

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 008

September Term, 2019

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SACHINDER N. GUPTA

v.

MARYLAND ENVIRONMENTAL SERVICE

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Fader, CJ,  
Meredith,  
Wright, Alexander, Jr.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Meredith, J.

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Filed: April 21, 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.

Sachinder N. Gupta (“Gupta”), appellant, filed suit in the Circuit Court for Anne Arundel County against Maryland Environmental Service (“MES”), appellee, alleging a violation of his right to exercise free speech under Article 40 of the Maryland Declaration of Rights (Count I), and defamation (Count II). MES filed a motion to dismiss both counts for failure to state a claim. After a hearing, the circuit court granted MES’s motion and dismissed the claims against MES, with prejudice, on the ground that the claims were barred by the doctrine of sovereign immunity. Gupta noted this appeal. The sole question presented for our review is:

Whether the Circuit Court erred in Granting MES’s Motion to Dismiss [the] Amended Complaint?

We answer “yes” to that question. We will vacate the judgment of the circuit court and remand the case for further proceedings.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The following factual background regarding this case is drawn from the allegations in Gupta’s amended complaint. MES is a State agency that provides environmental and technical services to both the government and private entities. The statute creating MES is codified in Maryland Code (2001, 2015 Repl. Vol., 2019 Supp.), Natural Resources Article, § 3-103.

In 1994, the Maryland Port Administration contracted with MES for MES to provide planning, permitting, designing, engineering, and management services for the expansion of the Cox Creek Dredged Material Containment Facility to increase the facility’s capacity for the storage of dredged material (“the Cox Creek Project”). MES, in

turn, hired three engineering firms—Moffat & Nichols, Gahagan & Bryant Associates, Inc., and Century Engineering—to provide design and engineering services for the Cox Creek Project.

Moffat & Nichols, in turn, retained SaLUT, Inc. (“SaLUT”), to provide consulting services in connection with the Cox Creek Project. Gupta was hired by SaLUT as a Senior Engineer for the sole purpose of assisting SaLUT on the Cox Creek Project. While Gupta was still working for SaLUT, however, he became affiliated with another firm, Hart Miller Assoc., LLC.

The Hart Miller Island Dredged Material Containment Facility was at one time also used for deposits of dredged material, but that location has been closed since 2010 pursuant to Maryland Code (1982, 2013 Repl. Vol., 2019 Supp.), Environment Article, § 5-1103.

On February 3, 2017, Gupta, acting as a representative of Hart Miller Assoc., LLC, met with an official of the Maryland Port Administration, and made a presentation proposing that Hart Miller Island be “reopened” for the purpose of receiving additional dredged material. In Gupta’s presentation to the Maryland Port Administration, Gupta estimated that, if the Hart Miller Associates’ proposal was adopted and implemented, that “could . . . save[] the State up to about \$150,000,000.”

After the February 3 meeting with Gupta, an official of the Maryland Port Administration shared a copy of Gupta’s PowerPoint presentation with MES. After persons at MES reviewed the PowerPoint proposal, MES sent Moffat & Nichols,

Gahagan & Bryant Associates, Inc., and Century Engineering each a letter on or about April 7, 2017, asserting that Gupta had a “conflict of interest” and directing those entities to immediately remove Gupta from any assignments related to either the Cox Creek Project or the Hart Miller Project. As a result of receiving the April 7 letters from MES, Moffat & Nichols, Gahagan & Bryant Associates, Inc., and Century Engineering insisted that SaLut remove Gupta from the Project. As a result, Gupta was “forced to remove himself from all work on the Project.”

Believing that his reputation had been defamed and damaged, Gupta provided written notice of his claims against MES to the State of Maryland Treasurer on February 7, 2018, consistent with the notice requirements of the Maryland Tort Claims Act (“MTCA”), as codified in Maryland Code (1984, 2014 Repl. Vol, 2019 Supp.), State Government Article (“SG”), § 12-106(b).

On April 6, 2018, Gupta filed a complaint in the Circuit Court for Anne Arundel County asserting five causes of action against MES, Jane Doe, and John Doe. MES filed a motion to dismiss the complaint pursuant to Maryland Rule 2-322(b)(2) for failure to state a claim upon which relief could be granted. Before the circuit court ruled on MES’s motion to dismiss, Gupta filed an amended complaint on September 21, 2018.

In the amended complaint (which is the subject of this appeal), Gupta abandoned his claims against Jane Doe and John Doe, and asserted two causes of action against MES alone: Count I, alleging a violation of his right to exercise free speech under Article 40 of the Maryland Declaration of Rights; and Count II, alleging defamation.

The alleged facts common to his claims for relief in the amended complaint included the following:

8. On or about February 3, 2017, Gupta, on behalf of Hart Miller Assoc., LLC (HMA) made a presentation directly to MPA [*i.e.*, the Maryland Port Administration] proposing that MPA consider re-opening Hart Miller Island Disposal Facility. If implemented, this could have saved the State up to about \$150,000,000. Gupta pointed out that the proposal by HMA would involve changing the law, *i.e.*, extending the closure date of the Hart Miller Facility.

\* \* \*

14. On or about April 7, 2017, MES, through its personnel, sent letters to GBA [*i.e.*, Gahagan & Bryant Associates], M&N [*i.e.*, Moffat & Nichol] and Century Engineering directing them to immediately remove Gupta from assignments related to the Cox Creek Project and the Hart Miller Project due to a falsely asserted “conflict of interest.” In sending these letters and asserting a “conflict of interest,” MES’s personnel: acted within the scope of their employment and their duties authorized by MES; acted during the regular course of MES’s business, acted in a manner related, incidental and in furtherance of MES’s business and operations; and did not act for the personnel’s own personal benefit. MES made these false assertions even though Gupta did not have any conflict of interest that would in any way limit his ability to work on the Cox Creek Project . . . .

15. In the separate letters sent to GBA, M&N and Century Engineering, MES referenced the definition of “conflict of interest” in COMAR 21.05.08.08; however, MES knew or should have known that this section was not applicable to Gupta because Gupta is not a “Person” under the regulation, COMAR 21.05.08.08.A(2)(b)(ii), or under the contracts. . . .

\* \* \*

20. As a result of the false and defamatory statements made by MES, GBA and M&N insisted that SaLUT, Gupta’s employer, remove Gupta from the Project. To comply with these demands, Gupta was forced to remove himself from all work on the Project.

21. As a direct and proximate result of MES' actions and false and defamatory statements, the character and reputation of Gupta were greatly damaged.

22. As a direct and proximate result of MES' actions and defamatory statements, Gupta's professional reputation in the industry, which he has spent more than four decades building, has been substantially impaired and damaged.

23. As a direct and proximate result of MES' actions and defamatory statements, Gupta has suffered and will continue to suffer substantial loss of income, has suffered and will continue to suffer severe mental anguish and personal humiliation, and has suffered and will continue to suffer other consequential damages.

24. Within one (1) year of the damage sustained by Gupta, Gupta sent to the Maryland State Treasurer, via certified mail, return receipt requested, notification of a claim under the Maryland Tort Claims Act, §§ 12-301 *et seq*[], of the Maryland State Government Article of the Maryland Annotated Code.

In his amended complaint, Gupta asked for compensatory damages exceeding \$75,000, an award of attorney's fees, the costs of the proceedings, and "such other and further relief" as the court deems just.

Pursuant to Rule 2-322(b)(2), MES moved to dismiss both counts of the amended complaint for failure to state a claim upon which relief could be granted. With respect to Count I, MES argued that Gupta failed to show how his Hart Miller presentation "was of a matter of public concern and not for his personal benefit so as to require constitutional protection." With respect to Count II, MES contended that Gupta failed to plead sufficient facts to state a defamation claim. Observing that the amended complaint did not allege that he was ever terminated or discharged by SaLUT, MES asserted that, because Gupta made only "conclusory allegations that he suffered harm," he did not

allege sufficient facts to support any claim for damages. MES also argued, in the alternative, that, even if the court found that the elements of defamation were sufficiently pleaded, his defamation claim must fail because the MES procurement officer's letter would be protected from liability by the "common interest privilege." MES noted further that Gupta did not allege in his amended complaint that the MES procurement officer acted with the malice that would be required to defeat the conditional privilege.

The circuit court heard argument on MES's motion to dismiss the amended complaint on January 18, 2019, and February 25, 2019. On February 25, the circuit court ruled from the bench. The circuit court focused on the immunity provision of the MTCA in its analysis and dismissed both counts of Gupta's amended complaint, explaining:

**THE COURT:** The Maryland Tort Claims Act allows the Plaintiff to sue the State for intentional and constitutional torts. **And having expressly waived its sovereign immunity where any tortious act or omission of State personnel that is not within the scope of other duties of the State personnel or is made with gross negligence or malice.**

\* \* \*

. . . Mr. Gupta's complaint does indicate that MES, through its personnel, were acting within the scope of their employment when they allegedly made false and defamatory statements about Gupta to three separate contractors.

Therefore, the alleged facts would not support a finding that the procurement officer's action were outside the scope of his or her duties.

Similarly, the facts do not support an inference or a finding by this Court that the procurement officer acted with malice or gross negligence. The complaint indicates – has a couple of pages of allegations regarding the defamatory statements or other representations and, just by way of example, . . . MES thereafter falsely represented that Gupta was proposing to terminate the Cox Creek project and was proposing to excavate or

remove the dredged material from Hart Miller and take it away to some unspecified location.

\* \* \*

[T]he Court is unable to make an inference that . . . the pleadings would support [a] finding that MES is grossly negligent because the conclusion would not be supported in the law.

The pleadings indicate that MES knew or should have known that the definition of conflict of interest was not applicable to Gupta because Gupta is not a person under the regulation, COMAR 21.05.08.08 because he did not have the authority to control or supervise all or a portion of the work for which a bid or offer is made.

However, COMAR defines person more broadly than indicated. . . . [I]n 21.01.02.01.(b)(64), person means any individual or corporation, partnership, sole proprietorship, joint stock company, joint venture, unincorporated association, union, committee, club or other organization or legal entity.

Such a definition would include Mr. Gupta under that definition.

**So, given that the State has not waived its sovereign immunity when the State employee[’s conduct] is within the scope of its public duties and made without malice or gross negligence, I will grant the Defendant’s motion to dismiss.**

(Emphasis added.) Gupta noted this timely appeal.

### STANDARD OF REVIEW

Pursuant to Maryland Rule 2–322(b)(2), a defendant may, in a civil suit in the circuit court, seek dismissal of a case through a preliminary motion when the complaint fails “to state a claim upon which relief can be granted.” In *Davis v. Frostburg Facility Operations, LLC*, 457 Md. 275, 284–85 (2018), the Court of Appeals described how an appellate court should review the circuit court’s ruling on a motion to dismiss:



The standard of review of the grant or denial of a motion to dismiss is whether the trial court was legally correct. In reviewing the ruling on the motion to dismiss, 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. When examining the pertinent facts, the Court limits its analysis to the four corners of the complaint[.] The pleader must set forth a cause of action with sufficient specificity—bald assertions and conclusory statements by the pleader will not suffice.

(Citations and quotation marks omitted.) We review the court’s legal conclusions *de novo*. *Wireless One v. Mayor of Baltimore City*, 239 Md. App. 687, 692 (2018), *aff’d*, 465 Md. 588 (2019).

### DISCUSSION

Gupta contends that the circuit court’s judgment should be reversed because it was premised upon two legal errors. First, Gupta claims that the circuit court erroneously interpreted the immunity provision of the MTCA. Second, Gupta claims that the circuit court erroneously found that he was a “person” within the meaning of the COMAR definition and therefore subject to the conflict of interest regulation in COMAR 21.05.08.08.

MES agrees with Gupta that the circuit court incorrectly interpreted the immunity provisions of the MTCA. And we agree with that as well.

Although sovereign immunity generally bars actions against the State for money damages, *Rodriguez v. Cooper*, 458 Md. 425, 451 (2018), “the General Assembly has enacted a limited waiver of the State’s sovereign immunity[.]” *Id.* The State has partially waived immunity for tort claims in SG § 12-104(a), which states:

(a)(1) Subject to the exclusions and limitations in this subtitle and notwithstanding any other provision of law, the immunity of the State and of its units is waived as to a tort action, in a court of the State, to the extent provided under paragraph (2) of this subsection.

(2) The liability of the State and its units may not exceed \$400,000 to a single claimant for injuries arising from a single incident or occurrence.

One of the “exclusions and limitations” referred to in SG § 12-104(a)(1) is set forth in SG § 12-104(b), which provides:

### **Exceptions**

(b) Immunity is not waived under this section as described under § 5-522(a) of the Courts and Judicial Proceedings Article.

Although written in a manner that is potentially confusing, SG § 12-104(b) incorporates § 5-522(a) of Maryland Code (1973, 2013 Repl. Vol., 2019 Supp.), Courts and Judicial Proceedings Article (“CJP”), which, in turn, describes certain circumstances under which the State’s sovereign immunity is *not* waived as follows:

### **Immunity of State not waived**

(a) Immunity of the State is not waived under § 12-104 of the State Government Article for:

(1) Punitive damages;

\* \* \*

(4) Any tortious act or omission of State personnel that:

(i) Is **not within** the scope of the public duties of the State personnel; or

(ii) Is made **with** malice or gross negligence; . . . .

(Emphasis added.)

But, conversely, the waiver of sovereign immunity described in SG § 12-104(a) *is* effective with respect to tortious acts or omissions of State personnel that *are* committed in the course of actions *within* the scope of the personnel’s public duties and *without* malice or gross negligence. To add to the potential for confusion, CJP § 5-522(b) extends to *individuals who are State personnel* conditional statutory immunity “from [personal] liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence . . . .”<sup>1</sup> The immunity provided to personnel under CJP § 5-522(b) protects State personnel from incurring personal liability so long as their conduct is “within the scope of [their] public duties” and is “without malice or gross negligence.” But it does not generally negate the State’s waiver of immunity pursuant to SG § 12-104(a) for tort liability, and any vicarious liability the State might have as the principal, for the tortious conduct of its personnel.

In the present case, Gupta’s amended complaint alleges that State personnel at MES committed tortious acts while acting within the scope of their public duties, and

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<sup>1</sup> CJP § 5-522(b) states:

(b) State personnel, as defined in § 12-101 of the State Government Article, are immune from suit in courts of the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence, and for which the State or its units have waived immunity under Title 12, Subtitle 1 of the State Government Article, even if the damages exceed the limits of that waiver.

there was no allegation that the acts were committed with malice or amounted to gross negligence. Consequently, the *waiver* of sovereign immunity described in SG § 12-104(a) *is applicable* to the torts alleged in Gupta’s amended complaint. And the exception described in CJP § 5-522(b)—and mentioned in SG § 12-104(b)—is *not* applicable to bar the claims against the State.

Because the court’s judgment dismissing the amended complaint was based upon an incorrect interpretation of the law, we shall vacate the judgment of the circuit court and remand the case for further proceedings.

We do not reach Gupta’s second contention (that the circuit court erroneously found that he was a “person” within the meaning of the cited COMAR provision); the court’s oral observations on that issue were not a dispositive ruling on the merits of that point.

MES contends, however, that we should affirm the circuit court’s judgment by ruling that the court could have properly dismissed the amended complaint on other grounds. MES urges us to adopt its contention that the “business proposal” presented by Gupta on behalf of Hart Miller Associates is not “protected speech” concerning “a matter of public concern.” And, with respect to the defamation claim, MES urges us to rule that the “common interest” privilege is clearly applicable to bar that cause of action.

Although there are some circumstances in which we can consider whether a circuit court’s dismissal could be affirmed on grounds other than the reason stated by the motion judge, we decline to do so in this case. We note that neither party filed any affidavit or

submitted any evidentiary material during the course of the proceedings on the motion to dismiss. In its brief in this Court, MES referred to numerous facts that were outside the four corners of the amended complaint even though our standard of review obligates us to consider only the well-pleaded allegations in the light most favorable to the non-moving party. Under the circumstances, we conclude that the circuit court should consider the merits of the parties' respective arguments on remand, and that a motion for summary judgment might provide a better vehicle for presenting the parties' positions.

In remanding the case to the circuit court, we express no view as to whether Gupta sufficiently stated a claim upon which relief can be granted in Counts I and II of his amended complaint. We hold only that the circuit court was incorrect as a matter of law in granting MES's motion to dismiss on the basis of sovereign immunity.

**JUDGMENT OF THE CIRCUIT COURT  
FOR ANNE ARUNDEL COUNTY  
VACATED. CASE REMANDED FOR  
FURTHER PROCEEDINGS CONSISTENT  
WITH THIS OPINION. COSTS TO BE  
PAID BY APPELLEE.**