the jury could have found that Jourdak acted maliciously by targeting Schifanelli on Twitter and seeking to interfere with Schifanelli in her professional capacity and employment as a lawyer and professor. The jury, however, did not so find.

Although we concluded the evidence did not support a finding that the statements were premised on false and defamatory facts, we also conclude the circuit court did not err in presenting the questions regarding defamation and falsity—i.e., abuse or actual malice—to the jury.

B. Limited Public Figure Privilege

Jourdak also asserts that judgment in her favor can be affirmed on alternate grounds and urges this Court to conclude the circuit court incorrectly determined that the limited public figure privilege was inapplicable. In reply, Schifanelli contends that she was not a limited public figure during the relevant time period in which Jourdak published her alleged defamatory statements. We agree with Jourdak that, even had the fair comment privilege been inapplicable, the limited public figure privilege would have applied, contrary to the ruling of the trial court. This is so because Schifanelli's social media activity, coupled with her conduct establishing herself as the leader of the movement to remove Dr. Kane, were sufficient to meet the privilege requirements.

An individual may be designated as a "limited public figure" by "voluntarily inject[ing] [oneself] or be[ing] drawn into a particular public controversy and thereby becom[ing] [a] public figure[] for a limited range of issues." *Waicker v. Scranton Times Ltd. P'ship*, 113 Md. App. 621, 630 (1997). Maryland courts have recognized this qualified privilege even where the individual who is the subject of the alleged defamatory statements does not hold public office. *See, e.g. A.S. Abell Co. v. Barnes*, 258 Md. 56, 67-68 (1970). The privilege applies where the individual has taken purposeful action "amounting to a thrusting of [one's] personality into the vortex of an important public controversy," or has sought or "to lead in the determination of policy, or, because, by any reasoning, [the individual] is a public [person] in whose public conduct society and the press have a legitimate and substantial interest." *Id*.

Maryland courts engage in a two-part test to determine whether a person is a limited public figure: "(1) was there a particular public controversy that gave rise to the alleged defamation; and, if so, (2) was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify public figure status?" *Waicker*, 113 Md. App. at 630. In determining whether an individual is a public figure with respect to an identified public controversy, we are guided by the following factors:

> (1) whether the individual had access to channels of effective communication; (2) whether the individual voluntarily assumed a role of special prominence in public controversy; (3) whether the individual sought to influence resolution or outcome of controversy; (4) whether controversy existed prior to publication of defamatory statements; and (5) whether the individual retained public figure status at the time of alleged defamation.

Id. at 631 (citing *Fitzgerald v. Penthouse Intern., Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982)). In applying each of these factors, we conclude that there was ample evidence in the record to support a finding that Schifanelli was a limited public figure. We explain.

The rationale for the first factor "is that when the plaintiff has access to the media, the 'public controversy can be aired without the need for litigation and that rebuttal of offending speech is preferable to recourse to the courts.'" *Id.* at 631–32 (citing *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708–09 (4th Cir. 1991)). It is apparent from the record that at the time of Jourdak's alleged defamatory statements, Schifanelli had access to and regularly utilized social media, print media, and local radio. As aptly noted in Jourdak's brief, Schifanelli engaged in the following conduct:

> - She founded the Kent Island Patriots, and established a public Facebook page and group to permit discussion regarding the controversy;
> - She founded and owned a company called the Maryland Eastern Shore Patriots;
> - She trademarked the name "Kent Island Patriots," giving ownership of the mark to her company Maryland Eastern Shore Patriots, and later selling merchandise using the mark;
> - She administered the Facebook group, including giving herself the ability to moderate (and delete . . .) posts by its thousands of members;
> - She posted frequently in the Facebook group (and on her own page and her law firm's page), including initiating content and responding to content by others in the group, and making plain the objectives of the group;
> - She supported a petition to have Dr. Kane removed, ultimately obtaining thousands of signatures in support of the petition . . .;
> - She and the Kent Island Patriots conducted public [meetings and] events . . . around the controversy;
> - She appeared on a Maryland talk radio show on July 31, 2020, allegedly in response to Jourdak's social media statements about the controversy . . .; [and]

- She gave nearly-contemporaneous interviews or statements regarding the schools' controversy and the Kent Island Patriots to the Baltimore Sun.

(Record citations omitted). It is evident that Schifanelli had access to channels of communication through her frequent use of social media, print media, and radio. Through her use of these platforms, Schifanelli established herself as a leader of the controversy with the instant ability to communicate, comment on, gain support for, and defend her views.

The second and third factors—whether the individual voluntarily assumed a role of special prominence in public controversy and whether the individual sought to influence the resolution or outcome of the controversy—"are often considered together because of their similarity." *Waicker*, 113 Md. App. at 634 (citing *Reuber* 925 F.2d at 709). "Taken together, these factors reflect a consideration that public figures are less deserving of protection . . . because public figures . . . have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Id.* (internal quotation marks omitted). Here, it is clear Schifanelli thrust herself into the forefront of the public controversy and led the effort to remove Dr. Kane as Superintendent, which ultimately was successful.

The fourth factor, whether the controversy existed prior to the publication of the alleged defamatory statement, is easily met. Dr. Kane's letter and the ensuing controversy preceded Jourdak's statements posted to Twitter in July of 2020. Moreover, the facts giving rise to this defamation action took place in the middle of 2020. The year was marked by

racial tensions and widespread protests and counter-protests, resulting in civic and political unrest. *See Smith v. State*, 481 Md. 368, 373–77 (2022) (discussing America's racial and political landscape in 2020). The controversy over Dr. Kane's letter, the backlash that ensued, and discussions regarding police brutality and race in education existed well before Jourdak's statements.

The fifth and final factor is whether the individual retained public figure status at the time of the alleged defamation. Here, Schifanelli not only retained her public figure status as the leader of the Kent Island Patriots and the campaign to oust Dr. Kane at the time of Jourdak's statements, but she continued to benefit from such status. Schifanelli touted her leadership role in the controversy to gain notoriety, ultimately leading to her candidacy for Lieutenant Governor of Maryland.

In sum, we conclude that Schifanelli was a limited public figure under the factors prescribed by the *Waicker* Court. Had the court applied the limited public figure privilege, the question of whether the privilege was abused would have been presented to the jury. Because we have concluded the court properly applied the fair comment privilege and correctly presented the question of malice to the jury, our alternate analysis and conclusion that the limited public figure privilege was, likewise, applicable does not alter the ultimate outcome of this appeal.[27]

[27] We note that "it is within our province to affirm the trial court if it reached the right result for the wrong reasons." *Pope v. Bd. of Sch. Comm'rs of Balt. City*, 106 Md. App. 578, 591 (1995).

III. THE COURT DID NOT ERR IN GRANTING JOURDAK'S MOTION FOR JUDGMENT AT TRIAL.

Schifanelli asserts that, because the court denied Jourdak's pre-trial motions[28] regarding the applicability of the fair comment privilege, she had a "reasonable expectation" that, at trial, she would not have to prove actual malice. Schifanelli claims that the court improperly "reverse[d] its decision" at trial by granting Jourdak's motion for judgment on the issue of fair comment privilege and that she was prejudiced as a result. Jourdak contends Schifanelli's claim of error is unfounded because, prior to trial, the circuit court did not make any ruling as to whether the fair comment privilege applied. Jourdak emphasizes Schifanelli could not have "reasonably relied" on any pre-trial ruling on the issue because there were none.

"[A] denial of a motion for summary judgment does not 'finally dispose' of any matter—it merely permits the case to proceed based on the finding that a dispute concerning a material fact exists." *Ralkey v. Minn. Mining & Mfg. Co.*, 63 Md. App. 515, 523 (1985). "The denial neither decides any issues of law nor precludes a subsequent finding that no factual disputes exist." *Id.* (citing *Joy v. Anne Arundel Cnty.*, 52 Md. App. 653, 660–61 (1982); *accord Com. Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 627 (1997). Here, the court made no finding whatsoever with respect to privilege at the summary judgment stage. Thus, it cannot be said that the court's denial of Jourdak's motion constituted a final ruling on the issue of privilege.

[28] See *supra* Factual and Procedural Background, Subsection C. Pre-Trial Motions for an overview of the motions relevant to this discussion section.

Nor did the court's denial of Jourdak's motion *in limine* constitute a final ruling on any issue raised in the motion. As this Court has explained, "[a] motion in limine is not a ruling on evidence; it adds a procedural step prior to the offer of evidence. It serves the useful purpose of raising and pointing out before trial, certain evidentiary rulings that the court may be called upon to make." *Funkhouser v. State*, 51 Md. App. 16, 23–24 (1982), *abrogated on other grounds by Pepper v. Johns Hopkins Hosp.*, 111 Md. App. 49 (1996).

Based upon our review of the record, it is clear the court declined to issue a substantive ruling on the issue of privilege prior to trial. In doing so, the court was not precluded from granting a motion based on the same grounds during trial. *See* Md. Rule 2-602(a)(3) (With an exception not applicable, "an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action . . . or that adjudicates less than an entire claim . . . is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties."). Thus, Schifanelli's claims that she had a "reasonable expectation" that she would not have to prove actual malice at trial and that she was prejudiced as a result are without merit.[29]

CONCLUSION

The court did not err in determining, as a matter of law, that Statement Two and Statement Three did not support a cause of action for defamation because neither statement

[29] Moreover, Schifanelli's counsel appeared to acknowledge he misinterpreted the court's pretrial ruling on Jourdak's motion *in limine.* In response to the trial judge's explanation that the judge who issued the order "decided not to hear it pre-trial," in deference to the trial judge's ability to "hear the evidence and make a decision before it went to the jury," Schifanelli's counsel replied, "I misread that order, I took it as final, I apologize."

supported a finding that it was defamatory as to Schifanelli. Neither did the court err in ruling that the remaining statements were protected by the fair comment privilege or by submitting the question on malice to the jury. Alternatively, we note that even had the fair comment privilege been inapplicable, the limited public figure privilege would have applied, and our analysis of that issue would have led to the same result at trial and, thus, the same outcome of this appeal. Finally, it was within the trial court's discretion to rule on whether the fair comment privilege applied after the evidence had been presented. As such, the court did not err in granting Jourdak's motion for judgment at trial.

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

Circuit Court for Queen Anne's County
Case No. C-17-CV-20-000140

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1041

September Term, 2022

GORDANA SCHIFANELLI

v.

MARY E. JOURDAK

Shaw,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.
Concurring Opinion by Raker, Irma S.

Filed: July 28, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

I join in the judgment of the Court affirming the judgment of the Circuit Court for Queen Anne's County. The jury found that appellee, Mary E. Jourdak, defamed appellant Jordana Schifanelli, but that she did not act with malice. I do not agree with the majority's reasoning to support the judgment on the basis that the fair comment privilege applies. I do, however, agree with the majority's alternative reasoning that Schifanelli was a limited public figure, and that in light of the jury's finding of no malice, there can be no defamation. Hence, I would affirm.

I disagree with the majority that Statement One is a protected statement of opinion, not fact, and protected by the fair comment privilege.[1] At best, the statement qualifies as a "mixed opinion," not protected by the fair comment privilege.[2] *See* Restatement (Second) of Torts S 566, Expressions of Opinion. The most common approach to distinguishing between fact versus opinion is to consider the content of the communication as a whole, its tone and purpose, and look to the over-all context in which the statements were made and determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the person claiming defamation. *Mann v. Abel*, 885 N.E.2d 884, 886 (N.Y. 2008). Here, it is readily verifiable whether Schifanelli was

[1] In all other respects, I agree with the majority opinion.

[2] Although an expression of opinion ordinarily cannot be the basis of a defamation action, when the speaker does not express a "pure opinion" and expresses what courts have defined as "mixed opinion", it may be actionable. *Samuels v. Tschechtelin*, 135 Md. App. 483 (2000). "Mixed opinion" has been defined as a communication blending an expression of opinion with a statement of fact.

disseminating misinformation/smear campaign. Context is important here as well. Significantly, Jourdak was making sure that Schifanelli's employers at the United States Naval Academy were aware of the statements, and the Maryland State Bar Association (a voluntary association) also.

Schifanelli contends that the court erred in ruling that Jourdak's statements were protected because each statement was a statement of fact, an opinion that implied a factual basis, or an opinion that was not supported by true or known facts. I agree with Schifanelli regarding Statement One.

Depending upon the context, calling someone a liar, or accusing another of making a misstatement, can be defamatory, causing harm to reputation." *See, e.g, Liar! Liar? The Defamatory Impact of "Liar" in the Modern World, Fordham Intellectual Property, Media and Entertainment Law Journal*, Vol. 27, No. 2 (2017). I recognize that "[p]recedent testing the liar epithet lacks clear and consistent application across courts and jurisdictions." *Id*. at 254. "The question of whether a statement is opinion or fact, particularly that in which a plaintiff's honesty and integrity is involved is not only confusing, but somewhat artificial." *Id.* at 269. And, complicated when dealing with the internet and social media platforms.

Most of the cases addressing the question of whether a statement is fact or opinion do not provide an actual test but do provide some guidance. *But see, Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Len Niehoff & Ashley Messenger, Milkovich v. Lorain Journal,* 49 U. Mich. J.L. Reform 467 (2016) (Milkovich opinion much criticized as a

deeply and unworthy opinion). We look at the context in which the statements are made, the circumstances surrounding the statements, and at the actual language to determine if it is used in a precise manner or in a figurative or hyperbolic sense. In addition, we look at the statements to determine if they are capable objectively of proven true or false. Finally, if the determination is that the statement is opinion, we look to see if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

As to Statement One, that Schifanelli is running a "misinformation/smear campaign", the majority holds that Statement One is an opinion and not a statement of fact. Maj. op. at 27-28. The majority reasons as follows:

> "The part of Statement One regarding Schifanelli's employment is a true assertion of fact; therefore, it is not defamatory at the outset. The rest of the statement would likely be understood by an ordinary person to be Jourdak's personal feelings about Schifanelli's criticism of Dr. Kane. As the facts of this case demonstrate, what one person characterizes as a "misinformation" or a "smear campaign" against a public official, such as a school superintendent, is, to others, an expression of legitimate concern about the official's use of office."

Maj. op. at 28-29. I disagree.

In my view, accusing someone of spreading misinformation and running a smear campaign is not pure opinion, but in context, a statement of fact, and not protected by the fair comment privilege. "Misinformation" is often defined as false or inaccurate information, especially that which is deliberately intended to deceive." (All misinformation is not necessarily intentional.).[3] The Cambridge Dictionary defines a "smear campaign"

[3] While "misinformation" and "disinformation" are often used interchangeably, they hold different meanings. "The difference between the two lies in the intent: where

as "a planned attempt to harm the reputation of a person or company by telling lies about them." *Smear Campaign*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/smear-campaign.

Assuming the jury found Statement One to be defamatory,[4] the jury found no malice. Even though I believe the majority is wrong in concluding that Statement One was protected by fair comment privilege, it is really of no moment here, because the court required the jury to consider whether Jourdak acted recklessly or with knowledge of the statements falsity, i.e., malice. If Schifanelli was a limited public figure doctrine, (which she was even though the trial court found otherwise, erroneously), Jourdak's statements were protected unless the statements were made with actual malice. The jury found no malice. The result is the same and the jury was correct. For me, that ends the inquiry.

"misinformation" is loosely defined as untrue, or semi-truthful content presented as fact, "disinformation" is defined as untrue, or semi-truthful content, *deliberately* and often covertly intended to influence its audience.". We are discussing here "misinformation," but the difference does not matter because both terms refer to untruthful or semi-untruthful statements.

[4] The trial court did not require the jury to identify which of the statements were defamatory but simply asked the jury to consider the submitted statements and to return a yes or no answer. Although speculative, Statement One is the statement most likely to be the basis of the jury verdict and so I focus solely on Statement One in this concurring opinion.