Circuit Court for Anne Arundel County
Case No. C-02-CV-18-000690

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2757

September Term, 2018

JNH REALTY LIMITED LIABILITY COMPANY LLC, ET AL

v.

RICHARD TROTT, ET AL

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: March 30, 2020

*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.

After the plaintiffs in this case had already filed a second amended complaint, the Circuit Court for Anne Arundel County dismissed their first amended complaint. The plaintiffs noted an appeal from the order dismissing the first amended complaint. Several weeks later, the court entered an order striking the second amended complaint and closing the case. The plaintiffs failed to note an appeal from that order.

For the reasons explained in this opinion, we will grant the defendants' motion to dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The following factual summary is derived from the original and amended complaints. In setting forth the pertinent facts, we accept all well pleaded allegations as true and draw reasonable inferences from those allegations that are most favorable to the plaintiffs. *See, e.g.*, *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 344 (2000).

A. Emails to Annapolis City Officials Regarding 37 Madison Place

The allegations in this case concern two emails sent to Annapolis City officials regarding a residential building located at 37 Madison Place in Annapolis. The authors of the emails are Jared Lerner and Richard Trott, who are members of the Presidents Hill Community Association and who own other properties near 37 Madison Place.

The property is owned by JNH Realty, a limited liability company that is managed by its sole member, Jonathan Hollander. As of early February 2018, JNH Realty was engaged in renovations at the property, which included work on the roof, siding, sprinkler system, and fire alarm system. During the renovations, Mr. Hollander temporarily moved into one residential unit at the property. He moved additional furniture into the building

in the process of "staging" another unit for real estate marketing purposes. During the installation of siding, a fire alarm was removed from the outside of the building; the alarm was later reattached in the final week of February 2018.

On February 12, 2018, Jared Lerner sent an email with the subject line "Presidents Hill Concern" to the official email address of the Mayor of the City of Annapolis. In his email signature, Mr. Lerner identified himself as a board member of the Presidents Hill Community Association. In the body of the email, he wrote:

> We have some concerns in Presidents Hill about what is going on with work at 37 Madison Place. It's a 3 unit house that has been under construction for going on 2 years. We have tried to make contact with the city to find out what is going on with permits with no success. Our concerns are as follows:
>
> 1. A tenant has moved in to one of the units. Is there an occupancy permit?
> 2. Some permits are posted in a top floor window of house, which makes them impossible to read. Is this permissible?
> 3. Has there been or is there an intent to try to get a driveway and curb cut in the front of the house?
> 4. Our understanding is that it is acceptable under city code to jump a curb and park on the front lawn; this house only has mud. This needs to be addressed by the city council. Both the tenant and contractors are doing this daily. This leads to ruts, in which standing water and mosquitos collect in [sic] during warmer weather.
>
> Many neighbors have voiced their concerns to me about these issues and more. While we are pleased the house is getting updated we are tired of the nuisance. The house is an eye sore in the neighborhood in its continued unfinished state. And of course we think it is unacceptable for people to be occupying a structure that is obviously still under construction.[1]

The Mayor's administrative assistant promptly forwarded Mr. Lerner's email to several City officials, and some of them forwarded it to others. Within a day, the

[1] The message has been transcribed verbatim, with all errors.

Constituent Services Officer and Ombudsman, the Director of Planning and Zoning, the Chief of Code Enforcement, the City Manager, and the Mayor's Chief of Staff each received copies of Mr. Lerner's email.[2]

The Constituent Services Officer and Ombudsman sent Mr. Lerner a reply, which included a response from the Director of Planning and Zoning. Among other things, the Director of Planning and Zoning stated that the City had "an active building permit" for the property and that it was the "understanding" of City officials that the "current owner" of the property was "only occupying the unit from time to time during the renovations."

Mr. Lerner shared his original email and the City's reply with Richard Trott, another member of the Presidents Hill Community Association.

On the next day, February 13, 2018, Mr. Trott sent an email with the subject line "37 Madison" to the official email address of the Annapolis Fire Marshal's Office. At the same time, Mr. Trott sent copies of his email to the Director of Planning and Zoning, the Chief of Code Enforcement, and the Ward One Alderwoman (the city council representative in the geographical area that includes the Presidents Hill neighborhood), as well as to Mr. Lerner. In his email signature, Mr. Trott identified himself as the president of the Presidents Hill Community Association. In the body of the email, Mr. Trott wrote:

> The property located at 37 Madison Place Annapolis has what appears to be renters moving in, the owner states below he only occupy this property from time to time during this renovation. The property is not finished, top

[2] The City Code requires that "[a]ll citizen complaints shall be directed to the ombudsman" in the Mayor's office, "who will arrange to have each complaint . . . directed to the appropriate department with copies sent to the aldermen." Annapolis City Code § 2.12.020(G). The Director of Planning and Zoning generally is responsible for the enforcement of the Building Code. *See* Annapolis City Code § 17.12.060.

> right hand corner of roof is open, the outside red metal fire alarm was removed for the sprinkler system.
>
> It is a hodge podge of construction, permit or not many in the neighborhood don't feel that they are being completely honest with Planning and Zoning, since he already tried to get away with not installing sprinkler system.
>
> Not sure if he has a use and occupancy permit even if he stays in there periodically, if it's not finished and the sprinkler system bell has been removed, what other short cuts has he taken.[3]

One of the City officials who received Mr. Trott's February 13 email (which included the text of Mr. Lerner's February 12 email) forwarded it to Mr. Hollander and asked whether Mr. Hollander owned the property at 37 Madison Place.

Two days later, on February 15, 2018, an attorney representing JNH Realty and Mr. Hollander sent a five-page, single-spaced letter to Mr. Lerner and Mr. Trott. The attorney accused Mr. Lerner and Mr. Trott of making "false and defamatory claims" in their emails to City officials a few days earlier. On behalf of his clients, the attorney threatened to file suit unless Mr. Lerner and Mr. Trott made a "complete retraction of [their] emails" to all recipients of those emails.

B. Allegations Arising Out of the Emails to Annapolis City Officials

Three weeks after demanding a retraction, Mr. Hollander and JNH Realty filed suit in the Circuit Court for Anne Arundel County against Mr. Lerner, Mr. Trott, and the Presidents Hill Community Association. Against each defendant, the complaint raised four counts: defamation, false light invasion of privacy, tortious interference with business relations or prospective advantage, and civil conspiracy.

[3] This message, too, has been transcribed verbatim, with all errors.

All claims arose out of the two emails that Mr. Lerner and Mr. Trott had sent to City officials. The plaintiffs alleged that Mr. Lerner and Mr. Trott, motivated by "actual malice" against the plaintiffs, "coordinated" with each other to make "false and defamatory statements" about the plaintiffs, to "intentionally cast" the plaintiffs "in a false light," and to "tortiously interfere" with the plaintiffs' real estate business. Using paraphrases of the emails, the complaint identified a series of allegedly false statements.[4]

In Mr. Lerner's email to the Mayor, Mr. Lerner had stated that the building at the property "ha[d] been under construction for going on 2 years." The plaintiffs alleged that Mr. Lerner "stated that construction of the property ha[d] been 'going on for two years." The plaintiffs alleged that Mr. Lerner's "statement" that construction "ha[d] been 'going on for two years' . . . was completely false[.]"

In Mr. Trott's email to the Fire Marshal, Mr. Trott had stated that the property "ha[d] what appear[ed] to be renters moving in" and had stated that he was "not sure if [the owner] ha[d] a use and occupancy permit" for the property. Similarly, Mr. Lerner had told the Mayor that "[a] tenant ha[d] moved in to one of the units" at the property and had asked whether there was "an occupancy permit" for the property. In the complaint, the plaintiffs acknowledged that Mr. Hollander was occupying one unit at the property and had moved furniture into another unit. The plaintiffs asserted, however, that the

[4] The plaintiffs mentioned the emails throughout their pleadings, but they did not reproduce copies of the emails. The defendants attached copies of the emails to their motions to dismiss, and the plaintiffs did not controvert the authenticity of those documents. Consequently, those documents merely supplemented the allegations of the complaints, without converting the motions to dismiss into motions for summary judgment. *See, e.g.*, *Margolis v. Sandy Spring Bank*, 221 Md. App. 703, 710 n.4 (2015).

statements from the emails were "false" because Mr. Hollander was "not charging himself rent" and was "therefore not a tenant."

In his email to the Fire Marshal, Mr. Trott had stated: "top right hand corner of roof is open[.]" The plaintiffs asserted that the statement "that the 'roof [was] open' on the property" was "not true at the time" of Mr. Trott's email.

In his email, Mr. Trott had noted that "the outside red metal fire alarm was removed for the sprinkler system" at the property. In the complaint, the plaintiffs acknowledged that "the outside alarm had . . . been temporarily removed for the purpose of completing the installation of new siding work on the building." Nevertheless, the plaintiffs accused Mr. Trott of having "falsely stated" that the plaintiffs "removed the outside fire alarm on the building in violation of the law."

In his email, Mr. Trott had reported that "many in the neighborhood don't feel that [the property owners] are being completely honest with Planning and Zoning, since [the owner] already tried to get away with not installing a sprinkler system." The plaintiffs accused Mr. Trott of having "falsely stated" that the plaintiffs "had attempted to subvert the law by avoiding the installation of a sprinkler system" and "falsely stated" that the plaintiffs "had not been 'completely honest with Planning and Zoning.'"

At the end of his email, Mr. Trott had posed the following question to the City officials: "if it's not finished and the sprinkler system bell has been removed, what other short cuts has [the owner] taken[?]" The plaintiffs alleged that Mr. Trott "falsely stated" that the plaintiffs had "taken 'short cuts' and were not in compliance with the fire code."

The plaintiffs asserted that, "[a]t all times relevant, [they] ha[d] complied with all

applicable laws regarding permits with the City of Annapolis and the scheduling of all work to be performed on the Property." Mr. Hollander and JNH Realty claimed that they "suffered serious reputational injury" as a consequence of the statements in the emails. The plaintiffs sought damages exceeding $75,000.

C. Motions to Dismiss the Complaint and First Amended Complaint

Before filing an answer, the defendants moved for dismissal or, in the alternative, for summary judgment. The plaintiffs filed a response in opposition to the motion and, two days later, filed their First Amended Complaint. Except for some new allegations related to the plaintiffs' theories of actual malice and reputational injury, the First Amended Complaint reproduced the claims in the original complaint.

The defendants withdrew the motion to dismiss the original complaint, explaining that the First Amended Complaint had "render[ed] [their] initial Motion to Dismiss moot." The defendants then filed a Renewed Motion to Dismiss, or in the Alternative, for Summary Judgment. As the primary ground for dismissal, the defendants contended that their statements to the City officials were entitled to absolute privilege.

Under Maryland law, participants in a judicial proceeding enjoy an absolute privilege to publish defamatory statements in the course of that proceeding. *See, e.g.*, *Reichardt v. Flynn*, 374 Md. 361, 368 (2003) (citing *Adams v. Peck*, 288 Md. 1, 3 (1980)). "This absolute privilege shields speakers from liability even if their motives were malicious, or they knew the statement was false, or their conduct was otherwise unreasonable." *Imperial v. Drapeau*, 351 Md. 38, 44 (1998). This privilege may apply "even if the allegedly defamatory statement is irrelevant to the proceeding." *Id.* The

rationale for this privilege is that the "'investigation, evaluation, presentation and determination of facts are inherent and essential parts" of the judicial process, and for this process "'to function effectively, those who participate must be able to do so without being hampered by the fear of private suits for defamation.'" *O'Brien & Gere Eng'rs, Inc. v. City of Salisbury*, 447 Md. 394, 409-10 (2016) (quoting *Adams v. Peck*, 288 Md. at 5).

Taking "a 'broad view' of the scope" of "this 'important privilege,'" the Court of Appeals has held that it "extends to administrative and other quasi-judicial proceedings." *Imperial v. Drapeau*, 351 Md. at 45 (quoting *Keys v. Chrysler Credit Corp.*, 303 Md. 397, 404 (1985)). This privilege may extend to "any governmental proceeding involving the exercise of a judicial or quasi-judicial function, including a wide variety of administrative boards, commissions, or other tribunals which may engage in judicial or quasi-judicial action though not part of the court system." *Id.* (citation and quotation marks omitted). "In sorting out which types of proceedings merit this protection, we probe: '(1) the nature of the public function of the proceeding and (2) the adequacy of procedural safeguards which will minimize the occurrence of defamatory statements.'" *Norman v. Borison*, 418 Md. 630, 652 (2011) (quoting *Gersh v. Ambrose*, 291 Md. 188, 197 (1981)).

Invoking these principles, the defendants contended that absolute privilege shielded them from liability based on their written complaints to City officials about possible violations of the City's Building Code and Fire Prevention Code. The defendants argued that there is a substantial "public interest in having buildings,

especially those which provide residential housing, . . . comply with all building and safety regulations." The defendants argued that they had properly directed their emails to "government officials who [sic] citizens reasonably contact with matters of local concern" and to other "individuals tasked with enforcing various aspects of the Annapolis City Code." The defendants also argued that the "process initiated by" their complaints involved procedural safeguards through which the property owner could "protect itself from any adverse consequences," including notice, the opportunity for a hearing, and the right to seek review of an unfavorable decision.

Opposing the motion to dismiss, the plaintiffs argued that the statements did not qualify for absolute privilege. The plaintiffs characterized the emails as expressions of an "ongoing gripe . . . about the status of a construction project," which, in the plaintiffs' view, were "not aimed at triggering a quasi-judicial proceeding" and did not implicate any "pressing public policy concerns."

D. Second Amended Complaint and Motion to Strike That Pleading

At the request of all parties, the circuit court scheduled a hearing on the renewed motion to dismiss the First Amended Complaint. Meanwhile, the court had issued a scheduling order, which established September 9, 2018, as the "[d]eadline for any party seeking to . . . amend a claim to file the appropriate pleading[.]" Ten days after that deadline, the plaintiffs filed their Second Amended Complaint.

The Second Amended Complaint raised the same claims that the plaintiffs previously raised in the original complaint and in the First Amended Complaint, along with some additional allegations based on deposition testimony and certain written

communications disclosed during discovery. According to the plaintiffs, these materials demonstrated that Mr. Lerner and Mr. Trott may have been motivated by "a longstanding grudge" against Mr. Hollander.

On September 25, 2018, the circuit court held a hearing on the defendants' renewed motion to dismiss the First Amended Complaint. At the beginning of the hearing, the defendants notified the court that the plaintiffs had filed the Second Amended Complaint during the previous week. The defendants asserted that the new allegations in that pleading would not affect the analysis of the issues raised in the motion to dismiss. The defendants noted that the plaintiffs had filed the Second Amended Complaint "after the deadline" established in the scheduling order and said that they "expect[ed] to be filing a motion to strike" the amended pleading. Because they had received the Second Amended Complaint "less than a week" before the hearing, the defendants said that they were still "in the process of preparing" the motion to strike.

The court concluded that the unfiled motion to strike the Second Amended Complaint was "not in front of the Court at this time." The court then directed the parties to make arguments regarding the motion to dismiss the First Amended Complaint.

One week after the hearing, the defendants filed a motion to strike the Second Amended Complaint. In support of the motion, the defendants argued that the plaintiffs had filed the new complaint after the deadline set forth in the scheduling order and without seeking or obtaining leave for their late filing.

E. Opinion and Order Dismissing the Amended Complaint

On October 16, 2018, the circuit court issued an order titled "Order Dismissing the

Amended Complaint." For the reasons set forth in an accompanying opinion, the court granted the defendants' renewed motion to dismiss and ordered that "the Amended Complaint . . . is dismissed with prejudice."[5]

In an introductory section of the opinion, the court wrote: "The matter comes before the Court on Plaintiffs' Second Amended Complaint[.]" In a corresponding footnote, the court observed that the plaintiffs had filed the Second Amended Complaint "after the Scheduling Order's deadline to do so" and had not "asked for or received leave of court to file the belated amended pleading[.]" The court stated: "Given this procedural posture, this Opinion considers only the sufficiency of the first Amended Complaint."

After summarizing the facts alleged in the First Amended Complaint, the court turned to "the question of whether absolute . . . privilege should apply to Defendants' communications to various City of Annapolis officials as to their concerns relating to Plaintiffs' renovation of a property on Madison Place[.]" The court relied on cases in which the Court of Appeals had extended absolute privilege to certain citizen complaints made to government officials, where the purpose or effect of the complaint was to trigger an administrative proceeding: *Reichardt v. Flynn*, 374 Md. 361 (2003), and *Imperial v. Drapeau*, 351 Md. 38 (1998).

In *Reichardt v. Flynn*, 374 Md. at 362, the Court of Appeals considered whether absolute privilege should extend to verbal complaints made by students and parents to a

[5] The defendants' motion had included a request for summary judgment as an alternative to dismissal. On appeal, all parties agree that the court's order "was the grant of a Motion to Dismiss rather than the Motion for Summary Judgment."

high school principal about alleged misconduct by a teacher who coached a track team. The students complained that the teacher appeared to be "more interested in coaching the male runners than the female runners" and made some "improper sexual comments[.]" *Id.* at 362-63. The Court identified a strong public interest in encouraging citizens to report misconduct by public school teachers. *Id.* at 371. Any disciplinary action against the teacher was subject to two levels of administrative appeals and to judicial review under the Administrative Procedure Act. *Id.* at 375-76. The court concluded that these procedures were adequate to protect the teacher from the consequences of false complaints. *Id.* at 376-77. Accordingly, absolute privilege barred a defamation action based on the complaints of the teacher's alleged misconduct. *Id.* at 377.

In *Imperial v. Drapeau*, 351 Md. at 40, the Court of Appeals extended absolute privilege to two letters that a physician had sent to the Governor and to a member of Congress, complaining about alleged misconduct by an emergency medical technician (EMT). The Court recognized the public interest in ensuring "that all medical participants in the emergency medical system be competent." *Id.* at 50. The complaint of misconduct was subject to investigation by a state agency and "[a]ny action, adverse to [the EMT], resulting from the investigation . . . could not be taken without [the EMT's] consent or without complying with the contested cases subtitle of the Maryland Administrative Procedure Act[.]" *Id.* at 51. The Court determined that these "procedural safeguards adequately protected the reputation of a subject of a complaint about emergency medical service." *Id.* at 50-51.

Here, the circuit court took notice that the Annapolis City Code authorizes

"'appeals of orders, decisions, or determinations made by the building official relative to the application and interpretation of [the] Code,' including alleged violations of the building code and fire prevention code." The court noted that these administrative proceedings "offer the opportunity for testimony in an adversary fashion and for further appellate review by [the circuit court] and other appellate courts[.]" In light of those safeguards, the court determined that the reports of alleged code violations to the officials responsible for enforcing those codes (the Fire Marshal, the Director of Code Enforcement, and Department of Planning and Zoning officials) were entitled to absolute privilege. The court observed that the defendants also directed their statements to two elected officials, the Mayor and an Alderwoman, who have "no direct responsibility for enforcement[.]" The court determined that those "communications were still absolutely privileged because they took place within the City Code's procedural framework which provided for due process in the form of an adversary hearing and appeals that, ultimately, could vindicate [the] [p]laintiffs."

The court concluded that it should "dismiss the Amended Complaint . . . with prejudice as barred by the absolute privilege of the Defendants." The court entered the opinion and Order Dismissing the Amended Complaint onto the docket on October 19, 2018.

F. Notice of Appeal Before Striking of the Second Amended Complaint

When the court issued its opinion and order, the period for the plaintiffs to respond to the motion to strike the Second Amended Complaint had not yet run. The plaintiffs filed no direct response in opposition to that motion to strike. Instead, they filed a written

request for a hearing on the motion to strike, asserting that the motion was "potentially dispositive."

Separately, the plaintiffs filed a "Motion for Leave to File Second Amended Complaint." The plaintiffs filed their motion on October 17, 2018, one day after the court signed the dismissal order but two days before that order was entered onto the docket.

In their motion, the plaintiffs asked the court to deny the motion to strike and to order that "the Second Amended Complaint filed September 19, 2018 shall remain in full force and effect due to the grant of leave by th[e] Court." The plaintiffs asserted that "it [was] in the interests of justice that the Plaintiff be granted leave to file the Second Amended Complaint that was already filed on September 19, 2018." The plaintiffs asserted that the court should grant their motion "for reasons set forth in" a supporting memorandum, but it appears that they never filed any such memorandum.

The defendants opposed the "Motion for Leave to File Second Amended Complaint." The defendants noted that the plaintiffs had already filed a Second Amended Complaint, after the deadline established in the scheduling order and without seeking or obtaining leave to do so. The defendants argued that any additional allegations related to the plaintiffs' theory of actual malice had no bearing on the court's determination that absolute privilege barred the plaintiffs' claims. The defendants argued that allowing the untimely pleading would "cause an unnecessary burden on th[e] [c]ourt, as [the court] ha[d] already reviewed the record . . . and rendered a decision that completely disposes of the case." "Thus," the defendants asserted, "th[e] Court should

not grant Plaintiffs leave to amend, the Second Amended Complaint should be stricken, and this case properly closed."

On November 16, 2018, while the parties' motions regarding the Second Amended Complaint were still pending, the plaintiffs filed a notice of appeal.

One week later, the circuit court issued an order stating that "the Defendants' Motion to Strike Plaintiffs' Second Amended Complaint and Plaintiffs' Motion for Leave to File Second Amended Complaint are **DENIED** as moot." The judge who signed the order was not the same judge who had issued the opinion and order dismissing the First Amended Complaint. The court did not explain its reasons for concluding that the pending motions were moot.

During the following week, the defendants moved for reconsideration of the denial of the motion to strike, contending that the issue of whether the court should strike the Second Amended Complaint was not moot. The defendants asserted that the court had "declined to make a ruling" as to the Second Amended Complaint, and thus that the dismissal order "had the effect of dismissing with prejudice only" the First Amended Complaint. The defendants argued that, "absent an [o]rder specifically addressing" the Second Amended Complaint, the order granting the motion to dismiss the First Amended Complaint was "not a final judgment because it adjudicated fewer than all of the claims in th[e] action." The defendants asserted that the appropriate relief in these circumstances was to issue an order striking the Second Amended Complaint "and thus concluding all pending claims[.]" Although the defendants designated their motion as one for "reconsideration," they addressed it to the court's general power, under Md. Rule

2-602(a), to revise an interlocutory order at any time before the entry of final judgment.

On January 24, 2019, the circuit court issued an order granting the defendants' motion for reconsideration, vacating the prior order denying the motion to strike the Second Amended Complaint, denying the plaintiffs' motion for leave to file the Second Amended Complaint (but not on the ground that it was moot), and striking the Second Amended Complaint. Finally, the court ordered, in light of the prior "Order entered on October 19, 2018, dismissing Plaintiffs' Amended Complaint with prejudice," that the case be "**CLOSED**."

The plaintiffs did not file a notice of appeal after the court entered the order striking the Second Amended Complaint. In this Court, the defendants moved to dismiss the appeal, contending that the plaintiffs filed their notice of appeal prematurely. This Court declined to dismiss the appeal at that time, but permitted the defendants to reassert their motion in their appellate brief.

DISCUSSION

I.

As a preliminary matter, the defendants have moved to dismiss this appeal. Maryland Rule 8-602(b) provides that this Court "shall dismiss an appeal if: (1) the appeal is not allowed by these Rules or other law; or (2) the notice of appeal was not filed with the lower court within the time prescribed by Rule 8-202." Subject to certain exceptions, a notice of appeal must be filed "within 30 days after entry of the judgment or order from which the appeal is taken." Md. Rule 8-202(a).

Under section 12-301 of the Courts and Judicial Proceedings Article of the

Maryland Code, parties are authorized to appeal from a "final judgment entered in a civil . . . case by a circuit court." Maryland Rule 2-602(a) provides that "an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim . . . is not a final judgment[.]" Rather, such an order is an interlocutory order, which "does not terminate the action as to any of the claims or any of the parties" and which "is subject to revision at any time before the entry of a judgment that adjudicates all of the claims" in the action. *Id.*

The Court of Appeals has explained that, to constitute a final judgment, the order "must be intended by the court as an unqualified, final disposition of the matter in controversy[.]" *Metro Maint. Sys. South, Inc. v. Milburn*, 442 Md. 289, 298 (2015). To satisfy that requirement, the order "must be 'so final as either to determine and conclude the rights involved or to deny the appellant the means of further prosecuting or defending his or her rights and interests in the subject matter of the proceeding.'" *Id.* at 299 (emphasis omitted) (quoting *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989)). "The order must be a complete adjudication of the matter in controversy, except as to collateral matters, meaning that there is nothing more to be done to effectuate the court's disposition." *Id*.

The defendants contend that the Order Dismissing the Amended Complaint, entered on October 19, 2018, was not a final judgment. The defendants argue that the order "did not adjudicate all the claims of the parties in the action," because it "did not address" the Second Amended Complaint that the plaintiffs had filed several weeks

earlier. The defendants contend, therefore, that the "only notice of appeal in this case was prematurely filed on November 16, 2018, before the entry (or announcement) of final judgment[.]" In the defendants' assessment, the court did not enter a final judgment until January 24, 2019, the date when the court entered the order striking the Second Amended Complaint and closing the case. The defendants note that the plaintiffs "failed to file a notice of appeal" at any time after the signing or entry of that order.

In response, the plaintiffs contend that the Order Dismissing the Amended Complaint was the final judgment even though it did not expressly dispose of the Second Amended Complaint. The plaintiffs acknowledge that they had filed the Second Amended Complaint before the court ruled on the motion to dismiss, but they assert that the First Amended Complaint was still "the operative pleading" at that time. According to the plaintiffs, the Second Amended Complaint "never bec[a]me the operative pleading" in the case. In their view, the motion to strike "was in fact moot" because, they say, "one cannot strike a complaint that has never become operative[.]"

The plaintiffs offer little explanation for their assertion that the Second Amended Complaint never became the "operative pleading" in the case. Under Maryland law, it is well settled that an amended complaint "supersedes the initial complaint, rendering the amended complaint the operative pleading." *Asphalt & Concrete Servs., Inc. v. Perry*, 221 Md. App. 235, 267 (2015) (citing *Gonzales v. Boas*, 162 Md. App. 344, 355 (2005)). An amended complaint "replaces an earlier complaint in its entirety, and the earlier complaint is regarded as withdrawn or abandoned." *Priddy v. Jones*, 81 Md. App. 164, 169 (1989). Upon the filing of an amended complaint, the "earlier complaint . . . is no

longer part of the complainant's averments against his adversary[,]" and the "sufficiency of his [or her] case thereafter depends upon the allegations of the amended complaint, without regard to what preceded it." *Mark Downs, Inc. v. McCormick Props., Inc.*, 51 Md. App. 171, 181 n.3 (1982).

The plaintiffs mention that they filed their Second Amended Complaint "after the time allowed in the Scheduling Order," but they cite no authority suggesting that an amended pleading should be ignored entirely if it is filed after the relevant deadline. The Maryland Rules set forth procedures for adjudicating the issue of what consequence, if any, should be imposed when a party files an amended pleading after the deadline set by the court. In civil cases, a scheduling order must include "a date by which amendments to the pleadings are allowed as of right[.]" Md. Rule 2-504(b)(1)(G). "A party may file an amendment to a pleading without leave of court by the date set forth in a scheduling order[.]" Md. Rule 2-341(a). "Within 15 days after service of an amendment, any other party to the action may file a motion to strike setting forth reasons why the court should not allow the amendment." *Id.* "On motion made by a party before responding to a pleading or, if no responsive pleading is required . . ., on motion made by a party within 15 days after the service of the pleading or on the court's own initiative at any time, the court . . . may order any pleading that is late or otherwise not in compliance with these rules stricken in its entirety." Md. Rule 2-322(e).

Nothing in these Rules suggests that an amended complaint is a nullity merely because it is filed late. When a plaintiff files an amended complaint after the deadline set forth in the scheduling order, several outcomes may result. The defendant might not

move to strike the late pleading and thereby allow it to stand. If, however, the defendant does move to strike, the "decision whether to grant [the] motion to strike is within the sound discretion of the trial court." *First Wholesale Cleaners Inc. v. Donegal Mut. Ins. Co.*, 143 Md. App. 24, 41 (2002). The court might grant the motion, or it might deny the motion and thereby allow the case to proceed on the amended complaint. In sum, even though an amended pleading is subject to a motion to strike on the ground that it was filed too late, the striking of a late pleading does not occur automatically.[6]

There are many reasons why a trial court might decline to strike an amended pleading that was filed after the deadline from the scheduling order. Even though a scheduling order generally "controls the subsequent course of the action," the scheduling order "shall be modified by the court to prevent injustice." Md. Rule 2-504(c). More generally, amendments to pleadings should be "freely allowed when justice so permits." Md. Rule 2-341(c). This Court has said that a motion under Rule 2-322 to strike a late pleading ordinarily "'should be granted only if the delay prejudices the defendant.'" *First Wholesale Cleaners Inc. v. Donegal Mut. Ins. Co.*, 143 Md. App. at 41 (quoting *Garrett v. State*, 124 Md. App. 23, 27 (1998)).

In the present case, the defendants responded to the late filing of the Second

[6] It should come as no surprise that many cases reach a final judgment after the trial court grants a dispositive motion directed at the merits of an earlier complaint and also grants a motion striking a subsequent amended complaint. *E.g. Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 9 (2005); *Bacon v. Arey*, 203 Md. App. 606, 631 (2012); *George Wasserman & Janice Wasserman Goldsten Family LLC v. Kay*, 197 Md. App. 586, 592-93 (2011); *Prudential Secs. Inc. v. E-Net, Inc.*, 140 Md. App. 194, 2017 (2001).

Amended Complaint by making a timely motion to strike that pleading. It is difficult to imagine how the case could have reached a complete resolution until the court ruled on that motion or otherwise adjudicated the status of the Second Amended Complaint. A ruling disposing of the First Amended Complaint only, but not the Second, would not determine and conclude the parties' rights, nor would it deny the plaintiffs the means of prosecuting the claims asserted in their Second Amended Complaint.

In arguing that the Order Dismissing Amended Complaint was a final judgment, the plaintiffs observe that the order granted a dismissal without an express grant of leave to amend. The plaintiffs cite *Mohuiuddin v. Doctors Billing & Management Solutions, Inc.*, 196 Md. App. 439 (2010), in which this Court explained that if a "dismissal order expressly grants 'leave to amend,' there is no final judgment and the case is not closed." *Id.* at 453. "By contrast," the Court said, "unless the case is being kept alive by some other means, such as other parties or other still unresolved claims, a dismissal [order] without the magic words 'with leave to amend' closes the case finally[.]" *Id.* In our assessment, when a plaintiff has already filed an amended pleading by the time that the court dismisses a prior pleading, the case "is being kept alive by some other means" through the existence of the "unresolved claims" asserted in the amended pleading. *Id.* In those circumstances, the possibility remains that the court might decline to strike the amended pleading and allow the plaintiff to proceed on the amended pleading. For that very reason, the plaintiffs here asked the court to deny the motion to strike and to order that the Second Amended Complaint "remain" in effect. The plaintiffs also requested a hearing on the motion to strike the Second Amended Complaint, recognizing that the

motion was "potentially dispositive" of the claims asserted in that pleading.[7]

In addition to arguing that it was unnecessary for the court to address the Second Amended Complaint, the plaintiffs suggest that the court "implicitly" disposed of the Second Amended Complaint through the Order Dismissing the Amended Complaint. The order itself does not mention the Second Amended Complaint. In the opinion accompanying that order, however, the court acknowledged that the plaintiffs had filed a Second Amended Complaint. In a footnote, the court wrote:

> The Second Amended Complaint was filed September 19—ten days after the Scheduling Order's deadline to do so. The record does not reflect that Plaintiffs asked for or received leave of court to file the belated amended pleading, per Rule 2-341(b). Given this procedural posture, this Opinion considers only the sufficiency of the first Amended Complaint.

The parties disagree over the meaning of this footnote. The defendants assert that, in this footnote, the court "expressly declined . . . to address" the Second Amended Complaint. In other words, the defendants say, the court was explaining that it had "excluded matters presented outside the first amended complaint" when it analyzed the sufficiency of the pleadings. The plaintiffs, on the other hand, assert that this comment meant that the court "would not consider the Second Amended Complaint" at all, because it had determined that "the First Amended Complaint was still the operative complaint." According to the plaintiffs, the footnote means that the court was "holding the Second Amended Complaint [to be] a nullity[.]"

The plaintiffs' expansive reading of the implications of this footnote is

[7] Maryland Rule 2-311(f) generally states that "the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested[.]"

unpersuasive. We do not interpret the carefully-worded statement—"*this Opinion* considers *only* the sufficiency of the first Amended Complaint"—to include an implicit ruling on the validity of the Second Amended Complaint. The court's language reflects an intention to limit the scope of the ruling, not to expand it. Moreover, an "implicit[]" "nullif[ication]" of the Second Amended Complaint would be uncharacteristic of the court's only other remarks on that issue. During the motions hearing, the court had announced that, because the defendants had not yet filed their motion to strike, any such motion was "not in front of the Court at th[at] time." Everything that the court said at the hearing and in its opinion is consistent with the conclusion that the court intended to rule first on the motion to dismiss the First Amended Complaint and then make a separate ruling, in due course, on the motion to strike the Second Amended Complaint.[8]

Beginning with their premise that the Order Dismissing Amended Complaint was a final judgment, the plaintiffs characterize the subsequent orders regarding the status of the Second Amended Complaint as "post-judgment" rulings. The plaintiffs observe that the court signed its dismissal order on October 16, 2018. On the following day, the plaintiffs filed their Motion for Leave to File Second Amended Complaint, seeking "leave to file the Second Amended Complaint that was already filed . . . retroactively to" the date it had been filed. That motion did not even mention the dismissal order, let alone argue that the court should revise any aspect of that order. In fact, it is unclear whether

[8] Furthermore, it is conceivable that the court might have granted leave to file the Second Amended Complaint, only to dismiss the Second Amended Complaint because it contained the same flaws as its predecessor.

the plaintiffs even knew of the dismissal order when they filed the motion to amend, as the order was not entered on the docket until two days after they filed the motion. The plaintiffs nevertheless assert that "a motion to amend a complaint" filed after a final judgment "is also a motion to revise and/or amend the judgment[.]" The plaintiffs theorize that, because the court had already signed an order that (in the plaintiffs' view) was the final judgment, their motion for retroactive leave "converted in status to a post-judgment motion to be properly disposed of under Maryland Rule 2-534[.]"

Under Rule 2-534, a motion to alter or amend a judgment is treated as timely if it is filed "after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket[.]" Md. Rule 2-534; *see Law Offices of Taiwo Agbaje, P.C. v. JLH Props., II, LLC,* 169 Md. App. 355, 366 (2006). Under Rule 8-202(c), a notice of appeal filed while a timely motion to alter or amend a final judgment is pending "shall be treated as having been filed on the day the postjudgment motion is withdrawn or disposed of by the court." *Doe v. Sovereign Grace Ministries, Inc.*, 217 Md. App. 650, 668 (2014) (citing *Waters v. Whiting*, 113 Md. App. 464, 474 (1997)). According to the plaintiffs, "the savings clause of Maryland Rule 8-202(c)" should operate to "carr[y] forward the Notice of Appeal to the time of that post-judgment disposition."

As the defendants point out, the relation-forward "effect of Rule 8-202(c) does not apply to a motion for reconsideration of a non-appealable interlocutory order, and has no bearing on the effectiveness of a notice of appeal filed while such a motion remains pending." *Id.* at 669 (citing *Carr v. Lee*, 135 Md. App. 213, 228 (2000)). Thus, the

plaintiffs' entire theory depends on their premise that the Order Dismissing Amended Complaint was a final judgment. As explained previously, we do not agree with that initial premise.

In addition to arguing that this Court should deny the motion to dismiss the appeal, the plaintiffs implore us not to consider the motion. The plaintiffs contend that the defendants should be "estopped" from even "arguing that the Circuit Court's Order of October 19, 2018, was not a final judgment." Although the defendants cite no authority in this regard, they appear to invoke the doctrine of judicial estoppel.

The plaintiffs' estoppel argument focuses on a statement from the defendants' memorandum in opposition to the Motion for Leave to File Second Amended Complaint. There, the defendants argued that allowing the untimely pleading "would also cause an unnecessary burden on th[e] [c]ourt, as [the trial judge] ha[d] already reviewed the record . . . and rendered a decision that completely disposes of the case." "Thus," the defendants asserted, "th[e] [c]ourt should not grant Plaintiffs leave to amend, the Second Amended Complaint should be stricken, and this case properly closed." The plaintiffs characterize the statement that the court "rendered a decision that completely disposes of the case," as an argument that "the Order of October 19, 2018, was a final judgment." The plaintiffs, going even further, say that, by making that statement, the defendants were "forcefully" asserting "that in the absence of the grant of a motion for leave to amend, the Second Amended Complaint had not yet become the operative complaint[.]"

We do not agree. On its own, the statement that the court "rendered a decision that completely disposes of a case" does not mean that the court has issued an order with

all necessary attributes of a final judgment. In context, the defendants made it clear that their position was that the case could not be "properly closed" until the court issued an order striking the Second Amended Complaint. Their position is identical to the positions that they later advanced in the circuit court and in this Court.

Even if the defendants had argued that the order of October 19, 2018, was a final judgment (which they did not), they would not be barred from advancing a different legal theory on appeal. Generally, "to assert a claim of judicial estoppel, a party must show that three circumstances exist: '(1) one of the parties takes a factual position that is inconsistent with a position it took in previous litigation, (2) the previous inconsistent position was accepted by a court, and (3) the party who is maintaining the inconsistent position must have intentionally misled the court in order to gain an unfair advantage.'" *Kamp v. Department of Human Servs.*, 410 Md. 645, 673 (2009) (quoting *Dashiell v. Meeks*, 396 Md. 149, 171 (2006)). Under this doctrine, "the position sought to be estopped must be one of fact, *rather than a legal argument*." *Montgomery Cty. Pub. Schs. v. Donlon*, 233 Md. App. 646, 675 (2017) (emphasis in original) (quoting *Thomas v. Bozick*, 217 Md. App. 332, 341 n.5 (2014)). The question of whether an order is a final judgment is a question of law for the appellate courts, not one of fact for the trial courts. *See, e.g., Monarch Acad. Baltimore Campus, Inc. v. Baltimore City Bd. of Sch. Comm'rs*, 457 Md. 1, 40 (2017).

Moreover, the plaintiffs fail to explain how the other necessary elements of judicial estoppel are present. The record does not establish that the court accepted the position that the Order Dismissing the Amended Complaint was a final judgment or that

the defendants intentionally misled the court in order to gain an unfair advantage. In fact, the defendants fully explained their position that the "October 19, 2019 Opinion and Order [was] not a final judgment" when they made a motion for reconsideration on November 26, 2018. The defendants' position was that the time for taking an appeal would begin to run once the court struck the Second Amended Complaint. Thus, they could not have obtained any unfair advantage, because they provided the plaintiffs with more than a fair opportunity to protect their appellate rights by filing another notice of appeal after the court struck the Second Amended Complaint.[9]

Overall, we conclude that this appeal should be dismissed under Md. Rule 8-602(b), because the plaintiffs filed the notice of appeal before the entry of final judgment on January 24, 2019. Ultimately, the plaintiffs here are attempting to challenge a judgment from which they did not appeal.

II.

If the issue were properly before us on an appeal from the final judgment, we would perceive no error in the conclusion that absolute privilege defeats the plaintiffs' claims based on the emails that the defendants sent to Annapolis City officials.[10] As the plaintiffs recognize, the question of whether a statement made in connection with an

[9] Finally, even if the defendants made no motion to dismiss, this Court "may dismiss an appeal" either "on motion or on [its] own initiative." Md. Rule 8-602(a).

[10] The plaintiffs do not dispute that, if the statements are entitled to absolute privilege, then this privilege bars suit not only for defamation but also for other alleged torts arising out of the privileged statement. *See generally O'Brien & Gere Eng'rs, Inc. v. City of Salisbury*, 447 Md. 394, 411-14 (2016); *Mixter v. Farmer*, 215 Md. App. 536, 545-50 (2013).

administrative proceeding may be entitled to absolute privilege "is 'decided on a case-by-case basis and . . . in large part turn[s] on two factors: (1) the nature of the public function of the proceeding and (2) the adequacy of procedural safeguards which will minimize the occurrence of defamatory statements.'" *Imperial v. Drapeau*, 351 Md. 38, 46 (1998) (quoting *Gersh v. Ambrose*, 291 Md. 188, 197 (1981)).

Absolute privilege is not "limited to testimony given as a witness in the course of a hearing, whether judicial or administrative." *Id.* Rather, "statements made with the direct purpose or effect of producing a judicial or quasi-judicial proceeding" may qualify for absolute privilege if "the proceeding, *which results from the statement*, serves an important public interest and possess[es] adequate procedural safeguards." *Norman v. Borison*, 418 Md. 630, 653-54 (2011) (emphasis in original). In other words, statements may be absolutely privileged not only where a proceeding is "ongoing" at the time of the statement but also where a proceeding is at least "'contemplated in good faith and under serious consideration.'" *Id.* at 657-58 (quoting Restatement (Second) of Torts § 588 cmt. e (2006)). As the plaintiffs concede, complaints that "trigger an administrative investigation with the potential of subsequent proceedings similar to those under the Maryland Administrative Procedure Act[] may be entitled to an absolute privilege[.]"

Contrary to the plaintiffs' suggestion, the Court of Appeals has not limited this privilege to circumstances in which the complainant is subject to penalties for making false statements in the complaint. The Court has extended this privilege even where the complaint is not made under oath or under penalty of perjury. *See Reichardt v. Flynn*, 374 Md. 361, 377 (2003) (verbal complaints made to public school authorities about

perceived misconduct of a teacher, where any disciplinary action against the teacher was subject to administrative challenge); *Imperial v. Drapeau*, 351 Md. at 40 (letters of complaint sent to elected officials about alleged misconduct of EMT, where any adverse action against the EMT was subject to administrative challenge). Nor is this privilege limited, as the plaintiffs say, to complaints that implicate "extremely pressing public policy concerns." Rather, absolute privilege ordinarily "should apply" where "the nature of the public function of the proceeding is that it acts to protect a socially important interest[.]" *Offen v. Brenner*, 402 Md. 191, 207 (2007).

The plaintiffs appear to agree that the purpose of the defendants' emails was to report alleged violations of the Annapolis City Code to City officials. According to the plaintiffs, the emails included accusations that the plaintiffs were "violating rental housing laws and fire safety codes of the City of Annapolis" and were "not be[ing] 'completely honest with Planning and Zoning,'" by "tak[ing] 'short cuts'" such as allowing tenants to move into an unfinished property without a rental license, avoiding the installation of a sprinkler system, and removing an exterior fire alarm. The plaintiffs go on to assert that, by sending the emails, the defendants "sought to trigger administrative enforcement action . . ., which could have immediately stopped work at the job site[.]" The plaintiffs fail to explain why, in such an event, the resulting proceeding either would fail to serve a socially important interest or would possess inadequate procedural safeguards to protect a property owner.

The plaintiffs emphasize that the defendants published their statements not only to officials in the Department of Planning and Zoning, which the plaintiffs say "would have

been the appropriate agency" to which to report Code violations, but also to "city employees and elected officials who had no power to enforce" alleged Code violations. As the circuit court correctly noted, however, the Court of Appeals does not require that a complainant "at the peril of defending a defamation action, sort through the complexities of governmental organization" to ensure that the complaint is "made directly to the appropriate body[.]" *Imperial v. Drapeau*, 351 Md. at 53. "Rather, it [is] appropriate for [a complainant] to invoke the 'constituent service' aspect of representative government in order to have the complaint reach the governmental agency that was charged with the responsibility to investigate." *Id.* at 53-54. Here, the complaints "in fact reached the appropriate investigating authority," and under the Court of Appeals' precedents, "that is all that was required" for their complaints to have a sufficient connection to proceedings by that agency. *Id.* at 54.

The plaintiffs insist that no procedural safeguards existed here, "because no administrative proceeding was ever initiated." After the complaints reached the officials in the Department of Planning and Zoning, those officials "determined that the [construction] project was in compliance with the law." In our assessment, this fact does not show that the safeguards were inadequate; it shows that the procedures worked as they were designed to work. In this regard, the outcome is no different from the outcome in *Imperial v. Drapeau*, 351 Md. at 43, where the letter of complaint was forwarded to the appropriate officials who then concluded that no misconduct had occurred and decided to take no adverse action. It is true here that "the alleged defamation occurred before a hearing or trial could take place at which the defamatory statement could be

rebutted." *Reichardt v. Flynn*, 374 Md. at 377. Of course, "[t]his same situation, . . . is going to exist in every case in which . . . the complaint initiates an administrative proceeding." *Id.* at 376.

Tellingly, the plaintiffs devote much their argument to criticisms of the majority opinions in *Imperial v. Drapeau* and *Reichardt v. Flynn*, rather than an attempt to show that the circuit court misapplied those precedents. Yet as the defendants aptly explain, this Court has a duty "to 'follow what a majority of its members discern to be the precept to be drawn' from the decisions of the Court of Appeals." *Scarborough v. Alstatt*, 228 Md. App. 560, 578 (2016) (quoting *Loyola Fed. Savings & Loan Ass'n v. Trenchcraft, Inc.*, 17 Md. App. 646, 659 (1973)). Even if we were to agree with criticisms of the controlling precedent regarding absolute privilege, "we may not entertain the [plaintiffs'] invitation to adopt and apply a new standard of law in contravention of existing Court of Appeals' precedent." *Shaarei Tfiloh Congregation v. Mayor & City Council of Baltimore*, 237 Md. App. 102, 145 (2018).

In sum, we see no error in the circuit court's application of absolute privilege. Accordingly, even if the plaintiffs had appealed from the circuit court's final judgment, their appeal would be unsuccessful.

MOTION TO DISMISS GRANTED. APPEAL DISMSSED. COSTS TO BE PAID BY APPELLANTS.