Circuit Court for Howard County
Case No. C-13-CV-21-000108

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 705

September Term, 2023

LISA KIM

v.

JENNIFER SOLPIETRO

Ripken,
Albright,
Wright, Alexander, Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: April 3, 2024

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

Appellant, Lisa Kim ("Kim"), filed an action in the Circuit Court for Howard County against Appellee, Jennifer Solpietro ("Solpietro"), alleging that Solpietro published defamatory statements about Kim on Facebook[1] and stated causes of action for defamation, intentional infliction of emotional distress, and false light. Kim subsequently filed a second amended complaint, adding an allegation that Solpietro made false and defamatory statements with actual malice. Solpietro then filed a motion to dismiss, or in the alternative, motion for summary judgment, arguing *inter alia*, that Kim was a public figure and that Solpietro's statements were thus protected by the fair comment privilege.

The circuit court held a hearing on Solpietro's motion, and subsequently issued an order denying the motion and an opinion holding that Kim was a limited public figure. The case proceeded to trial, and a jury found that while Solpietro defamed Kim, she did not do so with actual malice, thus, Kim was not awarded any damages. Kim filed a motion for a new trial on the issue of damages and a motion to alter or amend the judgment. The court denied the motions. Kim noted this timely appeal and presents the following issue for our review:[2] Whether the circuit court erred in requiring Kim to prove actual malice to succeed

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

[2] Rephrased from:

> Did the Circuit Court err in instructing the jury as to actual malice utilizing the definition that would have been applicable had Defendant pled and preserved a privilege defense, and then submitting the actual malice issue to the jury based only upon that jury instruction, when pleading a privilege defense in the Answer is a mandatory requirement to preserve the right to

on her claim of false light when Solpietro failed to assert a privilege defense in her answer. For the reasons to follow, we shall reverse and remand the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Controversy and Subsequent Facebook and Blog Posts

Kim is a resident of Howard County and was the chairperson of an organization called "Citizens for a Strong and Safe Howard County (in Opposition of CB 63-2020)," a position she assumed in December of 2020. The organization was formed to gather signatures from Howard County voters to put Council Bill ("CB") 63-2020,[3] also known as the "Sanctuary County" bill or "Liberty Act," to referendum on the November 2022 ballot.[4] Solpietro, also a resident of Howard County, is the author of the Howard County Progress Report, a news blog that she started in 2020 to cover and comment on local issues and events.

On February 10, 2021, Solpietro posted the following comment on the Howard County Progress Report's Facebook page:[5]

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present such defense, and Defendant herein failed to plead or preserve (and also failed to seek leave to amend the Complaint)?

[3] CB 63-2020 was passed by the Howard County Council on December 7, 2020, and signed into law by Howard County Executive Calvin Ball on December 10, 2020. The Act prevents county employees from inquiring about the immigration status of county residents and otherwise prevents county employees and law enforcement from participating in immigration enforcement.

[4] Per the Local Referendum Petition, registered voters of Howard County would vote for the approval or rejection of CB 63-2020 in the November 2022 general election.

[5] Kim also asserts that Solpietro posted the same comments on Twitter. "Twitter is a social networking platform that allows a person to post and read short messages called 'tweets.'

> I hope infamous local racist Lisa Kim recognizes that getting petition signatures under false pretenses is not actually "polling voters."

Attached to the Facebook post was an article from the Baltimore Sun, titled "Petition in Howard County seeks to create referendum on new sanctuary law."

B. Kim's Action for Defamation

On February 11, 2021, Kim filed a complaint against Solpietro alleging defamation, intentional infliction of emotional distress, and false light. Kim subsequently filed two amended complaints. Kim's second amended complaint added an allegation that Solpietro made false and defamatory statements with actual malice, stating "Furthermore, the Defendant [Solpietro] knowingly made the aforementioned false and defamatory statements with actual malice, i.e., with knowledge that the statements were false or made with reckless disregard of the truth."

C. Motion to Dismiss, or in the alternative, Motion for Summary Judgment

On March 3, 2021, Solpietro filed a special motion to dismiss,[6] or in the alternative,

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Tweets can be up to 280 characters long and can include links to websites and other resources." *United States v. Loughry*, 983 F.3d 698, 702 (4th Cir. 2020). However, based upon the record provided, Kim's assertion does not appear to be accurate. The only tweet provided in the record was posted by someone named Ainy Kazmi. The tweet posted by Kazmi states, "I was approached and told that if I supported the sanctuary bill, I should sign. If I hadn't known the CB63 passed, I would have signed." Solpietro testified at trial that before she posted her Facebook comment on February 10th, she saw the tweet from Ainy Kazmi. Solpietro testified that she relied on the tweet posted by Kazmi when Solpietro posted her comments on Facebook.

[6] One of the grounds for Solpietro's "special" motion to dismiss was that Kim's action was a strategic lawsuit against public participation ("SLAPP") and, therefore, should be dismissed pursuant to section 5-807 of the Courts and Judicial Proceedings Article ("CJP") of the Maryland Code, which requires a hearing on such a motion "as soon as practicable." CJP § 5-807. Although not specifically indicated in Solpietro's motion, it appears the word

motion for summary judgment. Among the grounds for the motion, Solpietro asserted that Kim, by virtue of her position as chairperson of Citizens for a Strong and Safe Howard County, was a public figure. Solpietro also claimed that her statements about Kim were opinion protected by the fair comment privilege. A hearing was held in June of 2021 before the judge who later presided over the trial.[7] The circuit court subsequently issued an opinion and order dismissing the intentional infliction of emotional distress count and denying Solpietro's motion to dismiss the defamation and false light counts. The court also ruled that as a matter of law Kim was a limited public figure, and thus would be required to meet the actual malice standard for the defamation and false light claims, explaining:

> [I]t is clear to this Court that the Plaintiff is a public figure for limited purposes in relation to the Sanctuary County referendum[.] . . . The fact, as acknowledged by both parties' counsel, that many thousands of signatures by Howard County residents have been collected in support of the referendum also indicates substantial public interest. Public controversy is demonstrated since those signatures apparently seek repeal of an ordinance supported by others.
>
> . . . This Court finds, as a matter of law, that leading a public campaign to create a public referendum on an issue of public controversy is enough to make Plaintiff a public figure for that limited purpose.
>
> Thus, to succeed in a claim for defamation as a public figure, Plaintiff must be [sic] demonstrate that the alleged defamatory publication was made with "constitutional malice," that is, knowledge of its falsity or with reckless disregard of the truth. . . . Plaintiff has alleged that Defendant "knowingly" made false statements; Defendant denies this. This Court cannot resolve this

"special" was included in the title because of the SLAPP issue. The SLAPP issue is not raised on appeal and therefore, need not be addressed.

[7] In addition to the motion to dismiss, or in the alternative, motion for summary judgment, the court also considered Solpietro's motion for protective order and plaintiff's motion to disqualify counsel. However, these motions are not at issue on appeal and thus need not be addressed.

material dispute on the basis of current matters of record and under affidavit.

Following the denial of her motion to dismiss, Solpietro filed an answer to plaintiff's second amended complaint. Solpietro did not raise any affirmative defenses, including privilege, in her answer.

D. Pretrial and Trial

Following the denial of Solpietro's motion to dismiss, the parties proceeded with discovery. The parties each filed pretrial statements, and Solpietro indicated that prior rulings by the circuit court found Kim to be a public figure as a matter of law. Solpietro also filed a motion *in limine* requesting a ruling consistent with the court's prior ruling that Kim was a public figure and requiring Kim to demonstrate Solpietro acted with actual malice to recover damages at trial. The circuit court granted Solpietro's motion *in limine*, indicating that Kim did not file a timely opposition, and confirmed its prior ruling that Kim was "a public figure and must demonstrate malice on behalf of [Solpietro]."

A two-day jury trial was held in April of 2023. Both Kim and Solpietro testified as witnesses regarding the preceding facts. *See supra* Subsection A. Underlying Controversy and Subsequent Facebook and Blog Posts. On the first day of trial, Kim filed a memorandum, asserting that Solpietro waived the defense of privilege because she failed to assert the affirmative defense in her answer.[8] At the close of Kim's case, Solpietro's counsel made a motion for directed verdict. Solpietro asserted that Kim failed to produce

[8] The trial memorandum indicates that it was hand-delivered to Solpietro's counsel on the first day of trial, but it was not docketed by the court until three days later. However, based on the trial record, it is clear the memorandum was provided to the court on the first day of trial.

any evidence that Solpietro knowingly published false statements about Kim, and that Kim could not recover any damages for defamation because Kim was a public figure and could not establish that Solpietro acted with actual malice. Kim's counsel opposed the motion, reiterating that Solpietro failed to preserve the right to raise the affirmative defense of privilege in the answer filed, and thus, the defense was not preserved. The court denied the motion for directed verdict, holding that "the trier of fact is not barred from awarding damages" if Kim established that Solpietro's statement was "defamatory per se" and "clear and convincing evidence demonstrate[d] that it was made with actual malice[.]"[9]

At the close of the evidence, the court gave jury instructions, discussed the verdict sheet with the jury, and counsel for both parties made closing arguments. The verdict sheet that the court directed the jury to complete posed the following questions, with intermittent instructions:[10]

1. Do you find that the Defendant, Jennifer Solpietro, defamed Plaintiff Lisa Kim?

   Yes ___ No ___

   If your answer to Question No. 1 is YES, proceed to question No. 2.
   If your answer to Question No. 1 is NO, proceed to question No. 5.

2. Do you find that the Defendant, Jennifer Solpietro, defamed Plaintiff Lisa Kim with actual malice?

   Yes ___ No ___

[9] In addressing the motion for directed verdict, the court did not expressly rule on the issue raised by Kim that Solpietro waived the defense of privilege because she failed to assert the affirmative defense in her answer.

[10] Kim's counsel objected to the verdict sheet, reiterating that Solpietro waived the defense of privilege.

If your answer to Question No. 2 is YES, proceed to question No. 3.
If your answer to Question No. 2 is NO, proceed to question No. 5.

3. What amount of compensatory damages do you award Plaintiff Lisa Kim?

   _____Compensatory Damages

4. What amount of punitive damages do you award Plaintiff Lisa Kim?

   _____ Punitive Damages

5. Do you find that the Defendant committed the tort of placing Lisa Kim in a false light?

   Yes ___ No ___

   If your answer to Question No. 5 is YES, proceed to question No. 6.
   If your answer to Question No. 5 is NO, please do not answer the remaining questions.

6. Do you find that the Defendant, Jennifer Solpietro, placed Plaintiff Lisa Kim in a false light with actual malice?

   Yes ___ No ___

   If your answer to Question No. 6 is YES, proceed to Question No. 7.
   If your answer to Question No. 6 is NO, please do not answer the remaining questions.

7. What amount of compensatory damages do you award Plaintiff Lisa Kim?

   _____ Compensatory Damages

8. What amount of punitive damages do you award Plaintiff Lisa Kim?

   _____ Punitive Damages

The jury found that Solpietro did not defame Kim.[11] However, it did find that Solpietro committed the tort of placing Kim in a false light, although it did not find that Solpietro acted with actual malice. Thus, no damages were awarded to Kim. The circuit court subsequently entered judgment in favor of Solpietro.

Kim filed a motion for new trial, asserting that Solpietro's "waiver of any privilege defense negated the issue of actual malice, and thus [Kim] is entitled to damages." Kim also filed a motion to alter or amend the judgment, requesting that the court enter judgment in Kim's favor on the false light count and set the matter for a trial on damages only. Solpietro opposed both motions. The circuit court denied both of Kim's motions. This timely appeal followed.

DISCUSSION

A. Standard of Review

Where, as here, the question before this Court "involves an interpretation and application of Maryland constitutional, statutory [and] case law, our Court must determine whether the trial court's conclusions are legally correct under a *de novo* standard of review." *Schisler v. State*, 394 Md. 519, 535 (2006) (internal quotation marks and citations omitted).

[11] Specifically, during deliberations the jury completed the verdict sheet by checking "No" under Questions No. 1 and No. 2. Despite the directions on the verdict sheet to proceed to Question No. 5 if the answer to Question No. 1 is "No," the jury answered "No" to Question No. 2. The jury checked "Yes" under Question No. 5 and checked "No" under Question No. 6. The jury left Questions Nos. 3, 4, 7, and 8 on compensatory and punitive damages questions blank.

B. Parties' Contentions

Kim's primary assertion is that Solpietro failed to plead and preserve the affirmative defense of privilege in her answer to the second amended complaint. Kim contends that the circuit court "confused the difference between constitutional malice as part of [Kim's] case-in-chief vs. the actual malice necessary to overcome a privilege[.]" Kim further argues that the circuit court erred in allowing Solpietro to rely upon the privilege defense which led the court to instruct the jury on actual malice, an instruction that should not have been given to the jury nor submitted as part of the verdict sheet. Kim urges us to vacate the judgment and remand the case to the circuit court for a trial on damages only.

Solpietro counters that Kim, as a public figure, was required to plead and prove actual malice in her case-in-chief. Solpietro maintains that she appropriately raised the defense of privilege in her motion to dismiss and therefore, the defense was preserved. According to Solpietro, the jury's decision on Kim's claim for defamation was dispositive as to her claim of false light; therefore, she asserts that Kim's arguments regarding false light, after failing in her claim for defamation, are moot. Solpietro also contends that, if successful, Kim is not entitled to the relief she requests. Instead, Solpietro asserts that if this Court is persuaded that Kim is entitled to a remand, it must be for the entirety of the case, not solely on the issue of damages.

We agree with Kim that Solpietro failed to plead, and therefore preserve, the affirmative defense of privilege in her answer as required by the Maryland Rules. However, we disagree with Kim's position that we must remand for a trial on damages only. Accordingly, we reverse the judgment in this case and remand for a new trial.

C. Effect of Failure to Plead Privilege Defense in Answer

Pursuant to Maryland Rule 2-323, "privilege is an affirmative defense that is required to be set forth separately in the answer." *Gooch v. Maryland Mech. Sys., Inc.*, 81 Md. App. 376, 384 (1990); *see also* Md. Rule 2-323(g)(19). Whereas, Rule 2-322 provides that certain defenses shall be made by motion to dismiss filed before the answer. Md. Rule 2-322(a). Despite Solpietro's contention otherwise,[12] privilege is not one of those defenses. *See* Md. Rule 2-322(a) (requiring the following defenses to be asserted in an answer or motion to dismiss filed before an answer: (1) lack of jurisdiction over the person, (2) improper venue, (3) insufficiency of process, and (4) insufficiency of service of process). When a party has failed to plead any of the affirmative defenses enumerated in Rule 2-323(g) in the answer, "the plaintiff may usually assume there is no issue with respect to those defenses, and the case will proceed accordingly." PAUL V. NIEMEYER & LINDA M. SCHUETT, MARYLAND RULES COMMENTARY 365 (5th ed. 2019).

Kim relies on this Court's decision in *Gooch v. Maryland Mech. Sys. Inc.*, 81 Md. App. 376 (1990), to support her contention that Solpietro's failure to plead the affirmative defense of privilege in her answer constituted a waiver of that defense. John B. Gooch, the appellant, sued Maryland Mechanical Systems, Inc., the appellee, for libel. *Id*. at 379. One

[12] Solpietro incorrectly asserts that Rule 2-322 "states that defenses, including privileges, may be raised in a preliminary motion to dismiss, or*, if not so made*, may be made in the answer, or in any other appropriate manner after the answer is filed." (emphasis in original). Solpietro further claims that "[i]f defenses must be raised in a motion to dismiss or are otherwise waived, it so follows that defenses raised in a motion to dismiss are preserved." We have found no such authority, nor is any provided, to support this proposition and note that the defenses waived if not made in a motion to dismiss do not include privilege. *See* Md. Rule 2-322(a).

of the issues raised on appeal was whether the appellees possessed a conditional privilege to write the letter that formed the basis for the libel suit. *Id*. at 383. However, this Court held that it was unnecessary to answer that question because "the appellees waived the issue by failing to plead specially this affirmative defense in their answer." *Id*. The *Gooch* Court explained:

> Privilege is an affirmative defense that is required to be set forth separately in the answer. *See* Md. Rule 2-323(g)(20)(1989). Appellees did not set forth any affirmative defenses in their answer. . . . The appellees never attempted to amend their pleadings, pursuant to Rule 2-341, to include the affirmative defense of conditional privilege. . . . Only those defenses that are expressly set forth in Rule 2-324 . . . as being assertable at any time are non-waivable defenses.[13] Thus, we hold that the failure of a defendant to include an affirmative defense in its original answer or a properly amended answer bars the defendant from relying on the defense to obtain judgment in its favor.

Id. at 384–85 (internal citations omitted and footnote added).

Similarly, in *Bowser v. Resh*, 170 Md. App. 614 (2006), this Court held that that the trial court erred in granting summary judgment based on a release signed by the moving party, because the defendant did not include the defense of release in an answer or amended answer as required by Rule 2-323(g)(12). 170 Md. App. at 646 (citing *Gilbert v. Washington Suburban Sanitary Comm'n*, 304 Md. 658, 661 (1985) (noting that "the question of workmen's compensation as an exclusive remedy should have been raised as an affirmative defense.")); *see also Bagwell v. Peninsula Med. Ctr.*, 106 Md. App. 470,

[13] Maryland Rule 2-324 governs the preservation of certain defenses, and provides, "[a] defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party under Rule 2-211, an objection of failure to state a legal defense to a claim, and a defense of governmental immunity may be made in any pleading or by motion for summary judgment under Rule 2-501 or at the trial on the merits." Md. Rule 2-324(a).

508 (1995) (holding that appellees waived the affirmative defense of statute of limitations by failing to include that defense in their answer as required by Rule 2-323(g)(15)); *Ocean Plaza Joint Venture v. Crouse Constr. Co.*, 62 Md. App. 435, 451 (1985) (holding that court properly excluded evidence of waiver, where appellant failed to plead the defense in its answer as required by Rule 2-323(g)(18)).

In response, Solpietro attempts to distinguish *Gooch* from the case at bar. Solpietro asserts that unlike the present case, the appellant, John B. Gooch, was not a public figure and the appellees never claimed that he was a public figure. In *Gooch*, the appellees first asserted conditional privilege in a request for admissions, and the appellees' motion for summary judgment subsequently relied upon the defense. 81 Md. App. at 384. Solpietro relies on the *Gooch* Court's reasoning that "the requirement that affirmative defenses be set forth separately . . . is designed to give notice to the plaintiff of the defenses asserted in [their] complaint" and the rule "prevents unfair surprise." *Id*. at 384–85. Solpietro emphasizes that the appellees in *Gooch* did not raise the privilege defense until approximately three years after the original suit was filed. *Id*. at 379–80, 385.

While we acknowledge that Solpietro asserted that her comments about Kim were protected by the fair comment privilege in her motion to dismiss, or in the alternative, motion for summary judgment, raising the defense for the first time in such motions does not comport with the express requirement in Rule 2-323 that affirmative defenses be set forth separately in the answer to the complaint. *See* Md. Rule 2-323(g)(19). Moreover, at no time did Solpietro take any steps to amend the answer filed in accordance with Rule 2-341(a) to add the privilege defense. Although this Court has stated that the purpose of the

rule is to prevent unfair surprise, we cannot overlook the requirement in Rule 2-323 or the caselaw which has consistently upheld the strict application of the rule. *See supra Gooch*, 81 Md. App. at 385; *see also supra* cases applying Md. Rule 2-323.

On the facts presented in this case, we conclude that Solpietro's assertion of the privilege defense in her motion to dismiss, or in the alternative, motion for summary judgment, does not satisfy the requirements of Rule 2-323(g) that such a defense must be raised specifically in a properly filed answer. Accordingly, the trial court committed reversible error in allowing Solpietro to rely upon the privilege defense and therefore, the actual malice instruction should not have been provided to the jury.

D. Actual Malice Standard

Having determined that Solpietro failed to plead, and therefore preserve, the affirmative defense of privilege in her answer, we need not reach Kim's assertion that the circuit court "conflated the 'Constitutional malice' standard with the standard necessary to overcome a fair comment privilege[.]" Moreover, it is not necessary to address Solpietro's contention that Kim was required to plead and prove actual malice in Kim's case-in-chief. However, recognizing that defamation law has been described as a "legal labyrinth" which "commentators, as well as the judiciary, have attempted to unravel" we take this opportunity to offer guidance on remand as these issues seem likely to reoccur. *Gooch*, 81 Md. App. at 378–79.

While the Supreme Court of the United States and Maryland appellate courts "have addressed a myriad of issues related to proof of defamation, First Amendment conditional privilege, and common law conditional privileges[,]" *Seley-Radtke v. Hosmane*, 450 Md.

468, 483 (2016), we limit our discussion to defamation actions involving public officials and public figures.[14] The United States Supreme Court addressed the field of defamation law in the landmark case of *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964), establishing what is now referred to as the constitutional malice standard. The Court held that a public official suing for defamatory statements relating to the official's public conduct cannot recover unless that person proves "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether or not it was false." *Id*. at 279–80. Shortly thereafter, the Court extended its holding to include "public figures." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967).

Maryland Courts subsequently recognized the public figure privilege established in *New York Times* and its progeny. *See, e.g., A.S. Abell Co. v. Barnes*, 258 Md. 56, 58–60 (1970); *Accord Kapiloff v. Dunn*, 27 Md. App. 514, 530–31 (1975). In *Kapiloff v. Dunn*, the Supreme Court of Maryland indicated that, as in *New York Times*, the Court recognized "the continuing validity of the defense of fair comment as modified by the new constitutional privilege." 27 Md. App. at 530. The *Kapiloff* Court explained its holding as follows:

> We hold that expressions of opinion, as well as statements of fact, concerning public officials and public figures can be actionable. Each, however, is under the protection of the constitutional privilege of *New York Times*. . . . False statements of fact are protected if not knowingly false or not published with reckless disregard of their truth or falsity. . . . Opinions based on false facts

[14] Our discussion does not address defamation actions concerning private individuals, as Kim does not appear to dispute that she was a public figure. Rather, Kim's primary contention is that the circuit court erred in allowing Solpietro to rely upon the privilege defense when Solpietro failed to plead the affirmative defense in the answer filed.

> are protected if the publisher was not guilty of actual malice with regard to these supportive facts.

Id. at 531–32. It is well-settled in Maryland that, "as in most jurisdictions, if not abused, privilege is a defense to a defamation action." *Hosmane v. Seley-Radtke*, 227 Md. App. 11, 24, *aff'd*, 450 Md. 468 (2016) (citing *Piscatelli v. Van Smith*, 424 Md. 294, 306-07 (2012)).

The Supreme Court of Maryland's discussion in *Piscatelli v. Van Smith* of conditional and qualified privileges is also instructive. 424 Md. at 307-08. In that case, the Court addressed whether the publisher and reporter of alleged defamatory remarks were protected by privilege. *Id*. at 302, 307. The *Piscatelli* Court explained the privileges as follows:

> Whether a conditional privilege exists is a question of law, and the defendant bears the burden of proof to establish the privilege. Once a prima facie case for a privilege is adduced, the plaintiff must produce facts, admissible in evidence, demonstrating the defendant abused the privilege, in order to generate a triable issue for the fact-finder. To demonstrate abuse of the privilege, the plaintiff must demonstrate that the defendant made his or her statements with malice, defined "as a person's actual knowledge that his or her statement is false, coupled with his or her intent to deceive another by means of that statement."

Id. at 307–08 (internal brackets omitted).

While Maryland clearly recognizes that the public figure privilege can be a valid defense to a defamation action if not abused, here, Solpietro waived her right to plead that defense by not asserting it in her answer. As the circuit court found that Kim was a public figure for the purposes of the litigation, had Solpietro properly asserted the privilege defense in her answer, Kim would have been required to prove that Solpietro acted with actual malice for Kim to recover damages. However, as the defense was *not* properly

asserted, on the facts of this case, we conclude that the circuit court ought not to have given the jury the actual malice instruction or included actual malice on the verdict sheet. On remand, the circuit court is instructed to act consistent with this opinion.[15]

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

[15] While Maryland Rule 8-604(b) permits a partial new trial, it is illogical for this Court to remand on damages only as the instructions provided to the jury before it reached its verdict were not correct. "Although Maryland cases applying [Rule 8-604(b)] have not identified every factor to be considered in determining whether a partial new trial should be ordered, according to the majority rule: . . . [w]hen manifest justice demands it and it is clear that the course can be pursued without confusion, inconvenience, or prejudice to the rights of any party, a new trial may be limited to a particular severable question." *Stickley v. Chisholm*, 136 Md. App. 305, 316 (2001) (internal quotation marks, citations, and brackets omitted). Here, as in *Stickley*, "it does not clearly appear to us that the effect of the jury instruction was limited to" the issue of damages and because "we do not know whether the jury decided to compromise, . . . we are persuaded that the entire case must be retried." *Id*. at 317–18.