Circuit Court for Montgomery County
Case No. 420238-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1026

September Term, 2017

MONTGOMERY COUNTY,
MARYLAND, *ET AL.*

v.

FRANK GILMER FONES, JR.

Fader, C.J.
Nazarian,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: March 14, 2019

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This is, at its core, an employment dispute that seeks an encore as a defamation claim. Frank Gilmer Fones, Jr. served as a police officer in the canine unit of the Montgomery County Police Department ("MCPD") for about twenty years. He was transferred out of that unit after a series of events involving his assigned police canine, Chip. Officer Fones challenged the employment decisions separately, then filed this defamation action against, among others, Montgomery County (the "County") and Captain Robert Bolesta, one of his supervisors. After motions to dismiss and motions for summary judgment were denied by the Circuit Court for Montgomery County, the case was tried to a jury, which found Captain Bolesta liable for defamation, but awarded no damages, and found the County liable for defamation and awarded Officer Fones $55,000 in damages.

The County and Captain Bolesta appeal and we reverse. We hold *first* that the County is immune from liability for defamation. *Second*, we hold that Captain Bolesta cannot be liable for defamation because the undisputed facts do not support a finding that Captain Bolesta acted with the requisite degree of "malice" to defame Officer Fones, a public official, and, *third*, in any case he was protected by the common interest privilege.

I. BACKGROUND

A. Introduction

The story began in April 2015, when Officer Fones's police canine, a Belgian Malinois named Chip, bit him during an exercise. The MCPD veterinarian prescribed the medication Trazadone to Chip, and Officer Fones administered it. Officer Fones also asked the veterinarian to prescribe Prozac to the dog, which she did, although Officer Fones never gave him any. Contrary to MCPD policy, Officer Fones did not inform his supervisors

either that he had administered the Trazadone or of the Prozac prescription. Also contrary to MCPD policy, Officer Fones had not been keeping Chip, who lived in Officer Fones's family home, in a County-issued, outdoor kennel; instead, he kept Chip in a homemade kennel that he had erected in his basement.

Officer Fones's supervisors—including Captain Robert Bolesta, who oversaw the canine unit—eventually learned about the Trazadone, the Prozac prescription, and the kennel. In a memorandum dated June 19, 2015, the MCPD informed Officer Fones that he was being transferred out of the canine unit, a move he considered a demotion.

Officer Fones challenged the transfer through administrative channels, and that is not before us. This case arises from statements made by Captain Bolesta, then-Montgomery County Executive Isaiah Leggett, and others about the situation. Officer Fones alleges that these statements defamed him. The four statements alleged in his complaint fall into two general categories. The *first* category includes statements made internally within the MCPD, and specifically include statements made by Captain Bolesta to his superiors and to members of the canine unit:

1. Captain Bolesta's June 9 statement to Assistant Chief Betsy Davis and Chief Thomas Manger that Officer Fones had "surreptitiously" obtained Prozac for Chip;
2. Captain Bolesta's June 19 statement to canine unit Officer Jonathan Greene that Officer Fones "had given his dog mind-altering drugs"; and
3. Captain Bolesta's July 29 comments to all members of the canine unit that Officer Fones had committed "egregious" acts or violations, and his references to "mind-altering" drugs.

The *second* category, and fourth statement, consists of a single statement by County

Executive Leggett to a member of the public:

> 4. County Executive Leggett's statement to Rupert Curry, a former canine unit officer and friend of Officer Fones's that Officer Fones "had given his dog a psychotropic drug."[1]

This was a contentious and emotional dispute from the start. But the parties agree on most of the relevant facts, and we set them forth below.

B. Factual Background

Officer Fones had been a member of the canine unit for twenty years. He was a well-regarded member of the canine unit, and had trained and worked with numerous police canines, including Chip, who lived with Officer Fones in his family home. It was standard operating procedure for canine unit officers to house their dogs at home, but the procedure also required officers to keep them in a kennel provided by the County, on a slab of concrete outdoors. Officer Fones had taken his County-provided kennel down in 2011, had a kennel erected in his basement, and kept Chip there instead. Officer Fones did not inform his supervisors about the alternative kenneling arrangement.

On April 23, 2015, Officer Fones brought Chip to a non-mandatory recertification exercise. During the exercise, Chip bit Officer Fones. Officer Fones sought medical attention, and afterward his immediate supervisor instructed him to keep Chip kenneled, to keep him away from Officer Fones's family when at home, and to have Chip evaluated by a veterinarian.

[1] The parties identify no evidence or testimony that any County official made defamatory statements "to the public," as alleged in the Amended Complaint.

The day after the bite, Officer Fones brought Chip to Dr. Godwin, the veterinarian who worked with the MCPD canines. She examined Chip and prescribed Trazodone. Dr. Godwin testified that Trazodone was "a drug that we use for keeping an animal quiet when it's in a confined state essentially . . . ."[2] Officer Fones administered the Trazodone to Chip for a week. MCPD standard operating procedures required officers to notify supervisors of any non-emergency medical treatment the police canines received. Officer Fones did not notify his supervisors of the Trazodone prescription or that he administered it to Chip.

Approximately three weeks later, Officer Fones asked Dr. Godwin to prescribe Prozac for Chip, which Dr. Godwin did. Officer Fones did not notify his superiors of the Prozac prescription, but ultimately never gave Chip any Prozac.

The MCPD scheduled an evaluation of Chip for May 20, 2015. During the evaluation, Chip jumped on Officer Fones again. That evening, Officer Fones received a letter of counseling, known as an "MCP 30," for failing to notify his supervisor about the Prozac. The next day, Officer Fones was ordered to board Chip away from his home. On May 25, Chip was evaluated by an outside expert who concluded, among other things, that

[2] As to issuing the prescription for Trazodone, Dr. Godwin stated that Chip had some bruising, and she recommended he rest and not be put back to work until he was healed:

> Trazodone is a drug that we use for keeping an animal quiet when its [sic] in a confined state essentially. Chip at that time, it was thought to, that based on examination and the elevated creatine kinase level in, in the, on the blood test, had suffered some sort of trauma, had some bruising and it was recommended that he be rested and not put back into work until he was healed and that drug was used as a medication to quiet and make it easier to do so.

Chip was not "command responsive," *i.e.*, responsive to voice commands in a way that one would expect for a police canine.

On June 9, Captain Bolesta met with Chief Manger and Assistant Chief Davis to discuss Officer Fones and his future in the canine unit. At that meeting, Captain Bolesta made the *first* of the four allegedly defamatory statements at issue in this appeal. Captain Bolesta, Chief Manger, and Assistant Chief Davis discussed the possibilities of retraining Chip, Officer Fones getting a new dog, and transferring Officer Fones. Captain Bolesta testified that he stated to Chief Manger and Assistant Chief Davis that Officer Fones "surreptitiously" obtained Prozac for Chip.

On June 19, 2015, Officer Fones received a memo from Assistant Chief Davis informing him of her decision to transfer him from the canine unit. The letter included references to Officer Fones's failures to keep Chip in a County-owned kennel and to notify his supervisors of the Prozac prescription.

That same day, Captain Bolesta called Officer Jonathan Greene, a member of the canine unit, to discuss Officer Fones's transfer. Captain Bolesta asked for Officer Greene's assistance in communicating that news to the other canine unit members and in "keep[ing] emotions in check." Officer Greene also testified that Captain Bolesta told him that Officer Fones had given his dog "mind-altering" drugs, the *second* statement at issue:

> Q Now, after he was transferred from the K9 Section, did you have an opportunity to speak to Captain Bolesta --
>
> A Yes.
>
> Q -- about Officer Fones?
>
> A Yeah, actually, that, that I do recall. The, the day that I

> learned that Gil was being transferred, which was probably the day that Gil learned he was being transferred, but not actually the day that he left the unit, so, I know he was given a notification, Captain Bolesta gave me a phone call.
>
> You know, and he was, basically, telling me that, you know, I'm sure you've heard, or if you haven't heard, Gil has been transferred, and, you know, I want to make sure that you let the guys know. You know, there's two sides to every story. I can't tell you everything about what's going on. He was basically asking me to help to keep emotions in check, I suppose, and keep work going I mean as a, as supervisor would do. If you see something that may become an issue, you would want to reach out, and, and, you know, try to prevent any kind of damage or fall out that would happen. So, we have a brief discussion on the phone about the circumstances. He didn't give me all the details, but gave me a few details. And then the gist of the conversation was just, you know, let's, let's help keep this place together.
>
> Q And what details did you get?
>
> A He mentioned two facts that Gil had, there'd been an evaluation, and I don't, again, recall what the specific results of the evaluation, but it wasn't favorable. And he mentioned also, and this did stick with me, because of the verbiage he used that **Gil had given his dog mind-altering drugs**. And that, that was just, it stuck with me just because of the terminology that, that, you know, I didn't get any specifics about what it was, or, you know, anything like that. It was just in the course of the conversation.

(Emphasis added.)

Sometime in July, Captain Bolesta transferred out of the canine unit, and on July 29, 2015, Captain Bolesta held a meeting for the unit's remaining members. One of the several reasons for the meeting was to explain to unit members why Officer Fones—a long-time officer whose "unbelievable work ethic and experience" Captain Bolesta acknowledged during the meeting—had been transferred, as well as to review standard

operating procedures about kenneling dogs and administering medication to them. MCPD standard operating procedures required officers to house police canines in a kennel provided by the County and to notify supervisors about any non-emergency medical treatment the dogs receive.

Several officers testified that during this meeting Captain Bolesta told them that Officer Fones had committed "egregious" acts or violations in the way he kenneled Chip and with regard to the medication he administered or had prescribed for Chip. The statements at this meeting comprise the *third* set of allegedly defamatory statements.

At least two officers present at the July 29 meeting testified about the statements Captain Bolesta made at the July 29 meeting. Officer Wells testified that Captain Bolesta said that "not having your kennel erected is an egregious violation" and that, under department policy, "giving your dog psychotropic medications" required supervisor approval:

> Q [] Did Captain Bolesta speak about Officer Fones at that meeting?
>
> A Yes.
>
> Q Okay. Can you tell us what he said about Officer Fones at that meeting?
>
> A Again, I'm referring to my notes, but he made mention of the steps and processes we took to address Gil's situation is unfortunate. He advised that he understood that it was a difficult time for Gil's family, and they would not be replacing Gil's bomb dog. He said he would not be, he would not put up with, such as in Gil's case, a passive/aggressive behavior or questioning of in, you know, my decisions. That's, that's all I can see in the, in the notes.
>
> Q Okay. Well, let me draw your attention to the bottom of page 2. You make a reference to Gil in Gil's case. Is that

relating to Officer Fones?

A Presumably. I don't, I don't know of any other Gil he would be referring to.

Q Okay. And what are your notes related to that?

A So, again, it says what I'm not going to put up with, with, such as in Gil's case, a passive/aggressive behavior, questioning my decisions.

And I'm sorry. It further goes on to say I didn't overlook his unbelievable work ethic and experience, but the decision had to be made. It further goes on, I'm sorry, to reference there is a multitude of what the police department would consider.

It says in Gil's case, there's a multitude of what the police department would consider **egregious violations**.

There's, and that was under, while speaking about kennels.

Q I'm sorry. That was while he was speaking about kennels? Was that a reference to Officer Fones?

A I, I, I can't, I can only go off of what my notes are saying, and my notes just above that I put it under the subheading of kennels. We were told that there was a common sense application of erecting your kennel, and not having your kennel erected is an **egregious violation**.

And I believe, if I may go back - -

Q I'm sorry. And then the last statement? I see there's a third statement.

A You as a handler should know the mind set of your dog. I want to provide you, I'm sorry. Did I miss something?

Q No, between not having your kennel erected is an egregious violation - -

A Oh.

Q - - you as the handler. Is that a note that's in Gil's case?

A In Gil's case there is a multitude of what the police department would consider **egregious violations**.

Q All right. Was there any reference to medications in relation to Officer Fones?

> A **In the beginning the policy was referenced, and Captain Bolesta cited policy number 1, 9.1.2., all non-emergency treatments not covered by contracted vets require supervisor's notification. This includes giving your dog psychotropic medications.**
>
> Q Okay. And relating to medications was there a discussion of Officer Fones?
>
> ***
>
> A Specifically, I don't have that noted in here, however, it is under the, again, at the beginning of the, the, when Captain Bolesta started the meeting it said the steps we took to address Gil's situation is unfortunate.
>
> And there was a reference to, and then it sort of carried along during the conversation. []
>
> Q And that was all part of it?
>
> A Yes.

(Emphasis added.)

Officer Paul Kukucka also testified that during the July 29 meeting, Captain Bolesta stated that Officer Fones had "committed egregious acts" and had specifically said that officers were required to notify their supervisors if their dogs were given "psycho mind altering" medication:

> Q Okay. Was there any other references that were made about Officer Fones?
>
> A There was a reference to **psycho mind altering medication**.
>
> Q Can you tell me exactly what, do you recall exactly what was said about that?
>
> A I believe the discussion was about supplements and what not to give your dog and that you have to notify supervisors and the **psycho mind altering drug**, if you give your dog a **pyscho mind altering drug** that you have to notify your supervisor.

> Q Okay. And was there any, is that, was Officer Fones referenced in that?
>
> A Well, I took it as a reference. It wasn't specific but it was all within the same context and I, I took it that way because that's what the unit, that's what, that's what was being referred to as this drug that he gave the dog was this **psycho mind altering medication**.

(Emphasis added.)[3]

Sometime after the July 29 meeting, County Executive Isaiah Leggett met with Rupert Curry, a former MCPD canine unit member and Officer Fones's friend. In the *fourth* and final statement at issue here, Mr. Leggett told Mr. Curry that Officer Fones had given his dog a "psychotropic" drug:

> Q After that transfer, in July of 2015, did you ever have any meetings with any, anybody from the county?
>
> A I met with Ike, Mr. Leggett about the, the transfer, or actually the, the removal of K9 Chip, trying to find Chip, and get Chip back. That was my biggest concern. I wanted to know where Chip was, because this is the first time in the county that any dog has ever been taken, forcibly removed from a handler's family or custody, and I thought that was wrong, absolutely 100 percent wrong.
>
> Q And did you meet with the county executive?
>
> A Yes, I did.
>
> Q Okay.

[3] Officer Kukucka also testified about the kenneling issue:

> [Q] [] Did Captain Bolesta make any other references to Officer Fones at that meeting?
>
> [A] We used, there is a volunteer program about care of your, your dog. There was, which kind of coincided with kenneling your dog. That the dog needed to be kenneled and again I feel that that was just knowing what was going on with Gil that that was also the result of Officer Fones.

> A For about 15 minutes we met with him in chambers outside of his office. We talked about how do we get Chip back. He said to us that one of the concerns he had was that if **I can remember what he said was that the officer had given his dog a psychotropic drug**. And I disagreed with that. I know Gil didn't do it. And we went on to talk about how to get Chip back, and he explained to us that the, the dog was no longer in the county, owned by the county. It was owned by a rescue organization, and if Officer Fones wanted to get the dog back, he would have to contact the rescue organization.
>
> I then asked Mr. Leggett, so are you going to tell us who this rescue organization is, and he said no, you'd have to speak to my, my lawyer, and they'll explain to you the process they have to go through.

C. Procedural History

On April 25, 2016, Officer Fones filed a complaint in the circuit court against the County and the MCPD. The Complaint stated a single count of defamation grounded in four statements (which tracked, but were not identical to, the four statements set forth above and ultimately at issue in this appeal). The Complaint alleged that in the June 19, 2015 memorandum, Assistant Chief Betsy Davis, stated falsely that Officer Fones "abused Chip," and "improperly medicated Chip." The Complaint alleged that Assistant Chief Davis had made the same false statements orally to other MCPD officers in or about July 2015. And the Complaint alleged that at a July 29, 2015 meeting of the canine unit, Captain Bolesta stated falsely that Officer Fones had "committed egregious acts" toward Chip.

The County and the MCPD moved to dismiss the Complaint on the grounds, among others, that the County is immune from common law tort liability. The circuit court denied that motion in a one-line order on September 14, 2016, shortly after Officer Fones filed an Amended Complaint. The Amended Complaint dropped the MCPD as a defendant,

retained the County, and added three individual defendants: Captain Bolesta, Assistant Chief Davis, and Sergeant Mary Davis.[4] The allegedly defamatory statements identified in the Amended Complaint were similar, but not identical, to the defamatory statements asserted in the initial Complaint. The statements fell into two broad categories: (1) statements made by Assistant Chief Davis, Captain Bolesta, and Sergeant Mary Davis to MCPD officers and personnel[5] and (2) statements made "to the public" by Assistant Chief Betsy Davis, Police Chief Thomas Manger, and County Executive Isaiah Leggett.[6]

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[4] The MCPD was dismissed formally at trial, when the court granted its Rule 2-519 motion for judgment.

[5] The allegedly defamatory statements by Chief Betsy Davis, Captain Bolesta, and Sergeant Mary Davis identified in the Amended Complaint specifically included the following:

- Assistant Chief Betsy Davis stated in a June 19 memorandum that, among other things, Officer Fones had "administered psychotropic medication to Chip" and "deliberately omitted the fact that the prescription medication was prescribed by Dr. Godwin, the county's own veterinarian."
- Assistant Chief Betsy Davis had made "these statements" orally to MCPD officers in or about July 2015.
- Assistant Chief Betsy Davis and Captain Bolesta had "republished these statements of abuse" to attendees at an internal affairs meeting at the end of July 2015.
- Captain Bolesta had made an oral statement at a July 29, 2015 canine unit meeting that Officer Fones had "committed egregious acts" toward Chip.
- Sergeant Mary Davis and "possibly others" in the chain of command told Armin Winkler – who had been retained by the County to perform an evaluation of Chip – "that Chip was 'vicious' and had been 'abused' by Fones."

[6] The Amended Complaint alleged that Montgomery County "republished and adopted" the allegedly defamatory statements through communications to the public by three county

The defendants moved again to dismiss, arguing again that Assistant Chief Betsy Davis, Captain Bolesta, and Sergeant Mary Davis were entitled to public official immunity, and that the County was entitled to governmental immunity. The circuit court again denied the motion in a one-line order entered on December 20, 2016.

All defendants moved for summary judgment. Captain Bolesta's arguments included contentions that:

- a defamation claim based on his alleged statements at the July 29, 2015 meeting was barred by the statute of limitations;
- Officer Fones is a "public official," and therefore must prove that Captain Bolesta acted with malice, a burden the undisputed facts preclude; and
- even if Captain Bolesta's statements were defamatory, they were protected by the common interest privilege.

The County argued, among other things, that:

- governmental immunity protects it from liability for defamation grounded in statements by Captain Bolesta, Assistant Chief Betsy Davis, Sergeant Mary Davis, Chief Manger, and/or Mr. Leggett;
- Officer Fones is a "public official," and therefore must prove that Chief Manger and Mr. Leggett acted with malice, a burden the undisputed facts preclude;
- even if Chief Manger's and Mr. Leggett's statements were defamatory, they were protected by the common interest and the fair comment privilege; and
- even if the County is not protected by governmental immunity, the County

officials, specifically Assistant Chief Betsy Davis, Police Chief Thomas Manger, and County Executive Isaiah Leggett:

> The statements made about Fones in writing and orally were republished and adopted by Montgomery County (Md.), including but not limited to Police Chief Thomas Manger, Deputy Chief of Police Betsy Davis and County Executive Isaiah Leggett, in communicating to the public and removing Fones from the canine unit.

> cannot be liable for defamation based on the statements of Captain Bolesta, because the Captain is entitled to summary judgment.

The court denied all motions, again in a one-line order entered on June 8, 2017. The case then went to trial on June 19, 2017 and lasted approximately five days.

At the close of Officer Fones's case, the defendants made an oral motion for judgment under Maryland Rule 2-519. Captain Bolesta argued, among other things, that a conditional privilege—*i.e.*, the common interest privilege—protected his statements about Officer Fones. The County argued that because the three individual defendants were not liable, the County could not be liable in *respondeat superior*. The County did not argue that it was immune from suit.

The trial court ruled from the bench and granted the motion as to Sergeant Davis and the MCPD (which, as noted above, had been dropped as a named defendant from the Amended Complaint but had not yet been formally dismissed). The defense case proceeded, and the defendants renewed their motion for judgment orally at the close of evidence. The court denied the motion again from the bench.

The jury found in favor of Assistant Chief Davis and against the County and Captain Bolesta. It awarded $55,000 to Officer Fones on his defamation claim against the County. The clerk of court entered judgment on the docket on June 29, 2018. This timely appeal followed.

We supply additional facts as necessary below.

II. DISCUSSION

The County and Captain Bolesta list six questions in their brief[7] and Officer Fones lists five.[8] From a bird's eye view, we need to decide whether the circuit court erred

[7] The County and Captain Bolesta state the Questions Presented as follows:

> I. Does governmental immunity bar Fones's defamation claim against the County?
>
> II. Did the Circuit Court err in entering a judgment against Bolesta when the jury found Fones did not suffer harm as a result of Bolesta's statements, a *prima facie* element of defamation?
>
> III. Did the Circuit Court err in failing to hold that the statements made are not defamatory as a matter of law as they are true or substantially correct?
>
> IV. Even if the statements are defamatory, did Fones fail to show by clear and convincing evidence that Constitutional malice existed, as required for a finding of defamation of Fones, a public official?
>
> V. Even if the statements are defamatory, did a conditional common interest privilege shield Bolesta and Leggett from liability?
>
> VI. Even if Bolesta's statements are defamatory, does the conditional privilege of fair comment shield Bolesta from liability?

[8] Officer Fones states the Questions Presented as follows:

> 1. Does the County's claim of governmental immunity defeat Fones's defamation claim?
>
> 2. Was the trier of fact required to make a finding of harm caused by Robert Bolesta in order to permit the entry of a judgment against him and in favor of Frank Gilmer Fones?
>
> 3. Did Fones satisfy all of the elements of a defamation claim to permit the trier of fact to enter a verdict in his favor?
>
> 4. Does the claim of a conditional common interest privilege shield Bolesta and County Executive Isiah Leggett on behalf of Montgomery County from liability?

allowing the case to proceed to trial. Zooming in to particulars, we must decide specifically whether the circuit court erred in denying the County's motions to dismiss and for summary judgment, Captain Bolesta's motion for summary judgment, and the Rule 2-519 motions for judgment. Before addressing those questions and the tangle of ancillary procedural and substantive issues raised in this case, though, we lay out the standards of review.

When reviewing a decision to grant a motion to dismiss for failure to state a claim, "we must determine whether the complaint, on its face, discloses a legally sufficient cause of action." *Schisler v. State*, 177 Md. App. 731, 743 (2007) (citations omitted). In so doing, "we accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party." *Converge Servs. Grp. v. Curran*, 383 Md. 462, 475 (2004).

"The standard for appellate review of a trial court's denial of a motion for summary judgment requires us to determine whether the trial court was legally correct." *Nationwide Mut. Fire Ins. Co. v. Tufts*, 118 Md. App. 180, 186 (1997). "In so doing, we review the same material from the record and decide the same legal issues as the circuit court." *Id.* We first decide whether a genuine dispute of material fact exists, and if not, what the ruling of law should be. *Jurgensen v. New Phoenix Atl. Condo. Council of Unit Owners*, 380 Md. 106, 114 (2004). We resolve all inferences from the record against the moving party. *Id.*

When reviewing the denial of a Rule 2-519 motion for judgment, we conduct the

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5. Does Bolesta's claim of the conditional privilege of fair comment shield him from liability?

same analysis as the trial judge did when considering the motion. *Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 394 (2001). That is, "we ask whether on the evidence adduced, viewed in the light most favorable to the non-moving party, any reasonable trier of fact could find the elements of the tort by a preponderance of the evidence." *Washington Metro. Area Transit Auth. v. Djan*, 187 Md. App. 487, 491 (2009) (quoting *Waldt v. Univ. of Md. Med. Sys. Corp.*, 181 Md. App. 217, 270 (2008)). "If there is even a slight amount of evidence that would support a finding by the trier of fact in favor of the plaintiff," then denial of the motion was proper. *Id.* at 492. "On the other hand, where the evidence is not such as to generate a jury question, *i.e.*, permits but one conclusion, the question is one of law and the motion must be granted." *James v. Gen. Motors Corp.*, 74 Md. App. 479, 484 (1988). And if the challenged order "involves an interpretation and application of Maryland statutory and case law, [we] must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review." *Walter v. Gunter*, 367 Md. 386, 392 (2002).

D. Governmental Immunity Bars Officer Fones's Defamation Claim Against Montgomery County.

1. Governmental Immunity

"Certain well-established rules apply to tort actions filed against local governments and their employees and officials." *DiPino v. Davis*, 354 Md. 18, 47 (1999). "Under Maryland common law, a local government is immune from tort liability when it functions in a 'governmental' capacity, but it enjoys no such immunity when it is engaged in activities that are 'proprietary' or 'private' in nature." *Zilichikhis v. Montgomery Cty.*, 223

Md. App. 158, 192 (2015); *see also Austin v. City of Balt.*, 286 Md. 51, 53 (1979) ("Unlike the total immunity from tort liability which the State and its agencies possess, the immunity of counties, municipalities and local agencies is limited to tortious conduct which occurred in the exercise of a 'governmental' rather than a 'proprietary' function."); *Rios v. Montgomery Cty.*, 386 Md. 104, 124 (2005).

The Court of Appeals has "recognized the difficulty in distinguishing between those functions which are governmental and those which are not . . . ." *Rios*, 386 Md. at 128. But it has adopted the guidelines to help courts determine whether a county function is governmental or proprietary:

> Where the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest, it is governmental in its nature.

Austin, 286 Md. at 59–60 (quoting *Mayor and City Council of Balt. v. State, ex rel. Blueford*, 173 Md. 267, 275–76 (1937)); *accord Rios*, 386 Md. 128–29. And "[a]nother way of expressing the test . . . is whether the act performed is for the common good of all or for the special benefit or profit of the corporate entity." *Tadjer v. Montgomery Cty.*, 300 Md. 539, 547 (1984).

The question here is whether the alleged defamation took place within the context of a governmental function; if it did, then the County is immune from suit. *Blueford*, 173 Md. at 272 (where governmental immunity is invoked on behalf of a local government "charged with a tort, the primary and essential inquiry is whether the tortious act was done

in the course of the performance of some governmental duty or function”).

The tortious conduct asserted here consists of allegedly defamatory statements that fall into three general categories: (1) statements made by members of the MCPD to other members of the MCPD, (2) statements made by members of the MCPD “to the public” and/or to the media, and (3) statements made by County Executive Leggett “to the public” and/or to private individuals.

As to the *first* category, all allegedly defamatory statements made (or alleged to have been made) by MCPD members to other MCPD members were in the context of the MCPD’s operation and management. As we explain below, running a police department—including the operation of a canine unit within that department—is a classically “governmental” function, and governmental immunity protects the County from liability for defamation to the extent that Officer Fones bases his claims on statements by MCPD members to other MCPD members.

At least four Maryland cases address a local government’s immunity from tort claims where police were involved or implicated in the allegedly wrongful conduct. In *Wynkoop v. Mayor and City Council of Hagerstown*, the Court of Appeals held that the plaintiff could not recover against the city in negligence for injuries sustained after being shot by a drunken neighbor to whom a city police officer had returned a revolver, in spite of concerns expressed by the man’s wife and son that the neighbor was dangerous. 159 Md. 194, 197–98 (1930). The Court observed that the acts of “agencies charged with the administration of the criminal laws, the conservation of the public peace, or the protection

of the citizen from violence . . . are almost everywhere regarded as governmental in their nature, and for the benefit of the entire public." *Id.* at 201.

In *Williams v. Prince George's County*, the plaintiff sued the county for negligence based on the alleged wrongdoing of police officers who mistakenly detained him for stealing a car. 112 Md. App. 526, 532, 533–36 (1996). We observed in *dicta* that the county was immune from a direct negligence claim because the allegedly tortious conduct had occurred within the scope of the police officers' "law enforcement function," which was governmental in nature. *Id.* at 550, 553–54.

In *DiPino*, the Court of Appeals held that a city was immune from intentional tort claims (false imprisonment, malicious prosecution, and abuse of process) that arose from a police officer's actions while working as an undercover narcotics agent. 354 Md. at 27, 47–48. The plaintiff had sought recovery for injuries sustained when he was arrested and spent two nights in jail on criminal charges that were later dismissed. The undercover officer was "purporting to enforce the State criminal law," and her conduct therefore was "quintessentially governmental in nature." *DiPino*, 354 Md. at 48.

And in *Clark v. Prince George's County*, two individuals were shot—one of them killed—by an off-duty police officer as they delivered furniture to the officer's home. 211 Md. App. 548, 554–55 (2013). We held that the county was entitled to governmental immunity for the common law torts of negligent hiring, retention, and entrustment. *Id.* at 557–58. Relying on *Wynkoop*, *Williams*, and *DiPino*, we held that "[t]he operation by a county of its police department is quintessentially governmental." *Id.* at 558. And we

observed specifically that the alleged acts or omissions of the county with respect to its hiring, retention, or entrustment of the officer "were governmental." *Id.* at 559.

The first three of these cases (*i.e.*, *Wynkoop*, *Williams*, and *DiPino*) address the governmental nature of the police department's actions in the context of its law enforcement functions, which are not precisely analogous to this case. The events at issue here did not involve, for example, on-duty officers making arrests or engaging in undercover operations. But those cases stand for the broad principle that the operation and functioning of a police department is "governmental" in nature. The *Clark* case took that principle one step further in holding that the administrative and/or managerial functions of a police department —such as managing personnel decisions—are also "governmental" in nature. *See also Leese v. Baltimore Cty.*, 64 Md. App. 442, 450, 478 (1985) (county's hiring and firing processes are governmental functions, and county was immune from liability for intentional tort claims of defamation and emotional distress arising out of critical statements made by supervisor in plaintiff's personnel record), *disapproved of on other grounds by Harford Cty. v. Town of Bel Air*, 64 Md. App. 442 (1985).

The alleged defamations in this case arose in the context of an employment dispute within a police department. MCPD leadership raised concerns about a police canine's ability to continue to perform adequately and questions about whether a canine unit officer was adhering to department policies and following the rules about caring for the dog. The actions that MCPD leadership took in response—including the allegedly defamatory statements here—occurred in the context of "governmental" functions. And as discussed

above, the operation and management of a police department—including running its canine unit and making disciplinary and personnel decisions—are governmental functions. *Clark*, 211 Md. App. at 557–58; *Leese*, 64 Md. App. at 450, 478; *see also Wynkoop*, 159 Md. at 201; *Williams* 112 Md. App. at 532, 533–36; *DiPino*, 354 Md. at 48. We hold, therefore, that the County is immune from liability for Officer Fones's defamation claim since it is grounded in allegedly defamatory statements made by MCPD members to other MCPD officers and personnel about the performance and functioning of unit members. And as a result, the court should have granted the County's motion to dismiss or, for the same reasons, its summary judgment and Rule 5-219 motions.

We reach the same conclusion with respect to the *second* category of allegedly defamatory statements, *i.e.*, the statements made by MCPD members "to the public." Those statements were made by Police Chief Manger and Assistant Chief Davis to the public, apparently in response to media inquiries, to the effect that Officer Fones administered "psychotropic medication" to Chip and that he hadn't properly kenneled him. But Officer Fones identified no allegation in the Amended Complaint, and no evidence in the summary judgment record, that could support a finding that any of these alleged comments occurred *outside* the context of the operation and management of the MCPD. And as we discussed above, operating and managing a police force is a governmental function that entitles the County to immunity from liability for defamation.

Finally, as to the *third* category, *i.e.*, statements made by County Executive Leggett "to the public" and/or to private individuals, the analysis is substantially similar, although

we first must untangle a procedural knot. To the extent the County argues that the circuit court erred in denying its *motion to dismiss* on the ground that it was immune from suit for defamation for these statements, we decline to address that question because it was not adequately briefed. *Klauenberg v. State*, 355 Md. 528, 551–52 (1999) ("[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal."); *see also Beck v. Mangels*, 100 Md. App. 144, 149 (1994); Md. Rule 8-504(a)(5) (requiring that an appellate brief contain "[a]rgument in support of the party's position"). We will, however, address the County's argument that the circuit court erred in denying its *summary judgment motion* on immunity.

The only evidence of any statement about Officer Fones made by the County Executive concerns his July 29 comment to Rupert Curry, a former canine unit officer and friend of Officer Fones. Officer Fones alleges that County Executive Leggett told Mr. Curry that the Officer "had given his dog a psychotropic drug." But we see neither authority nor evidence that the County Executive's response to an individual's inquiry about a police department matter fell outside of the scope of the County Executive's official responsibilities—especially since that individual went to see the County Executive at Officer Fones's behest. The County is, therefore, immune from liability for Officer Fones's defamation claim with regard to this alleged statement as well, and the circuit court should have granted the County's motion on that ground.

2. Officer Fones's Arguments

Officer Fones does not really dispute that the operation and management of a police

department is a governmental function. Instead, he tries to distinguish the operation of a *canine unit*, which he argues is proprietary because the canine unit officers "kept the police dogs at their private homes and cared for them while off duty." He relies in part on the absence in the County code of any provision that expressly establishes or regulates the operation of the canine unit.

He can't sever the canine unit from the rest of the police force, though. Whether or not the County code or other legislative provisions mentions one, there can be no serious dispute that the canine unit *is* part of the MCPD and serves, therefore, a quintessentially governmental function. Although Officer Fones is correct that the *Blueford* analysis includes consideration of whether the "act in question is sanctioned by legislative authority," 173 Md. at 275–76, that doesn't mean we ignore the reality of what the Unit does. *See Austin*, 286 Md. at 64 ("Our determination in *Blueford* that the City was performing a governmental function was not affected . . . by the fact that there was no specific authority for the maintenance of swimming pools, 'for they may naturally be included in the authority to maintain the parks in which they are located and of which they are a part.'") (quoting *Blueford*, 173 Md. at 276). Moreover, the MCPD itself is a creature of the Montgomery County Code, so all of its operations, whether enshrined expressly in legislation or not, are sanctioned generally by legislative authority. *See* Montgomery County Code § 35-1, *et seq.*

Officer Fones's assertion that the unit satisfies another *Blueford* factor—that the governmental entity receives a "profit or emolument"—similarly falls short. He argues that

housing dogs in police officers' homes benefits the MCPD and should be considered a profit. But officers housing their canine partners is hardly the kind of "profit or emolument" *Blueford* had in mind, and the range of "proprietary" government functions is extremely limited. One line of cases holds that the maintenance of public ways is proprietary and that governmental immunity does not protect the defendant local governments from negligence-based tort claims. *See Anne Arundel Cty. v. Fratantuono*, 239 Md. App. 126, 134–39 (2018). And at least one case has suggested that a local government's earning of a (significant) profit from a landfill could support a finding that a function or activity is proprietary. *Tadjer v. Montgomery Cty.*, 300 Md. 539, 549–50 (1984) (holding that it was a question of fact whether the income that the county derived from a landfill "was a real moneymaking proposition" for the county, in which case "it would be a proprietary function").

But we have found only one case in which the court went so far as to hold that a local government activity other than maintenance of a public way—renting stalls in a market—was "proprietary" in nature. *Reed v. Mayor and City Council of Balt.*, 171 Md. 115, 118 (1936) ("It seems clear that [the city] in owning the market and deriving a revenue from its stalls by way of rentals, was acting within its proprietary or private character, and would, therefore, be liable for negligence, assuming that, under similar facts and circumstances, liability would exist as against an individual."). And even in that case, the court also focused on the city's duty to maintain public walkways, and ultimately put less emphasis on the city's profits. *Id.* at 119 ("Moreover, since the purpose of the market is for

public use, if the city has reserved to itself the power of controlling and keeping open the passageways therein, it would be liable to any one who, while using due care, sustained an injury, because of the neglect or default of the city in keeping such passageways reasonably safe for public travel."). Simply put, in this case, any benefit the County receives from housing the dogs in police officers' homes is not the kind of "profit or emolument" that supports a finding of a "proprietary" function.

Finally, even if housing the dogs were a "proprietary" function, the connection between that function and the context of the alleged wrongdoing here would be too tenuous to deprive the County of immunity. The alleged defamation did not occur within the "function" of caring for or housing the canines, but rather in connection with the management of the canine unit itself.[9] Put another way, the governmental/proprietary analysis examines the connection between the challenged conduct or activity and the context in which it occurred. Here, the connection between the allegedly defamatory statements and the "function" of caring for and housing the dogs is simply too remote.

* * *

In sum, none of the allegedly defamatory statements occurred in a private or

[9] Officer Fones argues that we should follow a United States Courts of Appeals decision from the District of Columbia Circuit, which held that the District of Columbia was a proprietor of a police dog, and was therefore liable for injuries sustained when the dog bit a bystander in a police chase. *Harbin v. Dist. of Columbia*, 336 F.2d 950, 953 (1964). It appears that the District of Columbia has since "abandoned" the governmental/proprietary test, *Powell v. District of Columbia*, 602 A.2d 1123, 1126 (D.C. 1992), but even if that were still good law, the argument is not persuasive for the same reason discussed above, *i.e.*, the allegedly wrongful conduct here did not arise out of an injury caused by a police dog.

proprietary context. The existence and operation of the canine unit indisputably benefits the public and promotes the public welfare, and that Unit and the County Executive's responses to inquiries from members of the public about police matters all are "governmental" in nature. *See Austin*, 286 Md. at 59–60. The County should have been dismissed from the case, and/or summary judgment should have been granted in its favor, on immunity grounds.

E. Captain Bolesta Is Not Liable And The County Is Not Vicariously Liable For Defamation.

Even if the County were not immune, it would not be liable for defamation on a theory of *respondeat superior* because the undisputed facts preclude a finding that Captain Bolesta is liable individually. *Respondeat superior* is a doctrine of vicarious liability based on the tortious conduct of an employee or agent.[10] *See Respondeat Superior*, Black's Law Dictionary (10th ed. 2014). If judgment against Captain Bolesta was improper, then judgment against the County on a *respondeat superior* theory was erroneous as well. The specific question before us is whether the circuit court erred in denying Captain Bolesta's motion for summary judgment or his Rule 5-219 motion for judgment.

Defamation is a common law tort, and a "defamatory statement" is one that "tends

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[10] *Respondeat superior* liability is distinct from the county's obligation to defend and indemnify employees in tort actions arising from acts within the scope of employment under the Maryland Local Government Tort Claims Act ("LGTCA"), Md. Code (1973, 2013 Repl. Vol.) §§ 5-301 to 5-304 of the Courts and Judicial Proceedings Article ("CJ"). The LGTCA obligation to defend and indemnify does not render a local government *itself* liable in tort for the acts or omissions of its employees. *See Edwards v. Mayor and City Council of Balt.*, 176 Md. App. 446, 457–58 (2007).

to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or associating with, that person."[11] *Independent Newspapers, Inc. v. Brodie*, 407 Md. 415, 441 (2009) (cleaned up).

At the summary judgment stage, the only allegedly defamatory statements at issue by Captain Bolesta were made at the July 29, 2015 canine unit staff meeting.[12] Two more statements were addressed at trial: Captain Bolesta's June 9 statement to Chief Manger and Assistant Chief Davis and Captain Bolesta's June 19 statements to Officer Greene.[13] For the reasons we discuss next, Captain Bolesta was not liable for defamation for any of them, and nor was the County.

Captain Bolesta defended the defamation claim by arguing that (1) Officer Fones

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[11] The elements of defamation are:

> (1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff suffered harm.

Hosmane v. Seley-Radtke, 227 Md. App. 11, 20–21 (2016), *aff'd Seley-Radtke v. Hosmane*, 540 Md. 468 (2016).

[12] The statements at issue on summary judgment were:

- Officer Fones had "committed egregious acts";
- Officer Fones had given "psycho mind-altering drugs" to Chip; and
- Officer Fones had not kenneled Chip in a County-issued kennel.

[13] The additional statements at issue at trial were:

- Captain Bolesta's June 9 statement to Chief Thomas Manger and Assistant Chief Betsy Davis that Officer Fones had "surreptitiously" obtained Prozac for Chip; and
- Captain Bolesta's June 19 statement to Officer Jonathan Greene, a member of the canine Unit, that "there'd been an evaluation," the results of which "w[eren't] favorable," and that Officer Fones "had given his dog mind-altering drugs."

failed to establish that he had acted with the "malice" required to defame a public official, and (2) his statements fell within the common interest privilege.

1. Officer Fones did not meet his burden to establish that Captain Bolesta acted with "malice."

To recover for defamation, an individual who is a "public official" must prove by clear and convincing evidence, that the defendant "acted with what has been termed 'Constitutional malice,' *i.e.*, that they either knew their statements were false or acted with reckless disregard of whether they were true or false." *Smith v. Danielczyk*, 400 Md. 98, 114–15 (2007). The Court of Appeals has held that police officers are "public officials," *id.* at 114, and in this case, the circuit court ruled—in a decision neither party challenges—that Officer Fones was a "public official" at all relevant times.

Officer Fones argues that there is sufficient evidence to establish malice, but identifies only a single piece of supporting evidence: the fact that he returned "45 out of the 45 Prozac pills prescribed for Chip" to Captain Bolesta. This, he says, proves that Captain Bolesta knew or should have known that he did not administer the Prozac to Chip. His argument is based otherwise on evidence *not* presented: (1) "there was no testimony that [Captain Bolesta] has a medical background to make such assumptions that the drugs were 'mind-altering'" and (2) no evidence "that [Captain] Bolesta had ever spoken with Dr. Claire Godwin before stating at a meeting with officers that [Mr.] Fones committed 'egregious' acts, as he would have learned the Trazodone and Prozac prescriptions were in Chip's best interest, according to the County's own veterinarian."

This argument overlooks the fact that the burden of proof to establish malice is his,

Smith, 400 Md. at 114–15, and pointing to an absence of evidence doesn't meet it. The fact that that Officer Fones returned all of the pills doesn't create a jury question as to whether Captain Bolesta either knew his statements about Officer Fones having administered "mind-altering" or "psychotropic" medication were false, or that he made them with a reckless disregard for the truth. Officer Fones does not dispute that he did administer Trazodone to Chip, or that Trazodone is a medication that is used "for keeping an animal quiet when it's in a confined state essentially," as Dr. Godwin testified. And Officer Fones identified no evidence in the record that Trazodone is *not* a "mind-altering" or "psychotropic" medication, or about what Captain Bolesta knew or didn't know about Trazodone.

Put another way, Officer Fones did not meet his burden, as an initial matter, to prove the falsity of Captain Bolesta's statements, let alone meet his burden to prove Captain Bolesta's knowledge of their falsity or his reckless disregard for their truth. The circuit court therefore erred in denying Captain Bolesta's motion for summary judgment and his Rule 5-219 motion for judgment with respect to the July 29 statement at the canine unit meeting that Officer Fones had given Chip "psycho mind-altering drugs" and his Rule 5-219 motion for judgment with respect to the June 19 statement to Officer Greene that Officer Fones had given Chip "mind-altering" drugs.

The court also erred, although for a slightly different reason, in denying the Captain's motions with respect to the statements that Officer Fones had committed "egregious" violations and that he had not properly kenneled Chip, and the statement to

Chief Manger and Assistant Chief Davis that he had "surreptitiously" obtained the Prozac prescription. Officer Fones identifies *no* evidence that Captain Bolesta knew these statements were false or spoke with reckless disregard of their truth. To the contrary, the evidence in the record supports the County's position. Officer Fones does not dispute that he kenneled Chip in a manner contrary to County standard operating procedures, or that he obtained the Prozac prescription without the knowledge of his supervisors. Whether these violations warranted discipline is a separate question (and one not before us), but the undisputed truth of these statements precludes a finding that Captain Bolesta defamed Officer Fones by making them.

2. The common interest privilege shields Captain Bolesta from liability.

Even if Officer Fones had succeeded in establishing malice and the other elements of defamation, a qualified privilege provides an additional, independent ground on which to reverse the judgment against Captain Bolesta. A qualified privilege defeats an action for defamation unless abused. *Piscatelli v. Van Smith*, 424 Md. 294, 307 (2012). Qualified privileges arise in circumstances under which publication of a defamatory statement "advances social policies of greater importance than the vindication of a plaintiff's reputational interest . . . ." . *Gohari v. Darvish*, 363 Md. 42, 55–56 (2001) (quoting *Marchesi v. Franchino*, 283 Md. 131, 135 (1978)).

The Court of Appeals has recognized four basic common law qualified privileges.[14]

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[14] The four common law qualified privileges are:

(1) The public interest privilege, to publish materials to public

Gohari, 363 Md. at 57. The first of the two privileges raised in this case—the common interest privilege—"recognizes the broader public value in 'promot[ing] free exchange of relevant information among those engaged in a common enterprise or activity and to permit them to make appropriate internal communications and share consultations without fear of suit.'" *Shirley v. Heckman*, 214 Md. App. 34, 43 (2013) (quotations and citation omitted); *accord Lindenmuth v. McCreer*, 233 Md. App. 343, 359 (2017). This privilege applies when those involved in a situation or circumstance share an interest and are, in serving that interest, entitled to know the facts:

> An occasion is conditionally privileged when the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that facts exist which another sharing such common interest is entitled to know.

Gohari, 363 Md. at 57 (quoting *Hanrahan*, 269 Md. at 28).

A common interest inheres in communications arising out of relationships such as an employer-employee relationship, *McDermott v. Hughley*, 317 Md. 12, 28–29 (1989) (citing cases), a franchisee-franchisor relationship, *Gohari*, 363 Md. at 58, and among the members of the board of a youth football league. *Shirley*, 214 Md. App. at 43–44. Whether a privilege exists is a question of law for the court to decide. *Gohari*, 363 Md. at 73–74.

> officials on matters within their public responsibility; (2) the privilege to publish to someone who shares a common interest, or, relatedly, to publish in defense of oneself or in the interest of others; (3) the fair comment privilege; and (4) the privilege to make a fair and accurate report of public proceedings.

Gohari, 363 Md. at 57 (quoting Dan B. Dobbs, *The Law of Torts*, §§ 413 (2000)).

The parties did not cite, and we did not find, any cases holding in so many words that communications among members of a police department in the conduct of their official duties are protected by the common interest privilege. But we don't see any difference between this case and cases holding that an employer's comments about an employee's termination are protected because they arose in the context of business dealings or an employer-employee relationship. *See, e.g.*, *Gohari*, 363 Md. at 58 (common interest between franchisee and franchisor found where they shared in business and professional dealings; employer/franchisee made comments to potential franchisor about former employee's fitness to operate a franchise); *Happy 40, Inc. v. Miller*, 63 Md. App. 24, 35–36 (1985) (common interest in employees' morale and sense of security protected supervisor's response to inquiries by remaining employees about why a former employee had been fired). Captain Bolesta's communications here—his June 9 statement to his superiors that Officer Fones had "surreptitiously" obtained the Prozac prescription, his June 19 statements to canine unit member Officer Greene that Officer Fones had given Chip "mind-altering drugs," and his July 29 comments at the canine unit staff meeting about Officer Fones's "egregious acts," administration of "mind-altering drugs" to Chip, and improper kenneling of Chip—all were protected by the common interest privilege.

Indeed, *all* of the statements at issue here were made by Captain Bolesta, an MCPD supervisor, to other MCPD officers, specifically Captain Bolesta's supervisors, Chief Manger and Assistant Chief Davis, or other canine unit members, including Officer Greene. And none of these statements was published to anyone falling outside the zone of

common interest. As the County points out in its brief, MCPD leadership and canine unit members shared common interests in "the efficient operation and effectiveness of the canine unit, compliance with MCPD policies in furtherance of that mission, [and] the safety of officers within the Unit . . . ." Internal communications concerning the reasons for the transfer of a 20-year veteran of the canine unit furthered those interests, and Captain Bolesta's statements were protected by the common interest privilege. *See Gohari*, 363 Md. at 58; *Happy 40*, 63 Md. App. at 35–36.

Once a qualified privilege has been found, it will protect the defendant from the defamation claim unless the plaintiff can demonstrate that it has been abused. *See Gohari*, 363 Md. at 74. Officer Fones argues in the alternative that if the privilege applies, Captain Bolesta abused it. Whether a privilege has been abused is a question of fact for the fact-finder to resolve, although that question may be decided by the court if the evidence is insufficient to support such abuse. *Lindenmuth*, 233 Md. App. at 360–61; *Happy 40*, 63 Md. App. at 35–36.

Abuse, and therefore loss of the privilege, occurs when the publication (1) is made with "malice," *Shirley*, 214 Md. App. 42 (citing *Piscatelli*, 424 Md. at 307); (2) does not further the common interest, *id.* at 48 (citing *Gohari*, 363 Md. at 64); or (3) is made "to third persons other than those whose hearing is reasonably believed to be necessary or useful to the protection of the interest, *i.e.*, by an excessive publication." *General Motors v. Piskor*, 277 Md. 165, 173 (1976). "Malice" for these purposes is "a person's actual knowledge that his statement is false, coupled with his intent to deceive another by means

of that statement.”[15] *Ellerin v. Fairfax Sav. F.S.B.*, 337 Md. 216, 240 (1995); *see also Shirley*, 214 Md. App. at 45 (explaining evolution of definition of “malice”).

In this case, there was insufficient evidence to create a jury question about whether the common interest privilege had been abused, and the circuit court should have granted Captain Bolesta’s summary judgment motion and Rule 5-219 motion judgment on privilege grounds. The only evidence that Officer Fones identifies in support of his argument that the privilege was abused is Captain Bolesta’s trial testimony that (1) Officer

[15] Maryland cases—one decided as recently as 2017, *Lindenmuth*, 233 Md. App. at 359–60, have cited the following block quote when identifying the circumstances under which a privilege can be found to have been abused:

> (1) the publication is made with malice, that is, with “knowledge of falsity or reckless disregard for truth . . .”, *Marchesi v. Franchino*, 283 Md. at 139, 387 A.2d 1129. Restatement of Torts 2d § 600-602; (2) the statement was not made in furtherance of the interest for which the privilege exists, Restatement of Torts 2d § 603; (3) the statement is made to a third person other than one “whose hearing is reasonably believed to be necessary or useful to the protection of the interest . . .”, *General Motors Corp. v. Piskor*, 277 Md. 165, 173, 352 A.2d 810 (1976); Restatement of Torts 2d § 604; and (4) the statement includes defamatory matter not reasonably believed to be in line with the purpose for which the privilege was granted. Restatement of Torts 2d § 605.

Mareck v. Johns Hopkins Univ., 60 Md. App. 217, 225 (1984), *cited with approval in Gohari v. Darvish*, 363 Md. 42, 74 (2001); *see also Carter v. Aramark Sports and Entertainment Servs., Inc.*, 153 Md. App. 210, 242–43 (2003); *Happy 40*, 63 Md. App. at 32–33.

But the standard for “malice” in this quote appears to be incorrect, at least for the purposes of finding a privilege. As we explained in *Shirley*, the definition of “malice” has evolved from “knowledge of falsity or reckless disregard for truth” (as appears in the block quote above) to “a person’s ***actual knowledge*** that his statement is false, coupled with his ***intent to deceive*** another by means of that statement.” 214 Md. App. 34 at 45 (cleaned up) (emphasis added). We apply the current standard here.

Fones "provided him with 45 out of the 45 Prozac pills prescribed for Chip" and (2) Captain Bolesta "agreed with Mary Davis" and that "Mary Davis' techniques were the proven method." This evidence falls short for the same reason it fell short with regard to public official immunity: Officer Fones bore the burden of proof to establish abuse of the privilege, and he has failed to meet that burden as a matter of law.

First, as discussed above, the fact that the Officer returned 45 out of 45 Prozac pills failed to create a jury issue as to Captain Bolesta's knowledge that his "mind-altering" drugs statement was false. And indeed, the standard here—*actual* knowledge—is even higher than the standard for malice in the context of public official immunity, which allows a showing of either actual knowledge or reckless disregard for the truth. *See Smith*, 400 Md. at 114–15.

Second, Officer Fones's argument about Captain Bolesta's alleged disagreement with Officer Fones over training methods falls short as well. Officer Fones's claim is that Captain Bolesta had a "vengeful personal agenda against Fones" and that he "used the dog bite incident to get rid of [Officer] Fones, exaggerating the events that transpired." But we don't see a cause-and-effect relationship between Captain Bolesta's ostensible agreement with Sergeant Davis (and disagreement with Officer Fones) about training methodology and Officer Fones's removal from the canine unit. Indeed, as discussed above, the evidence supports the conclusion that Captain Bolesta, in his role as its leader, simply communicated to the other canine unit officers why Officer Fones had been transferred. And the statements he made to them were true: without the knowledge of his superiors, Officer Fones

administered Trazodone to Chip, acquired the Prozac prescription, and housed Chip in a non-County provided kennel, all in a manner contrary to MCPD policy.[16]

* * *

This case was contentious and emotional, and we can understand why Officer Fones and others took issue with the County's personnel decisions. Even so, the defamation claims at issue here never should have gone to the jury. The County was immune from liability for defamation and should have been dismissed at the motion to dismiss or the summary judgment stage. And the evidence, whether viewed at summary judgment or at trial, could not support a judgment against Captain Bolesta for defamation.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. APPELLANT TO PAY COSTS.

[16] Because we reverse on independently sufficient grounds, we decline to reach the County's arguments that Officer Fones did not establish falsity (an essential element of a *prima facie* case of defamation, *Hosmane*, 227 Md. App. at 20–21) with respect to certain of the statements, and that Captain Bolesta's statements were protected by the fair comment privilege. We also decline to reach the merits of the County's argument that the jury's finding of zero dollars in damages as to the claim against Captain Bolesta means that the jury made a specific finding that the evidence was insufficient to establish harm, which is another essential element of defamation. *Id.*