Circuit Court for Harford County
Case No. 12-C-17-001388

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1413

September Term, 2017

ANNE MARIE L. CULLEN

v.

BOARD OF EDUCATION OF HARFORD COUTY, ET AL.

Wright,
Nazarian,
Arthur,

JJ.

Opinion by Wright, J.

Filed: October 23, 2018

Appellant, Anne Marie Cullen, appeals the Circuit Court for Harford County's grant of appellees', Board of Education of Harford County ("BOE") and Charlie Taibi, motion to dismiss appellant's defamation claim. Cullen appeals to this Court and presents the following questions for our review, which we reworded for clarity:[1]

1. Whether the circuit court erred in finding that the appellees possessed one or more privileges from appellant's defamation claim?

2. Whether the circuit erred in granting appellees' motion to dismiss?

For the reasons to follow, we answer both questions in the negative and affirm the judgment of the circuit court.

I. BACKGROUND

Cullen was a school bus driver for BAMC Student Transportation, LLC ("BAMC"). BAMC contracted with Harford County Public Schools ("HCPS") to provide school bus transportation services. Under Maryland law, all school bus drivers are required to obtain training and certification from the BOE before transporting

[1] The original questions presented were:

1.Was the trial court correct in determining that the Appellees possessed an absolute privilege from Appellant's defamation claim?

2.Was the trial court correct in determining that Appellees' communications with Appellant's employer were subject to the common interest privilege?

3.Did the lower court err as a matter of law in dismissing this case?

students. *See* COMAR 13A.06.07.06[2] and 13A.06.07.09[3] (detailing the certification and pre-service requirements for school bus drivers). As BOE's Supervisor of

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[2] COMAR 13A.06.07.06. School Vehicle Driver Trainee and School Vehicle Driver Qualifications.

A. School Vehicle Driver Trainee Qualifications. Before a school vehicle driver trainee transports a student in a school vehicle the trainee shall:

(1) Meet all licensing requirements of the Motor Vehicle Administration, including commercial driver's license requirements with appropriate endorsements;
(2) Have not more than two current points on the individual's driving record and a satisfactory past driving record as determined by the supervisor of transportation;
(3) Complete the preservice instruction required under regulation .09A of this chapter;
(4) Have no evidence of a criminal history which would be a disqualifying condition under regulation .07C of this chapter or an action under Regulation .07D of this chapter, either of which in the opinion of the supervisor of transportation makes the individual unfit for employment;
(5) Be 21 years old or older;
(6) Satisfactorily pass the appropriate medical examination for school vehicle drivers under COMAR 11.19.05.01; and
(7) Receive a negative controlled substances test result required under Regulation .10 of this chapter.

B. School Vehicle Driver Qualifications. A school vehicle driver shall:

(1) Do one of the following:
  (a) Meet the requirements in § A of this regulation; or
  (b) Complete the in-service instruction required under Regulation .09B of this chapter;
(2) Demonstrate the capacity to make appropriate decisions, especially in emergency situations; and
(3) Properly wear a seat belt when the school vehicle is in operation.

C. School Vehicle Driver Evaluations.

(1) A qualified school vehicle driver instructor certified under Regulation .05 of this chapter, a supervisor of transportation, or an assistant supervisor of transportation shall evaluate each driver at least once every 2 years.
(2) For regular school vehicle drivers, the evaluator shall:
(a) Ride with the school vehicle driver on a regularly scheduled route to or from school; or
(b) Conduct an external observation, if an external observation is approved by the supervisor of transportation.
(3) For substitute school vehicle drivers, an evaluator may conduct an evaluation over a sample route for a minimum of 30 minutes and incorporate all the elements of a regular school vehicle driver evaluation, except for student and driver interaction.

[3] COMAR 13A.06.07.09. Instructional Content Requirements.

A. Preservice Instruction for School Vehicle Drivers.

(1) A trainee shall satisfactorily complete a minimum of 8 hours of classroom instruction in the core units of the school bus driver instructional program developed by the Department, including:
(a) First aid;
(b) Railroad grade crossing safety; and
(c) Bridge crossing safety.
(2) All or a portion of the classroom instruction required under § A(1) of this regulation may be waived by the supervisor of transportation if the trainee is currently certified by a local school system.
(3) A trainee shall receive a minimum of 9 hours behind-the-wheel instruction, except if the trainee is:
(a) A current holder of a commercial driver's license with a passenger and school bus endorsement for 3 years, and has received a minimum of 3 hours of behind-the-wheel instruction; or
(b) Currently certified as a school vehicle driver by a local school system, and has received a minimum of 3 hours of behind-the-wheel instruction.
(4) Class size shall be conducive to individualized instruction.

B. In-Service Instruction for School Vehicle Drivers.

(1) At least 6 hours of in-service instruction shall be provided annually.
(2) Five hours shall have an emphasis on safety procedures, strategies, and laws.
(3) In-service instruction topics:

(a) Shall be selected from the core or advanced units of the school vehicle driver instruction program developed by the Department; and
(b) May include other topics contained in the National Safety Council's Defensive Driving Course, controlled substances and alcohol regulations, or personnel and student safety issues.

(4) One hour of the 6 hours of in-service instruction may be on-the-bus observation, instruction, or both.

(5) In-service instruction in the following topics shall be given at least once every 3 years:
(a) First aid; and
(b) Bridge and railroad grade crossing.

(6) Class size shall be limited to 35 students except as provided in § B(7) of this regulation. If the number of students exceeds 35, the session does not meet the State instructional requirements.

(7) A maximum of two large-group safety meetings of more than 35 students, not to exceed 2 hours each, may be provided each year.

(8) At least 2 of the 6 hours per year of in-service instruction shall be conducted in classes of not more than 35 students.

C. School Vehicle Driver Recertification.

(1) A school vehicle driver who has been deleted from a school system's driver roster for 1 year or less may be recertified as a school vehicle driver if the individual satisfactorily completes refresher training that includes a minimum of 3 hours of classroom instruction and 3 hours of behind-the-wheel instruction, unless the supervisor of transportation determines less refresher training is necessary.

(2) An explanation to support the decision to require less than the minimum refresher training shall be placed in the school vehicle driver's personnel file.

(3) If a school vehicle driver has been deleted from the school system's driver roster for more than 1 year, the school vehicle driver shall complete all school vehicle trainee qualifications as required under Regulation .06A of this chapter.

D. School Vehicle Attendant Instruction.

(1) Preservice Instruction. Before riding in the capacity of a school vehicle attendant on a school vehicle with students on board, a school vehicle attendant shall complete a minimum of 4 hours of preservice instruction that includes:
(a) 1 hour of instruction in first aid; and
(b) 1 hours of instruction appropriate to the duties of the school vehicle attendant.

Transportation, Taibi was responsible for ensuring compliance with school bus driver certification.

On September 13, 2016, Taibi issued a decertification letter via email to Cullen, which disqualified her from operating as an HCPS school bus driver. Taibi also sent the email to BAMC (Cullen's employer) and Matt Bedsaul (HCPS' Supervisor of Transportation). The letter states in pertinent part:

> Your inappropriate interaction with school administrators and failure to comply with their requests in specific areas where improvement was needed has prompted action . . . . After reviewing all relevant information, I am disqualifying you as a school bus driver . . . . Your actions are a serious breach of not only appropriate conduct, but also personal safety and security in every aspect of the education and operations practices of HCPS.

At issue here is Taibi's sending of the letter to third parties, and his inclusion of details outlining Cullen's decertification. Cullen appealed the decertification decision, and on September 30, 2016, the BOE's Assistant Superintendent heard the appeal. The

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> (2) In-Service Instruction. A school vehicle attendant annually shall complete 2 hours of in-service instruction in topics that include equipment, student management, and first aid.
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> E. Instructional Records. A local school system shall maintain attendance records, electronic or printed format, of all preservice and in-service instructional sessions which include the following information, as appropriate:
>
> (1) Name of the trainee, driver, or attendant;
> (2) Name of the instructor;
> (3) Dates of instruction;
> (4) Number of hours of classroom instruction and topics of instruction; and
> (5) Number of hours of behind-the-wheel instruction.

Assistant Superintendent reduced the decertification to a suspension but requested that Cullen complete re-training and mentorship before she was eligible to reapply for HCPS certification.[4]

On June 5, 2017, Cullen filed a complaint against Taibi and the BOE, alleging a single claim of defamation stemming from the emailed decertification letter. Cullen alleged that: (1) the letter contained false statements regarding her performance; (2) that those statements were published to third parties (BAMC and Bedsaul); (3) that appellees were legally at fault in making the statements; and (4) as a result, she suffered damages in the form of lost employment opportunities, lost wages, and mental anguish.

On June 26, 2017, the BOE and Taibi answered the complaint, responding that Cun's defamation claim failed as a matter of law because one or more privileges applied to the letter. They emphasized that Maryland law required HCPS to ensure that drivers were properly trained and that they obtained its certification. Pursuant to COMAR 13A.06.07.04,[5] the certification of drivers is the responsibility of an appointed Supervisor

[4] The conditions for reinstatement included eleven hours of classroom instruction, ten hours behind the wheel retraining, mentoring by assigned driver for two weeks, and providing a written statement that training was met. Cullen would then be eligible for a reassignment with the approval of Taibi.

[5] COMAR 13A.06.07.04. Local Supervisor of Transportation.

> A local school system shall designate an individual to be responsible for the administration of the student transportation program. The supervisor of transportation designated shall have sufficient time to perform all the duties of the position as detailed in this chapter and established by the policies of a local board of education.

of Transportation, in this case Taibi. Appellees argue that the absolute privilege applies, or, in the alternative, that the common interest privilege applies.

On July 7, 2017, Cullen responded to the motion by refuting the existence of either an absolute or common interest privilege and, alternatively, arguing that if the common interest privilege applied, it was abused in this case.

On August 10, 2017, the circuit court issued a detailed memorandum opinion granting appellees' motion to dismiss. The court explained that an absolute privilege applied to the statements in Taibi's decertification letter because the statements were made in the context of an "administrative proceeding." Additionally, the court found that a common interest was present between BOE and BAMC, so the qualified common interest privilege applied as well. As the court found that both privileges asserted by appellees applied to the communications in Taibi's letter, the court granted appellees' motion to dismiss.

Additional facts will be added as they become relevant to our analysis.

II. STANDARD OF REVIEW

We review appeals from an order to dismiss for failure to state a claim *de novo*. *Clark v. Prince George's Cty.*, 211 Md. App. 548, 557 (2013). "In reviewing the grant of a motion to dismiss, we must determine whether the complaint, on its face, discloses a legally sufficient cause of action. An appellate court should presume the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom." *Fioretti v. Maryland State Bd. of Dental Exam'rs*, 351 Md. 66, 72 (1998). Dismissal for failure to state a claim is only appropriate when well-plead facts and inferences drawn

from them, if later proven to be true, still would not afford the plaintiff relief. *Morris v. Osmose Wood Preserving*, 340 Md. 519, 531 (1995).

III. DISCUSSION

We conclude that the appellees sufficiently established both privileges, that appellees cannot prove abuse of the privilege, and therefore, the circuit court did not err in dismissing the defamation claim.

To establish a *prima facie* case of defamation, a plaintiff must demonstrate four elements: "(1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered harm." *Indep. Newspapers, Inc. v. Brodie*, 407 Md. 415, 441 (2009). A defamatory statement is one "which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or associating with, that person." *Batson v. Shiflett*, 325 Md. 684, 722-23 (1992). A false statement is regarded as "one that is not substantially correct." *Id.* at 726. A plaintiff bears the burden of proving falsity, and the ultimate determination of whether defamation is present in a publication is a legal question for the court. *Hosmane v. Seley-Radtke*, 227 Md. App. 11, 21 (2016).

Cullen alleges one count of defamation in her claim. Appellees assert two privileges in defense against the claim. A defendant who asserts a privilege, when not abused, may avert a claim of defamation. *Piscatelli v. Van Smith*, 424 Md. 294, 306-07 (2012).

A. Privilege

As discussed, appellees assert that an absolute privilege and a common interest privilege, insulate them from any liability stemming from the decertification letter. *Piscatelli*, 424 Md. at 306-07. The determination that a privilege is applicable is a legal question for the court to decide. *Id.* at 307. Even if a privilege is found to apply, the plaintiff may still endeavor to prove it was abused, which is a question for the jury. *Id.*

1. Absolute Privilege

An absolute privilege provides total immunity from liability for a claim of defamation. *Offen v. Brenner*, 402 Md. 191, 199 (2007). For an absolute privilege to apply to alleged defamatory communications, the communications must occur in a legislative, judicial, or administrative proceeding. *Reichardt v. Flynn*, 374 Md. 361, 369, 400 (2003). The privilege only applies in "some" administrative proceedings. *Id.*

Cullen argues that an absolute privilege does not apply in this case. She alleges that the defamatory statement (the decertification letter) was issued in an email and falls outside of what qualifies as a proceeding. Appellees counter that an absolute privilege applies because the letter was part of an administrative proceeding.

Cullen relies on *Gersh v. Ambrose*, 291 Md. 188 (1981), in response to Appellees' assertion of its absolute privilege defense. She argues that an absolute privilege only applies in the context of an "actual hearing," and that here, the alleged defamatory statements were emailed to third parties outside the scope of a hearing. Cullen contends that the decertification letter was a "non-judicial correspondence" and therefore falls outside of its extension of the privilege. Appellees dispute Cullen's contextual argument

that an absolute privilege requires an "actual hearing," saying Cullen's focus is misplaced and unsupported by the cases cited in her brief.

We begin our analysis of this issue by examining *Gersh* and *Reichardt* in turn, as the parties correctly identify *Gersh* and *Reichardt* as instructive for the purpose of establishing an absolute privilege.

In *Gersh*, the Court of Appeals considered whether a Baltimore Assistant State's Attorney's allegedly defamatory statements about one of the Baltimore City's Community Relations Commission members, made during a public hearing, were protected by an absolute privilege. *Gersh*, 291 Md. at 188. The State's Attorney based his claim of an absolute privilege on the fact that he was a testifying witness at a commission hearing. *Id.* at 189. The Court explained that the purpose of an absolute privilege was to protect testifying witnesses from potential harassment or intimidation in a judicial proceeding and prevent their exposure to potential lawsuits. *Id.* at 192. The Court noted that the commission did not qualify as a judicial body and therefore the attorney's testimony was not in the context of a judicial proceeding. *Id.* at 196. It further stated that in some cases the privilege has been extended to administrative proceedings but required certain procedural safeguards. *Id.* at 193. The Court developed a two factor analysis for identifying when a party who makes a defamatory statement in an administrative proceeding may be shielded by an absolute privilege. *Id.* at 197. The Court held that statements made during an administrative proceeding were protected depending on: "(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." *Id.* at 197. The Court's application of this test sought to balance the public interest being advanced in the proceeding, by permitting the free expression of ideas during testimony, against the risk that it might leave a defamed individual without judicial remedy. *Id.* at 196. The Court applied the first factor and determined that the nature of commission's hearing did not constitute a significant public interest because the hearing was nothing more than a typical open public meeting. *Id.* In applying the second factor, the Court held that because this type of hearing did not allow for the traditional procedural aspects associated with a trial it lacked the necessary safeguards to prevent the risk of harm to the allegedly defamed individual.[6] *Id.* at 196. The Court ultimately decided that failure of both prongs of the test demonstrated that "[t]he public benefit to be derived from testimony at [c]ommission hearings of this type is not sufficiently compelling to outweigh the possible damage to individual reputations to warrant absolute witness immunity." *Id.*

In *Reichardt*, the Court of Appeals considered whether an absolute privilege applied to the statements of students and their parents, made to public school officials regarding a teacher's alleged inappropriate sexual misconduct. *Reichardt*, 374 Md. at 364-65. The Court explained that precedential extension of an absolute privilege had been applied to statements made in judicial proceedings, some administrative

[6] The Court in *Gersh* looked at the hearing for similarities to trial court proceedings: adversarial in nature, sworn witness testimony, availability of cross-examination, presence of legal counsel, and a reviewable opinion. *Gersh*, 291 Md. at 196.

proceedings, documents prepared for judicial proceedings, and citizen complaints against law enforcement officers. *Id.* at 367-71. The Court applied the *Gersh* test and concluded that the first factor was met because ensuring the safe reporting of complaints, made by parents and children about a teacher, to school officials, represented a significant public function regarding their safety. *Id.* at 373. The Court determined that the second factor was established by the availability of "two levels of administrative appeals and judicial review," which ensured adequate procedural safeguards were in place. *Id.* at 377.

Cullen's next contention is that the context in which the decertification letter was distributed to third parties does not constitute a "proceeding" under the *Gersh* factors because it was an email and sent to third parties. We find this argument unpersuasive. Applying the *Gersh* two-factor test, we conclude that the decertification letter was in fact a part of a proceeding to ensure the safe reporting of complaints, made by parents and children about a school bus driver regarding safety and accordingly, that an absolute privilege exists.[7] The letter was the first and necessary step in the process of decertification, established by Maryland law, and is an administrative proceeding that is concerned with ensuring the safety of the HCPS transportation system. COMAR 13A.06.07.07.D provides:

> Disqualification for Unsafe Actions. Misfeasance, incompetence, insubordination, or any act of omission that adversely affects transportation or safety may be ground for disqualification and termination by the supervisor of transportation.

[7] It is beyond objection that a paramount responsibility of a school bus driver is child safety. *Middletown v. Campbell*, 69 Ohio App.3d 411, 416 (12th Dist.1990) (A school bus driver is in the best position to prevent harm to a child by using the care society expects.).

In *Reichardt*, the Court emphasized, "there is really nothing more important to the core of the well-being of our community, our State and our nation . . . than the public school system." *Reichardt*, 374 Md. at 373.

The authority of the BOE under COMAR 13A.06.07.03 as to the safe operation of its school transporting system is as follows:

> B. A local school system is responsible for the safe operation of its student transportation system and shall conform to the regulations promulgated by the U.S. Department of Transportation and the Maryland State Board of Education, and the procedures and guidelines established by the Department.
>
> C. A school system may adopt policies and procedures that do not conflict with existing Federal and State statute, rules, regulations, policies, and procedures.
>
> D. Local policies and procedures may exceed the minimum requirements established in this chapter.

As noted above, Taibi was designated as the local Supervisor of Transportation by the BOE. This designation was pursuant to COMAR 13A.06.07.04 to be responsible for the administration of the student transportation program.

Taibi, at the time pertinent to this action, was responsible for disqualifying drivers who are under contract with the BOE. COMAR 13A.06.07.07A provides:

> A. A school vehicle driver who does not meet the qualifications of the evaluation under Regulation .06 of this chapter may be disqualified from driving a school vehicle at the discretion of the supervisor of transportation, unless the supervisor of transportation determines that retraining, instruction, or both, are satisfactorily completed.

Disqualification was well within the purview of Taibi on behalf of the BOE. And in accordance with this authority, Taibi disqualified Cullen under COMAR 13A.06.07.07D.

It is evident the disqualification of Cullen involved the proper administration of the public school transportation system. The reasoning set forth in Taibi's letter notifying Cullen that she was disqualified was well within Taibi's authority as the Supervisor of Transportation.

Furthermore, *Reichert* is instructive in determining whether an absolute privilege applied where Taibi's letter decertifying Cullen qualified as an administrative proceeding. Citing *Gersh*, the Court held that the privilege applies where the adequacy of procedural safeguards minimize the occurrence of defamatory statements. *Id.* at 376. In the instant case, Cullen had the ability to appeal the disqualification and the factual basis for it pursuant to COMAR 13A.06.07.21, which states:

> A school vehicle driver or attendant who has exhausted the local school system appeal process, may appeal to the State Board of Education under COMAR 13A.01.05.

This administrative proceeding qualifies as an important public function in light of its direct effect on public school children's safety. The decertification process operates as a safety mechanism to ensure that complaints leveled against a school bus driver are communicated through the appropriate channels. The decertification of Cullen stemmed from complaints of parents and school administrators which, as explained in *Reichardt*, warrants a degree of protection both for those registering the complaint and those investigating its merits. Second, the administrative proceeding involved in the decertification process, unlike the hearing in *Gersh*, included an appeals process. Similar to *Reichardt*, Cullen had two levels of appeals in which she could dispute the decertification. As discussed, Cullen successfully reduced her total decertification

through appeal, and she thus demonstrated that procedural safeguards were in place. Appellees decertified Cullen after investigations of the complaints against her were substantiated and the email was published in accordance with Maryland law. The fact that the decertification was communicated by email does not remove it from the context of an administrative hearing. In this case, the public function of the safe transportation of school children and the safeguards offered by the appeals process certainly outweigh any concerns raised by Cullen.

2. Common Interest Privilege

A common interest privilege applies when two parties share a mutual interest and the publication of statements advances or protects their mutual interest. *Gohari v. Darvish*, 363 Md. 42, 57-58 (2001). "The common interest privilege is one of the four qualified or conditional privileges to defamation that 'is conditioned upon the absence of malice and is forfeited if it is abused.'" *Shirley v. Heckman*, 214 Md. App. 34, 42-43 (2013) (quoting *Piscatelli*, 424 Md. at 307). Whether the common interest privilege applies is a legal question, placing the burden of proof to substantiate the privilege on the defendant. *Piscatelli*, 424 Md. at 307. If the court determines the existence of a conditional privilege, the burden then shifts to the plaintiff to demonstrate it was abused. *Id.* at 307-08.

A. Application of the Privilege

Cullen relies on several cases in support of her argument that a common interest privilege is inapplicable to the facts of this case. Appellees respond that the common interest privilege is not limited to the categories outlined by Cullen.

The first case Cullen cites is *Shirley*, involving the alleged defamation of a youth football league coach against a football league and its president. *Shirley*, 214 Md. App. at 37. In that case, we provided scenarios where the common interest privilege had been successfully applied, which included: statements published in self-defense or the defense of another; statements among those in a "common enterprise" providing pertinent information through "internal communications;" statements shared by "identifiable groups" where members "cooperate in a single endeavor;" and situations where those sharing a "common interest in a particular subject matter correctly or reasonably to believe facts exist which another sharing such common interest are entitled to know." *Id.* at 43 (citations omitted).

Cullen also cites *Happy 40, Inc. v. Miller*, 63 Md. App. 24 (1985), and *Gohari*, in a vain attempt to distinguish this case from those where the common interest privilege has been found to apply. In *Happy 40*, the alleged defamatory communication provided to its employees was an employer's explanation of why a former employee was fired. *Id.* at 28. There, the Court acknowledged the lower court's finding that an employer was protected under a common interest privilege to explain to employees why another employee was fired. *Id.* at 35-36. This determination was based on the premise that providing a rationale for termination of an employee would prevent the decision from seeming arbitrary and further the interests of all parties involved. *Id.*

In *Gohari*, the Court reviewed whether a franchisee's alleged defamatory statements made by the franchisee to its franchisor, regarding a former employee's application for its own franchise, was protected by a common interest privilege. *Gohari*,

363 Md. at 42. The Court determined that the nature of the communication between the franchisee and franchisor was in furtherance of a business relationship for the success of their overall operation and was protected under by a common interest privilege. *Id.* at 59-60.

Cullen first attempts to argue that the common interest privilege does not apply by contending that the purpose of the privilege identified in *Shirley* was to "allow members of a group to safely 'make internal communications.'" Cullen next contends that *Happy 40* and *Gohari* create a common purpose requirement, that in order for the common interest privilege to apply, the relationship between the parties must be a "direct business groups or group affiliation." She maintains that the relationship between the BOE and BMAC does not fall into this category because BMAC is a private company that is unaffiliated with the BOE, a public entity. Cullen suggests that because of the private/public designations, the appellees' relationship with BMAC is required to fall into one of four categories ("franchisor/franchisee, employer/employee, parent/subsidiary, or inter-corporate relationships") and those relationships are not present.

Cullen is correct that a common interest is necessary to ensure safe internal communications between group members and business affiliates; but falters when she then goes on to suggest that the BOE and BMAC are not entitled to such designation because their respective private/public ownership prevents them from having a mutual interest. We do not agree. In *Shirley*, we stated that "[t]here is no rigid definition of common interest . . . it covers speakers and recipients within a readily definable business or organizational relationship." *Shirley*, 213 Md. at 43. Appellees rightly contend that in

Gohari, the Court acknowledged that a conditional privilege is broad and may apply to an infinite variety of factual circumstances. *Gohari*, 363 Md. at 56-57. In this case it is not necessary to reach outside of the already established common interest boundaries.

BAMC contracts with BOE to provide it with school bus drivers. Under Maryland law, BOE is required to certify BAMC drivers, and Taibi oversees the certification process. Taibi's decertification of Cullen, a BOE driver, would directly affect both BOE's contract with BAMC and BAMC's overall business. There is a clearly identifiable shared interest between two entities that have undertaken a contractual relationship, which is synonymous with the scenario described in *Shirley*, 214 Md. App. at 43, (explaining that an "identifiable group" who shares a common endeavor falls under the common interest privilege). Additionally, like the employer in *Happy 40*, the BOE would want to assure BAMC that Cullen's decertification was not arbitrary, thus Taibi's explanation of the circumstances leading to Cullen's decertification further deserves protection by the common interest privilege. Accordingly, we agree with appellees that the statements made in the decertification letter are protected by a common interest privilege.

B. Abuse

Cullen alternatively argues that if the common interest privilege does apply, it was abused. She contends that in order to prove that the appellees abused the privilege, she is not required to prove malice on the part of the appellees. This argument is without merit.

In *Happy 40*, we explained that a finding of publication with malice or "knowledge of falsity or reckless disregard for the truth," predicates abuse of the

common interest privilege. *Happy 40,* 63 Md. App. at 32 (quoting *Marchesi v. Franchino,* 283 Md. 131, 139 (1978)). We ultimately held that the employer was protected under a common interest privilege when one employee gave the reason to other employees why another employee was fired. *Id.* at 35-36. In *Gohari,* the Court determined that because the former employee (alleging defamation and abuse of the common interest privilege) had not met their burden of proving malice on the part of the franchisee and therefore, abuse of the privilege could not be established. *Gohari*, 363 Md. at 76.

Cullen argues that in *Gohari*, the Court acknowledged that the question of whether a privilege was abused is a factual question to be submitted to the jury. Cullen suggests that here a jury could find abuse of privilege, and therefore, she is prevented from having to prove malice on the part of the appellees. In response, the appellees argue that because Cullen admits that there was no malice on the part of appellees, she could not prove an abuse of privilege.

In *Piscatelli*, the Court held that after a conditional privilege has been established, the plaintiff then bears the burden of proving abuse of the privilege. *Piscatelli*, 424 Md. at 307. In order to prove abuse of the privilege, a proper showing of malice is required. *See Piscatelli*, 424 Md. at 307; *Gohari*, 363 Md. at 64; *Happy 40*, 62 Md. App. at 32 (explaining that an abuse of a privilege is conditioned upon the plaintiff's successful demonstration that a communication was knowingly false or in reckless disregard for the truth). Cullen concedes that there was no malice in the letter drafted by Taibi and sent to

BAMC.[8] In arguing that malice does not need to be proved, Cullen concedes the absence of malice. Therefore, she cannot claim that the common interest privilege was abused.

At both the circuit court and here, Cullen readily admits that appellees acted without malice by sharing the decertification letter with BAMC. Regardless, Cullen claims that the common interest was forfeited by sharing the reason why she was decertified with BAMC. According to Cullen, appellees should have only informed BAMC that she was decertified – without providing them any rationale for why such a decision was made. Again, Cullen provides no case law to support her argument. As noted by the circuit court, "this argument is implausible" as "disclosing the disqualification is meaningless in terms of understanding BAMC's contractual obligations to the BOE without also knowing the reasons for disqualification." Moreover, by knowing the reasons for disqualification, BAMC was able to prepare an appeal of the initial decision, on Cullen's behalf, which ultimately allowed her to apply for reinstatement after meeting certain conditions to "promote safe transportation of students – a common interest shared by the BOE and BAMC."

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[8] In paragraph 3 of her complaint, Cullen alleges:

> 3. Mr. Taibi is the Supervisor of Transportation for the Board, was employed in Harford County, Maryland, during the operative period of this complaint, and continues to be employed in Harford Coujnty, Maryland. During the operative period of the complaint, Mr. Taibi was employed by the Board, and committed his tortious act or omission, which caused Ms. Cullen damages, while acting within the scope of his said employment. *At all pertinent times, Mr. Taibi acted without malice and gross negligence.*

(Emphasis added).

Accordingly, the circuit court was correct in its determination that the communications between the BOE and BAMC were privileged because of the common interest in promoting safe transportation of HCPS students. The Court of Appeals has stated "[w]hile malice is usually a question for the fact-finder, it need not be submitted to the fact-finder when the plaintiff fails to allege or prove facts that would support a finding of malice." *Piscatelli*, 424 Md. at 308 (citing *Chesapeake Publ'g Corp. v. Willams*, 339 Md. 285, 302 (1995)). Cullen's concession that she cannot prove malice eliminates the need to submit the question to a jury because it would be impossible for her to prove its existence without contradicting her own admission.

Conclusion

After reviewing all of the facts of this case and inferences drawn from them, Cullen has not demonstrated that, if they were proven true, she would be entitled to relief. Appellees are shielded by both an absolute and common interest privilege which prevents Cullen from advancing her claim of defamation.

For the foregoing reasons, we affirm the judgment of the circuit court.

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