Circuit Court for Anne Arundel County
Case No. C-02-CV-18-001942

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3119

September Term, 2018

GERALD SMITH

v.

BRIAN GRIFFITHS

Graeff,
Leahy,
Battaglia, Lynne A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: September 9, 2020

This appeal arises out of a defamation action filed in the Circuit Court for Anne Arundel County by Gerald I. Smith, Jr., appellant, against Brian Griffiths, appellee. Mr. Smith was a candidate in the 2018 Republican primary for the United States Senate in Maryland. He alleged in his complaint that statements made by Mr. Griffiths in an article posted on the political website blog "Red Maryland" were defamatory and "motivated by ill-will." In response to the complaint, Mr. Griffiths filed a motion to dismiss or, in the alternative, for summary judgment. A hearing was held on November 14, 2018, and, on December 10, 2018, the circuit court entered a written memorandum opinion and order granting summary judgment in favor of Mr. Griffiths. This timely appeal followed.

Mr. Smith, who is proceeding pro se, as before the circuit court, presents four questions for our review.[1] We consolidate Mr. Smith's questions into two:

1. Did the circuit court improperly treat the motion to dismiss, or in the alterative, for summary judgment, as a motion for summary judgment?

[1] Smith phrased his questions presented as follows:

"1. Did the trial judge make an egregious error of law in violation of Maryland Rule10-222(h)(3)(iii) and 18 U.S.C. 1001 by falsely stating no facts were in dispute?

2. Did the trial judge make an egregious error of law in violation of Maryland, [sic] Rule 10-222(h)(3)(iii) and 18 U.S.C. 1001 by falsely stating court allowed evidence outside the scope of the initial pleadings at oral argument?

3. Did the trial judge make a legal error by not following the legal precedent of McDermott v. Hughley, 317 Md. 12 (1989) [sic] in deciding the facts and the merits of the case?

4. Did the trial judge make a legal error by not following the legal precedent of McDermott v. Hughley, 317 Md. 12 (1989) [sic] which allows a jury to decide whether malice existed and whether the qualified privilege was abused?"

2. Was the circuit court legally correct in granting Mr. Griffiths' motion for summary judgment and dismissing Mr. Smith's defamation action on the ground that the allegedly defamatory statements made by Mr. Griffiths were protected by the constitutional privilege?

For the reasons set forth below, we hold that the circuit court did not err in granting summary judgment on Mr. Smith's defamation action. First, the court properly considered the motion to dismiss as a motion for summary judgment. Second, because each statement at issue is either an assertion of fact or covered by the First Amendment conditional privilege and fair comment privilege, none of the statements provides a basis for liability. Consequently, we affirm the judgment of the circuit court.

BACKGROUND

In 2018, Mr. Smith was a Republican candidate in Maryland's primary race for the United States Senate. Mr. Griffiths is a self-described "noted Maryland political commentator whose work has appeared in such publications as *The Baltimore Sun* [and] *The Annapolis Capital*" and is the editor-in-chief and a founding contributor of the political blog and newsletter Red Maryland.

Mr. Griffiths' Article

After Mr. Smith filed his candidacy with the State Board of Elections, on January 30, 2018, Mr. Griffiths posted an article entitled "Conspiracy Theorist Files for U.S. Senate." Initially, a Looney Tunes logo appeared at the top of the post, but Mr. Griffiths later deleted the logo and replaced it with the hand-written word "CRAZY." The vast majority of the article quoted Mr. Smith's own words, with Mr. Griffiths contributing only those sentences highlighted in bold below:

A conspiracy Theorist filed as a Republican for U.S. Senate today.

Gerald I. Smith, Jr. filed with the State Board of Elections and made a statement on Facebook that you have to see to believe.

*** * ***

Gerald Smith

It's official[.] I'm running for U.S. Senate as a Republican in the state of Maryland. I'm the only Republican running thus far and hope it stats that way (the link below provides details on all the candidates running thus far). Chelsea Manning is running as a Democrat and I've already reached out to her campaign in hopes of doing some informal debates/discussions. Hopefully I can get some funding from the RNC and other organizations so I can establish a website which will al. . . See More

2018 Candidate Listing

The State Board of Elections provides all eligible citizens of the State convenient a. . .

14 Comment 2

*** * ***

Smith runs a website entitled "Human Rights Support" that explains . . . well, I'll let Smith's own words explain it.

U.S. Air Force Catholic senior leaders in conjunction with other senior government officials used former Air Force Major Gerald I. Smith Jr.'s 1989 religious event to plan and cover-up the worst tragedy in American history. Based on the timeline of events Catholics and others wanted to use Gerald's religious events as an opportunity to make 9/11 appear as a religious Biblical event. The 1989 religious event that involved Gerald was reported to the Catholic Church by Catholic individuals who were also involved in the 1989 religious event. As sickening as this may sound based on the numerous horrific actions taken against Gerald it's obvious numerous individuals have been involved in the planning and continued execution of one of the worst plans ever conceived in U.S. history.

Individuals like President Obama and Vice President Biden knew of this plan and did their absolute best to use Gerald Smith to achieve their personal political goals. Even while serving in the Peace Corps in Ukraine from 1997-

1999 many actions were planned against Gerald Smith. While Gerald was contemplating joining the military after receiving his MBA the Air Force and others planned Gerald's first day in the military to be one week prior to 9/11. Shortly after 9/11 senior Air Force members were given the Chairman of the Joint Chiefs of Staff position along with other key government positions.

Later in 2008 shortly after Gerald Smith was assigned to Ramstein Air Base Germany, the Air Force and others planned a needle stabbing incident against Gerald which led to religious visions – specifically Catholic. The first religious vision occurred on Columbus Day 2008. Based on many facts the timing of this Catholic vision for this day was by no coincidence. After Gerald Smith filed complaints with the Air Force and German police he encountered many years of severe harassment. The reprisal against Gerald included many illegal cruel actions to include being improperly referred to mental health where two Air Force Catholic mental health doctors tried to declare Gerald delusional. After hiring several lawyers, Gerald was the first person in the history of the Air Force to be returned to active duty with the false diagnosis of delusional. Gerald later went to Army doctors for further evaluation where it was determined there was "no evidence of medical or psychiatric issues."

The harassment against Gerald Smith lasted until his separation from the Air Force which was on 31 March 2014. Due to the continued harassment both on the military base and in the Dover, Delaware community Gerald filed a federal lawsuit in the District of Delaware. The court documents regarding Gerald Smith's case are publicly available via the Public Access to Court Electronic Records (PACER) service. The complaint number is 15-112. Since the federal judge in Delaware did not approve Gerald's motion for change of venue and also due to the outside influence of powerful individuals like Vice President Biden who was a U.S. Senator from Delaware from 1973 to 2009, Gerald is planning to refile his federal lawsuit in Manhattan, New York district court sometime in 2017. Also due to the failure of the District of Delaware federal court to follow proper procedure Gerald asked the International Criminal Court for assistance where his case is currently under consideration. Click the "Human Rights Violations" tab above or the "Read More" button below to see the organizations and documents that Gerald reported the human rights violations to.

Needless to say that as a Catholic I really don't have a lot of time for this type of what appears to be anti-Catholic nonsense or with somebody who was willing to collaborate with a traitor like Chelsea Manning.

There are still four weeks until the filing deadline; here's hoping that we have a credible Republican candidate file between now and then.

Mr. Smith's Complaint

On July 6, 2018, Mr. Smith, filed, in proper person, a complaint against Mr. Griffiths asserting a claim for defamation in the Circuit Court for Anne Arundel County. Mr. Smith alleged that Mr. Griffiths published the remarks described above on the Red Maryland website and in a newsletter that was disseminated via email. After the remarks were published, Mr. Smith sent two emails to Mr. Griffiths. In the first email, Mr. Smith asked him to remove the "Looney Tunes" caption that was printed above the article. In the second email, Mr. Smith stated, "I am NOT anti-Catholic or collaborating as you state in your newsletter with Chelsea Manning. If you don't remove your material immediately I will seek recourse in court." Mr. Smith alleged that Mr. Griffiths did not respond to either of his requests, but he removed the "Looney Tunes" caption and replaced it with the word 'CRAZY.'"

Mr. Smith claimed that Mr. Griffiths defamed him "by intentionally publishing false and malicious information" in order to affect the outcome of the primary election. He asserted that Mr. Griffiths provided no evidence that he was "crazy," "anti-Catholic" or that he was "willing to collaborate with a traitor like Chelsea Manning." Mr. Smith also asserted that he was a private figure, not a public figure, and that Mr. Griffiths was "a non-media Defendant due to only using the Red Maryland organization to publish the defamatory story and not the Capital Gazette where he works as a columnist." As a result

of the article's publication, Mr. Smith alleges that he "did not attend any of the numerous public events which he was invited to."

Mr. Smith asserted that about a year after he was "[h]onorably discharged (not medical) from the U.S. Air Force in 2014 due to a non-promotion," he created a website for the purpose of educating victims "on how to report and get assistance with human rights violations." Mr. Smith "used his website to document the human rights violations that were committed against him while he was serving on active duty military." Mr. Smith acknowledged that his website included documents and the names of "senior Catholic individuals who were involved in criminal actions taken against" him, but he asserted that none of those documents provided any evidence that he was anti-Catholic. In addition, Mr. Smith acknowledged that his website included "numerous details and medical documents which provide evidence of no mental disorders." Mr. Smith claimed he received a false diagnosis from the Air Force, "which was later ruled out by the Army[,]" and that he was "in the process of trying to return to the military through the Air Force Board of Corrections for Military Records."

According to Mr. Smith, the defamatory statements made by Mr. Griffiths were "motivated by malice" and made "in hopes another political candidate would enter and win the race." Mr. Smith alleged that a week after the statements were published, a staff member from Red Maryland entered the race.

Motion to Dismiss, or in the Alternative, Motion for Summary Judgment

In response to the complaint, Mr. Griffiths filed a motion to dismiss or, in the alternative, motion for summary judgment on August 19, 2018. With regard to the alleged

defamatory statements, that Mr. Smith was "crazy," that he was "anti-Catholic," and that he was "willing to collaborate with a traitor like Chelsea Manning," Mr. Griffiths argued that he was a member of the press and that Mr. Smith, as a candidate for the United States Senate, was a public figure. As a result, Mr. Smith had "the burden to allege and then present sufficient evidence from which a trier of fact could find or infer, by applying the clear and convincing evidence test," that the statements made were false or that they were published with reckless disregard for their falsity. Mr. Griffiths argued that dismissal was required because Mr. Smith failed to allege knowing falsity or reckless disregard of whether the statements were false and, as a result, failed to state a claim sufficient to overcome the constitutional protections of the media from defamation claims by public figures.

Mr. Griffiths also argued that the alleged defamatory statements constituted opinions that were supported by facts readily available to the public and that he was immune from liability for those opinions. Relying on *Kapitoff v. Dunn*, 27 Md. App. 514 (1975), he averred that a "member of the media, like any member of the community may, without liability, honestly express a fair and reasonable opinion or comment on matters of legitimate public interest." In addition, he argued that Mr. Smith's claim for damages was based on the unsupported assumption that, but for the alleged defamation, he would have been elected to the United States Senate, even though "the election [wa]s still months away."

Attached to Mr. Griffiths' motion was his affidavit. Mr. Griffiths acknowledged authoring the article about Mr. Smith's candidacy and further testified as follows:

> 8. The Smith Opinion Column only contains five sentences that are not direct quotes from Smith's own website and writings. One of these sentences simply stated the fact that Smith filed as a candidate for the United States Senate. Another of these sentences provides a link to Smith's own writings and introduces the long block quote from Smith's website. The other three sentences were my opinions, given my review and analysis of Smith's own writings, regarding Smith's qualifications as a candidate for the United States Senate.
>
> 9. I do not know Smith personally nor was the Smith Opinion Column the result of any purpose other than to express my opinions as a political columnist of the qualifications of a newly filed candidate for the United States Senate, opinions based upon a review of Smith's own words.

Mr. Smith filed an opposition to Mr. Griffiths' motion on August 30, 2018. Among other contentions, Mr. Smith asserted that he had made two requests to Mr. Griffiths to remove the remarks from the website and that Mr. Griffiths engaged in a "bad faith attack" when "he wrote the false and malicious story attacking [Mr. Smith's] reputation." Next, according to Mr. Smith, Mr. Griffiths wrongly accused him of having filed "numerous lawsuits" when Mr. Smith had only filed one lawsuit but was planning to refile suit. Further, Mr. Smith averred that Mr. Griffiths was "the only individual to malicious[ly] characterize [him] as 'crazy,' 'anti-Catholic' and 'collaborating with a traitor." Instead, Mr. Smith explained that he had "written to many senior government individuals to include President Donald J. Trump, U.S. Attorney General Jeff Sessions, the Secretary of Defense (SECDEF) and many members of the U.S. Congress. . . . none of the senior individuals [Mr. Smith] communicated with had any issues with [his] website." Also, Mr. Smith averred that, because Mr. Griffiths failed to mention facts about Mr. Smith's actions involving the Air Force, available on his website, his "motive was not related to public interest but rather that he wanted to defame [Mr. Smith's] complaints in order to help one

of his co-workers colleagues win the Republican primary**."** Mr. Smith averred that he was not a public figure because he had "never been involved with politics or held elected office[.]" He claimed that Mr. Griffiths' statements were "inherently defamatory" and that Mr. Griffiths was a "non-media Defendant due to only using his personal organization to publish the defamatory story and not the Capital Gazette where [he] works as an opinion columnist." Even if Mr. Griffiths was considered a "media Defendant," he was "motivated by malice and ill-will[.]" Mr. Smith concluded that Mr. Griffiths "transgressed the limits of merely an opinion by using malicious and defamatory remarks to describe [Mr. Smith]."

A hearing on Mr. Griffiths motion was held on November 14, 2018 in the circuit court. Counsel for Mr. Griffiths argued that "this is a fairly straightforward case." Counsel averred that Mr. Griffiths' statements were "opinions based upon the facts[.]"

> As a result, there is an absolute privilege against liability for defamation based on those opinions. And again it gets back to the concept that someone can comment upon public figures, in this case someone running for one of the highest offices in the land can make a comment, the factual basis of which is available to anybody who reads the comment and they're not going to be liable for defamation.

Next, relying on *New York Times v. Sullivan*, 376 U.S. 254 (1964), counsel asserted that the complaint did not include allegations that "rise to the level of actual malice[.]" Counsel for Mr. Griffiths then read the entire contents of the article to the court. The judge requested that counsel "tell [her] each statement that he made that might be a factual statement and why it is fair comment[.]" Counsel for Mr. Griffiths then reviewed each of the statements.

In response, Mr. Smith argued that the title itself, which referred to him as a "conspiracy theorist" is "clearly defamatory." Mr. Smith noted that:

> [N]o one's ever called me crazy, by the way. No one's ever called me anti-Catholic by the way, and no one's ever told me I was ever collaborating with a traitor like Chelsea Manning. So those are three unique things to me. I do have lots of medical records.

After explaining the purpose of the hearing to Mr. Smith and that Mr. Griffiths "would like to treat this as a summary judgment [motion]," the judge requested Mr. Smith to address whether there were any material facts in dispute. Mr. Smith confirmed that the statements at issue were the five addressed in Mr. Griffiths article plus an additional statement in his email and that there was "no dispute about what his blog said." After the parties completed their arguments, the judge took the motion under advisement.

On December 10, 2018, the court granted summary judgment in favor of Mr. Griffiths. In a memorandum opinion, the judge clarified that "in order to be eligible for the qualified privilege, [Mr. Griffiths] must show that the false statements were made and that they concern a public official and his activities." First, the court determined that because Mr. Smith was a candidate for public office, he was a public figure. Second, the court concluded that there was no dispute of material fact regarding the creation of Mr. Griffiths' post or the nature of his statements, but found that the statements at issue were "within the constitutional privilege."

In reaching that conclusion, the court "consider[ed] whether the statements are 'false statements of fact' by taking each in turn." Concerning the first statement, the judge determined that Mr. Griffiths' characterization of Mr. Smith as a conspiracy theorist was

"an opinion based on verified information directly from [Mr. Smith] and is therefore within the constitutional privilege." The court found the statement that Mr. Smith "filed with the State Board of Elections and made a statement on Facebook that you have to see to believe," to be "an objective truth" that was within the constitutional privilege. Mr. Griffiths' statement that "Smith runs a website, 'Human Rights Support' that explains . . . well, I'll let Smith's own words explain it[,]" was found to be an assertion of accurate fact and within the constitutional privilege. The judge determined that Mr. Griffiths' reference to "anti-Catholic nonsense" was a reference to Mr. Smith's own statement "referring to Catholic religious visions [Mr. Smith] had following a 'needle stabbing incident.'" The court found the statement to be Mr. Griffiths' opinion and a response to Mr. Smith's own words. The court also determined that the statement that Mr. Smith was "willing to collaborate with a traitor like Chelsea Manning," was supported by Mr. Smith's own statement that he had reached out to Manning's campaign in the hope of "doing some informal debates/discussions." Mr. Griffiths' statement, "here's hoping that we have a credible Republican candidate file," was found to be an opinion based on Mr. Smith's own statements that was protected by the constitutional privilege. Lastly, the court found the hand-written word "CRAZY" to be constitutionally protected "opinion and commentary" made by Mr. Griffiths regarding Mr. Smith's statements that were directly quoted in the article. Because the judge found that all of the allegedly defamatory statements were "based on *true* facts – [Mr. Smith's] own words[,]" she declined to reach the issue of actual malice. Mr. Smith noted a timely appeal to this Court.

DISCUSSION

I.

Standard of Review

We review a trial court's grant of a motion to dismiss for legal correctness. *Floyd v. Mayor of Baltimore*, 463 Md. 226, 241 (2019). In reviewing the grant of a motion to dismiss, we must determine whether the complaint, "'*on its face*, discloses a legally sufficient cause of action.'" *Scarbrough v. Transplant Res. Ctr. of Md.*, 242 Md. App. 453, 472 (2019) (quoting *Pittway Corp. v. Collins*, 409 Md. 218, 234 (2009) (emphasis in original)). If the circuit court, in ruling on a motion to dismiss, considers materials outside of the pleading, the motion to dismiss "shall be treated as one for summary judgment." Md. Rule 2-322(c); *see also Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 475-76 (2004).

A motion for summary judgment is properly granted where "there is no genuine dispute as to any material fact" and the moving party "is entitled to judgment as a matter of law." Md. Rule 2-501(f). "A determination of '[w]hether a circuit court's grant of summary judgment is proper in a particular case is a question of law, subject to a non-deferential review on appeal.'" *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012) (citations omitted). "In reviewing a trial court's grant of summary judgment, we examine 'the same information from the record and determine the same issues of law as the trial court.'" *Cent. Truck Ctr., Inc. v. Cent. GMC, Inc.*, 194 Md. App. 375, 387 (2010) (quoting *La Belle Epoque, LLC v. Old Europe Antique Manor*, 406 Md. 194, 209 (2008)). Further, "[w]e look only to the evidence submitted in opposition to, and in support of, the motion for

summary judgment[.]" *Id.* This Court "consider[s] the record in the light most favorable to the non-moving party and consider any reasonable inferences that may be drawn from the undisputed facts against the moving party." *Mathews v. Cassidy Turley Md., Inc.*, 435 Md. 584, 598 (2013). Finally, we review whether the court's decision was correct as a matter of law regardless of whether the court's order operated as a grant of a motion to dismiss or for summary judgment. *Greater Towson Council of Cmty. Ass'ns. v. DMS Dev., LLC*, 234 Md. App. 388, 408 (2017).

II.

Procedural Challenge

As a preliminary matter, Mr. Smith challenges whether the circuit court properly considered Mr. Griffiths' motion to dismiss as a motion for summary judgment. Specifically, Mr. Smith argues that the trial court judge refused to consider evidence "outside of the scope of the initial pleadings at oral argument." Mr. Smith maintains that the judge did not allow evidence to be submitted at the hearing and, specifically, prohibited him from introducing certain documents on the ground that the motions hearing was "not an evidentiary hearing." In support, Mr. Smith refers us to the "Annotated Code of Maryland, Rule 10-222(h)(3)(iii)" and "18 U.S.C. 1001."

Mr. Griffiths counters that the court's statements "were not false and did not violate either the Maryland Rules or federal law [] as Smith insists." Mr. Griffiths avers that the "evidence outside of the pleadings that the [c]ircuit [c]ourt received were the documents attached to the parties' pleadings, including the allegedly defamatory [article] and an affidavit of Griffiths, which Smith never rebutted."

Preliminarily, we note that Maryland does not have a Rule 10-222. We infer from the language quoted by Mr. Smith that he is referencing Maryland Code (1984, 2014 Repl. Vol, 2018 Supp.), State Government Article ("SG"), § 10-222(h). Section 10-222 governs judicial review from decisions made under the Administrative Procedure Act and is not applicable to the case at hand. Likewise, title 18 of the United States Code governs federal crimes and criminal procedures and is not applicable.

Maryland Rule 2-322(c) provides, in pertinent part:

> If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501.

By offering the non-moving party a reasonable opportunity to present material that may be pertinent to the court's decision, there is no risk that a party may be prejudiced when a circuit court treats a motion to dismiss as a motion for summary judgment and considers material outside the pleadings. *Green v. H & R Block, Inc.*, 355 Md. 488, 502 (1999).

Mr. Smith challenges the veracity of the judge's statement that evidence outside the scope of the initial pleading was considered. While the court did not receive in evidence "a letter from the White House and memos from Maryland U.S. Senators," the record is clear that the court considered a copy of Griffiths' affidavit, which was attached to his motion to dismiss. Because the court considered that uncontroverted affidavit at the hearing, the court properly treated the motion to dismiss as a motion for summary

judgment. Md. Rule 2-322(c). Thus, the statement in the circuit court's memorandum opinion was correct.

Moreover, Mr. Smith did have ample opportunity to present pertinent materials. First, in response to Mr. Griffiths' motion to dismiss, or in the alternative, motion for summary judgment, Mr. Smith argued that Mr. Griffiths was the only individual to characterize him as "crazy," "anti-Catholic," or "collaborating with a traitor." In support, Mr. Smith referenced various letters and memoranda, including a letter from President Trump. Second, the circuit court judge provided Mr. Smith an opportunity at the hearing "to articulate what disputed material facts existed." Mr. Smith confirmed that the statements at issue were the five addressed in Mr. Griffiths article plus an additional statement in his email and that there was "no dispute about what his blog said."

We also note that, pursuant to Maryland Rule 2-322(c), Mr. Smith was only entitled to present "pertinent" material in opposition to Mr. Griffiths' motion. While the "letter from the White House and memos from Maryland U.S. Senators" may support that Smith is not "crazy" or "anti-Catholic," as we address below, the gravamen of this suit is not whether Griffiths' opinions are true but whether the *facts* upon which he based his opinions are true. By setting forth Smith's statements and then commenting on them in his article, Smith enabled his readers to judge whether his opinion was well-founded and is protected speech. *See Kapiloff v. Dunn*, 27 Md. App. 514, 527 (1975). In short, Mr. Smith had an opportunity to submit materials in his opposition and articulate any disputed material facts. Because he conceded that there were no disputed facts at the hearing, aside from Mr. Griffiths' statements in the article and the headline sent to subscribers of Red Maryland,

there is no danger that he was prejudiced by the circuit court's treatment of the motion as one for summary judgment.

III.

Defamation

A. Parties' Contentions

Mr. Smith advances three arguments in support of his contention that the circuit court erred in granting summary judgment in favor of Mr. Griffiths.[2] First, Mr. Smith contends that the circuit court "made an egregious error of law" in violation of Maryland Rule 10-222(h)(3)(iii) and 18 U.S.C. 1001 by "falsely stating no facts were in dispute." Second, Mr. Smith avers that the circuit court erred "in deciding the facts and the merits of the case at a hearing on a motion for summary judgment." Third, Mr. Smith argues that the circuit court erred "by not allowing a jury to decide whether malice existed and whether the qualified privilege was abused."

In response, Mr. Griffiths contends that Mr. Smith's argument "ignores the gravamen of the [c]ircuit [c]ourt's decision and this Court's review of the case. The material issue of fact is not whether Mr. Griffiths' opinions were 'true' but only whether the facts upon which his opinions were based were true." According to Mr. Griffiths, his "opinions that [Mr. Smith's] statements are 'crazy' or 'anti-Catholic' are constitutionally

[2] Mr. Smith also avers in his reply brief that Mr. Griffiths' attorney prejudiced his appeal by asserting that Mr. Smith "has engaged in numerous lawsuits." Mr. Smith had the opportunity, and did, respond to the allegation of Mr. Griffiths' attorney. The circuit court did not address, and neither party raised, this issue at the hearing, and it is not relevant to the circuit court's grant of summary judgment.

privileged free speech no matter how insistent Mr. Smith is that he is neither crazy nor anti-Catholic."

B. Applicable Law

Supreme Court precedent directs us first to determine whether a plaintiff is a private or public figure or official and whether the matter relates to a public concern because "'[w]hen the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is [necessary with a private plaintiff].'" *Waicker v. Scranton Times, Ltd*., 113 Md. App. 621, 629 (1997) (quoting *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775, (1986)). In contrast, "[d]efamation actions not implicating the First Amendment, that is, those concerning private individuals only, are based upon Maryland common law." *Hosmane v. Deley-Radtke*, 227 Md. App. 11, 22, *aff'd*, 450 Md. 468 (2016).

Generally, in a defamation action relating to a matter of public concern or concerning a public figure or official, the plaintiff cannot recover unless the plaintiff establishes by clear and convincing evidence that the "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false[.]" *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (setting forth defamatory standard for "public officials"); *see also Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154-55 (1967) (extending standard enunciated in *Sullivan* to "public figures"); *Phila. Newspapers*, 475 U.S. at 768-769, 776 (holding that "at least where a newspaper publishes

speech of public concern," a private-figure plaintiff bears "the burden of showing falsity, as well as fault, before recovering damages.").

Speech is a matter of public concern "when it can be 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)). A candidate for office is characterized as a public figure and "must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971). The Court explained:

> The principal activity of a candidate in our political system, his 'office,' so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. . . . And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when . . . an industrious reporter attempts to demonstrate the contrary.

Id. at 274; *see also Capital-Gazette Newspapers, Inc. v. Stack*, 293 Md. 528, 540 (1982).

Here, it is uncontested that Smith was a candidate for public office, United States Senate, and, accordingly, a public figure. It is also clear that the qualifications and integrity of a candidate for public office is a matter of public concern. Accordingly, the "actual malice" standard enunciated in *Sullivan* and its progeny applies.

Having resolved this threshold issue, we review the requirements for setting forth a prima facie case of defamation relating to a public figure and any relevant privileges to defeat a claim of defamation.

"It is well-settled under both Maryland and federal law that '[t]he First Amendment of the United States Constitution requires that before a public figure may recover for defamation, clear and convincing evidence must establish that the statements in issue were: (1) defamatory in meaning, (2) false, and (3) made with 'actual malice.'" *Chesapeake Pub. Corp. v. Williams*, 339 Md. 285, 295 (1995) (citation omitted).

The Court of Appeals enunciated the relevant characteristics of a qualified privilege in *Seley-Radtke v. Hosmane*:

> It is well established that, in a defamation action, a defendant may assert a qualified or conditional privilege. A common law conditional privilege arises from the principle that a defendant may not be held liable for an otherwise provable defamatory statement if publication of the statement advances social interests that outweigh a plaintiff's reputational interest. A defendant may also assert what has been described in case law as a First Amendment conditional privilege. The Supreme Court has stated that statements pertaining to public officials and to public figures on matters of public concern merit special protection in our society; thus, such statements are subject to a conditional privilege—the First Amendment conditional privilege—that is overcome only by actual malice, i.e., "knowledge that [the statement] was false or with reckless disregard of whether it was false or not."
>
> The existence of both common law and First Amendment conditional privilege is a question of law, and the defendant has the burden of proof with respect to establishing the privilege. If a conditional privilege is established, a plaintiff seeking to rebut the privilege must do so by demonstrating that the defendant made the alleged statement 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."

450 Md. 468, 473-74 (2016). In sum, when a defendant makes allegedly defamatory statements pertaining to public officials or public figures on matters of public concern, the defendant may assert, depending on the circumstance, a First Amendment conditional privilege or a common law conditional privilege.[3]

The Supreme Court also recognizes "constitutional limits on the *type* of speech which may be the subject of state defamation actions." *Telnikoff v. Matusevitch*, 347 Md. 561, 592 (1997) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990)). A "statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Id.*; *see also Letter Carriers v. Austin*, 418 U.S. 264, 286 (1974) (union newsletter, calling a non-union worker a "scab" and "traitor" for refusing to join union, was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refused to join," and could not be reasonably viewed as a "factual representation").

In the instant case, Mr. Griffiths argues that even if his statements were defamatory, they were shielded by the First Amendment conditional privilege, addressed above, and by

[3] A defendant may also assert an applicable absolute privilege, which "provides complete immunity and applies, subject to limitations, principally to (1) judicial proceedings; (2) legislative proceedings; (3) in some cases to executive publications; (4) publications consented to; (5) publication between spouses; (6) publications required by law." *Gohari v. Darvish*, 363 Md. 42, 55 n.13 (2001).

the common law "fair comment privilege." Maryland has recognized that, under the fair comment privilege,[4]

> a newspaper like any member of the community may, without liability, honestly express a fair and reasonable opinion or comment on matters of legitimate public interest. The reasons 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.

A.S. Abell Co. v. Kirby, 227 Md. 267, 272 (1961) (citation omitted).

The fair comment privilege is available for opinions or comments regarding matters of legitimate public interest. *Piscatelli*, 424 Md. at 314. Whether a publication falls within the fair comment privilege often turns on whether "it contains misstatements of fact as distinguished from expression of opinion." *Kirby*, 227 Md. at 273. In determining whether a published statement is fact or opinion, the relevant test is whether "an ordinary person, reading the matter complained of, [would] be likely to understand it as an expression of the writer's opinion or as a declaration of an existing fact[.]" *Id.* at 274. When the facts upon which the publisher of the alleged defamatory statement based his or her opinion are not given alongside the opinion, however, the opinion "itself may be interpreted as being factual and therefore potentially defamatory." *Peroutka*, 116 Md. App. at 319-20.

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

[4] While not raised by either party, the Court of Appeals has clarified that the fair comment privilege "seems to apply to public figures as was the case in *A.S. Abell Co. v. Kirby*, 227 Md. 267, 270-72 (1961), as well as to private figures. *Magnusson v. N.Y. Times Co.*, 98 P.3d 1070, 1080 (Okla. 2004)." *Piscatelli*, 424 Md. at 314 n.4.

common knowledge or because, though perhaps unknown to a particular recipient of the communication, they are readily accessible to him.'" *Kirby*, 227 Md. at 279-80 (quoting 1 Harper & James, *The Law of Torts*, § 5.28, p. 458-59 (1954)). An opinion based upon undisclosed facts, or that permits the inference of an undisclosed factual basis, is not privileged. *Id.* at 274. In *Kapiloff*, we explained:

> We believe that comments, criticisms and opinions concerning the involvement of public persons in matters of public or general interest or concern are within the protection of the constitutional privilege. When [commentary on a matter of public interest] is not based upon stated facts or upon facts otherwise known or readily available to the general public, it is treated as a factual statement and possible constitutional immunity is determined on that basis. Where the statements, however, are actual expressions of opinion, based upon stated or readily known facts, their objective truth or falsity depends on the veracity of these underlying facts. Therefore, any determinations with regard to falsity or the presence of actual malice must look to the stated or known facts which form the basis for the opinion[.]

Kapiloff, 27 Md. App. at 533. Consequently, "[f]air and honest opinions which are based upon true facts and which have some relation to or connection with those facts[] are also *absolutely* privileged." *Id.* at 531 (footnote omitted) (emphasis added). Therefore, *New York v. Sullivan* only strengthened Maryland's common law fair comment privilege by giving absolute protection to opinions based on true facts, regardless of the existence of the common law malice or, for that matter, the constitutional actual malice. *Id*. at 531-32.

The Court of Appeals examined the fair comment privilege in *Piscatelli*. In that case, a reporter published two articles in the *City Paper* concerning a 2003 double murder in Baltimore. 424 Md. at 302. The plaintiff-petitioner Piscatelli, "who was mentioned unflatteringly in the articles, perceived that his reputation had been injured thereby and he

had been portrayed in a false light." *Id.* While another individual, Miller, was convicted of the murders, "[b]oth articles more than hinted that Piscatelli may have been involved in the murders, despite that he was not charged criminally in connection with the crimes." *Id.* at 302-03. In particular, the articles highlighted two aspects from the case. *Id*. at 303. First, the article contained a discovery response, which summarized a conversation with the victim's mother in which she attested that an unknown man approached her and "advised her that [] Piscatelli was behind her son's murder, he covered his tracks and hired someone to kill him." *Id.* Second, the article recounted Piscatelli's testimony at Miller's trial. *Id.* at 312. The article included comments "that may be distilled into three themes: the double murder remains 'mysterious,' despite Miller's conviction; Piscatelli may have had a motive to kill [one of the victims]; and [the victim's mother] believed Piscatelli may be involved in her son's murder." *Id.* at 304.

Piscatelli sued the reporter and the owner of *City Paper* in the Circuit Court for Baltimore City for damages based on defamation and false light. *Id.* at 302. The reporter and owner of the paper moved for summary judgment and argued that "Piscatelli failed to establish that [the reporter and paper's] statements were false and the fair reporting and fair comment privileges protected any allegedly defamatory material." *Id.* at 304. In his opposition, Piscatelli contended that the accusations against him were false and that the reporter and paper abused the fair reporting and fair comment privilege. *Id.* The circuit court granted summary judgment in a written order "without further explication," and this Court affirmed because the "statements were privileged and not defamatory. *Id.* at 305. The Court of Appeals granted certiorari. *Id.*

The Court held that Piscatelli did not establish that the reporter and the owner of the paper abused the fair reporting requirement because Piscatelli "did not adduce facts tending to show that the report was unfair or inaccurate." *Id.* at 312. Likewise, "[a]lthough perhaps an unflattering account of Piscatelli's relationship with [the victim], . . . [the] report was an accurate, fair account of Piscatelli's testimony." *Id.* at 313. The circuit court further held that the circuit court correctly applied the fair comment privilege. *Id.* at 316-17. "Simple opinions, which are protected by the fair comment privilege, include derogatory opinions based on privilege statements of fact." *Id.* at 317. The Court concluded that, where the reporter and newspaper owner "expressed in the articles simple opinions based on disclosed, privilege statements, those opinions are themselves privileged as fair comment." *Id.* at 318. Consequently, the Court of Appeals affirmed the judgment of this Court. *Id.*

C. Analysis

Applying the foregoing decisional law to the instant case, we hold that the circuit court properly granted summary judgment as a matter of law because each statement in the article and a headline sent to subscribers of Red Maryland is either a true or uncontested assertion of fact or an opinion covered by the First Amendment conditional privilege and fair comment privilege.[5] Accordingly, the allegedly defamatory statements cannot support a basis for liability.

[5] Smith asserts on appeal that he only considered three statements as defamatory. However, at the November 14, 2018 hearing, in response to a question from the court, Smith responded that the statements at issue concerned: (a) the five statements in Griffiths' article that are not direct quotations from Smith's own writing; (b)the separate statement in the email; and, (c) the headline "CRAZY."

We address each statement in turn.

1. "A Conspiracy Theorist filed as a Republican for U.S. Senate today."

This statement contains a true assertion of fact—that Mr. Smith filed as a Republican candidate for the Senate. It also reflects Mr. Griffiths' opinion that Mr. Smith was a conspiracy theorist. The expression of Mr. Griffiths' opinion is privileged because it "honestly express[es] a fair and reasonable opinion or comment on matters of legitimate public interest." *Kirby*, 227 Md. at 270. The factual basis for Mr. Griffiths' opinion is readily ascertainable to be Mr. Smith's four-paragraph statement that the column cites verbatim. *Id.* at 274.

2. "An anti-Catholic conspiracy theorist filed to run for US Senate this week."

Mr. Smith asserts that a similar headline providing a link to the article in "an email sent by [Mr. Griffiths] to Republicans" was defamatory. Similar to the statement immediately above, this statement contains the same factual assertion concerning Mr. Smith's candidacy, and the expression of Mr. Griffiths' opinion that Mr. Smith is anti-Catholic is similarly based on Mr. Smith's statement.

3. "Gerald I. Smith, Jr. filed with the State Board of Elections and made a statement on Facebook that you have to see to believe."

This statement contains two assertions of fact—first, that Mr. Smith filed with the Board of Elections and, second, that he made a statement on Facebook. Mr. Griffiths then provides, as the circuit court noted, "rather generic commentary," namely that you "have to see to believe" Mr. Smith's statement. He then provides Mr. Smith's "statement on Facebook" immediately below. Accordingly, an ordinary person likely would understand

this limited commentary as opinion and would be able to ascertain the factual basis for Mr. Griffiths' opinion and judge for him or herself the quality of the opinion based on Mr. Smith's statement. *Piscatelli*, 424 Md. at 317.

4. "Smith runs a website entitled 'Human Rights Support' that explains . . . . well, I'll let Smith's own words explain it."

As the circuit court correctly noted, Mr. Griffiths does not provide any commentary concerning this statement. The statement merely contains a statement of fact and then directs the reader to review a quote from Mr. Smith's website.

5. "Needless to say that as a Catholic, I really don't have a lot of time for this type of what appears to be anti-Catholic nonsense or with somebody who was willing to collaborate with a traitor like Chelsea Manning."

The first portion of the statement—"Needless to say that as a Catholic, I really don't have a lot of time"—refers to Mr. Griffiths' own religious belief and expression of his own dislike and does not concern Mr. Smith. The phrase "for this type of what appears to be anti-Catholic nonsense," as the circuit court resolved, "refer[ed] to Catholic religious visions . . . following a 'needle stabbing incident." Plainly, an ordinary person reading Griffiths' statement would recognize that Mr. Griffith is expressing an opinion based on Mr. Smith's recitation of various events involving the Catholic Church and Catholic individuals based on Mr. Smith's own words. Similarly, as the circuit court summarized, the phrase "with somebody who was willing to collaborate with a traitor like Chelsea Manning" "is a characterization of Chelsea Manning and supported by [Mr. Smith's] tweet accompanying the article that, 'Chelsea Manning is running as a Democrat and I've already reached out to her campaign in hopes of doing some informal debates/discussions.'" In

addition, Mr. Griffiths' characterization as "collaborat[ing] with a traitor" is similar to the "rhetorical hyperbole" examined in *Letter Carriers*, 418 U.S. at 286. In short, this statement reflects either Mr. Griffiths' personal beliefs and state of mind or is an expression of opinion, and one can readily ascertain the factual basis from reading quotations from Mr. Smith provided in the article. *Id.*

6. "There are still four weeks until the filing deadline; here's hoping that we have a credible Republican candidate file between now and then."

This statement contains an assertion of fact—there was four weeks before the filing deadline. It also expresses, by implication, Mr. Griffiths' opinion that Mr. Smith was not a "credible Republican candidate." An ordinary person reading this statement would recognize that this clause represents Mr. Griffiths' opinion. The facts from which Mr. Griffith forms this conclusion—Mr. Smith's Facebook past and portion of his website—are provided in his article, and Mr. Smith does not challenge their veracity—indeed the facts are Mr. Smith's own words. *See Peroutka*, 116 Md. App. at 20.

7. "CRAZY"

Finally, the headline image "CRAZY" likewise is Mr. Griffiths' commentary concerning statements made by Mr. Smith that are directly quoted in the article. As the circuit court held, "the image is within the purview of constitutional protection as an opinion[.]"

In sum, none of the statements provide a bases for liability. Mr. Smith cannot rebut either the First Amendment conditional privilege or the fair comment privilege because the allegedly defamatory statements are based on Mr. Smith's own words.

As detailed above, the circuit court correctly determined that the statements made by Mr. Griffiths were either facts or opinions based on true facts, specifically Mr. Smith's own words, and are protected by the First Amendment and the fair comment privilege. The court found that "the facts [supporting Mr. Griffith's opinions] amount to [Mr. Griffiths'] copying of [Mr. Smith's] words into a blog post and adding five to six sentences of commentary." The court properly noted that Mr. Smith did not dispute the material facts in the case, specifically the creation of the post or the nature of Mr. Griffiths' comments.[6]

Mr. Griffiths' allegedly defamatory statements were plainly opinions regarding matters of legitimate public interest—the suitability of a candidate for public office—and based on Mr. Smith's own words, which were quoted verbatim and readily available to members of the public. Thus, Mr. Smith could not prove the falsity of the facts underlying Mr. Griffiths' opinion, and his statements were privileged. Consequently, there was no reason for the circuit court to reach the issue of malice. *See Kapiloff*, 27 Md. App. at 529-31.

[6] Mr. Smith also refers us to Maryland Rule 18-101.2(a), a section of the Maryland Code of Judicial Conduct that governs the promotion of confidence in the judiciary. It provides: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Mr. Smith asserts that the trial judge violated Rule 18-101.2(a) by failing to address whether Mr. Griffiths made his statements for public interest or for his own malicious intent. In support of that assertion, Mr. Smith directs our attention to discussions between the trial judge, counsel, and Mr. Smith during the motions hearing, not actual rulings by the court. Mr. Smith maintains that because the trial judge discussed whether there were material facts in dispute regarding malice, her ultimate finding that there were no material facts in dispute was "false." As we address, the judge correctly determined that there were no material facts in dispute and that there was no reason to reach the issue of malice.

Mr. Smith also argues that the circuit court erred by making inappropriate factual determinations, including Griffiths' intent, in entering judgment in favor of Mr. Griffiths. In support of his argument, Mr. Smith directs our attention to *McDermott v. Hughley*, 317 Md. 12 (1989), in which the Court of Appeals stated, "our cases make indelibly clear that at a hearing on a motion for summary judgment, the trial judge's role is not to decide the merits of the case but rather to determine whether any material facts are in dispute." Mr. Smith also challenges the trial court's reliance on *Kapiloff v. Dunn*, 27 Md. App. 514 (1975), because that case "require[ed] a determination of facts."

As we noted in *Kapiloff*, "opinions cannot be judged by a court or jury" because the plaintiff "cannot objectively prove 'falsity'" and the defendant "cannot objectively prove 'truth.'" *Kapiloff*, 27 Md. App. at 525. In the instant case, the issue determined by the circuit court was not whether Griffiths' statements were "true," but whether his opinions were based on true facts. The court properly determined that Mr. Griffiths' statements were opinions that were based on Mr. Smith's own words. Mr. Smith never disputed that the words quoted by Mr. Griffiths were not his or that they were taken out of context. In *Kapiloff*, we stated:

> If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful,' this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defense but privilege or truth."

27 Md. App. at 527 (quoting *Kirby*, 227 Md. at 280).

The record before us makes clear that there was no dispute of material fact. Mr. Griffiths' statements were expressions of his opinion based on Mr. Smith's own words. Readers were able to judge for themselves whether those opinions were well founded. Mr. Griffiths' statements were protected speech, and summary judgment was properly granted in his favor.

Finally, Mr. Smith avers that the circuit court erred "by not allowing a jury to decide whether malice existed and whether the qualified privilege was abused." In support of this argument, Mr. Smith directs us to *McDermott v. Hughley*, 317 Md. 12 (1989).

In *McDermott*, the Court of Appeals noted that there was an issue of whether Hughley, the plaintiff, consented to the publication of statements in a report made by McDermott, a psychologist retained by Hughley's employer, and whether Hughley had reason to anticipate that McDermott's report might be defamatory. 317 Md. at 31. There was also a dispute of material fact concerning the reason for McDermott's decision to change his diagnosis of Hughley. *Id.* In addition, there was a dispute about whether McDermott "pushed his privilege beyond permissible limits" and "evinced a purpose other than furthering the interest entitled to protection." *Id.* The court noted that "a jury may have determined that McDermott exhibited malice and thereby forfeited any claim to qualified privilege." *Id.*

That is not the case here. As we have already noted, each of the allegedly defamatory statements were either true facts or opinions regarding matters of legitimate public interest, specifically a candidate for public office, that were based on the candidate's

own words, which were set forth and readily available to members of the public. Mr. Griffiths' statements were, therefore, privileged. Because Mr. Griffiths' opinions were based on Mr. Smith's own words, there was no reason to reach the issue of malice. *See Kapiloff*, 27 Md. App. at 529-30.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.