Circuit Court for Baltimore County
Case No. 03-C-15-005270

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2098

September Term, 2016

FAITH NEVINS HAWKS

v.

MICHAEL RUBY, ET AL.

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*Woodward,
Meredith,
Leahy,

JJ.

Opinion by Woodward, J.

Filed: October 1, 2019

*Woodward, Patrick L., J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

This appeal concerns an article about appellant, Faith Nevins Hawks, that was published in *The Country Chronicle* ("*The Chronicle*"), a local newspaper distributed in northern Baltimore County. In the Circuit Court for Baltimore County, Nevins Hawks filed a defamation suit against appellees: Michael Ruby, editor and reporter for *The Chronicle*; Right Action Communications, LLC ("Right Action"), *The Chronicle's* publisher; and Patricia Bentz, executive director of the Baltimore County Historic Trust, Inc., a/k/a the Preservation Alliance ("Preservation Alliance"), who was quoted in the article.

The case was tried to a jury and, at the end of Nevins Hawks's case-in-chief, the circuit court granted judgment in favor of Ruby, Right Action, and Bentz, ruling that Nevins Hawks failed to make out a *prima facie* case of defamation against appellees and, in the alternative, that Ruby and Right Action were protected by the fair reporting and fair comment privileges and had not abused those privileges. Nevins Hawks's motion for a new trial was denied.

Nevins Hawks presents two questions for our review, which we have rephrased:[1]

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[1] The questions as posed by Nevins Hawks are:

> 1. Did appellant produce legally sufficient evidence to prevail on appellees' motions for judgment and, if so, did the trial court err in granting those motions?
>
> 2. Were the alleged defamatory statements made and published by appellees privileged?

I. Did the trial court err by ruling that Nevins Hawks failed to adduce sufficient evidence to make out a *prima facie* claim of defamation against Bentz?

II. Did the trial court err by ruling that Nevins Hawks failed to adduce sufficient evidence to make out a *prima facie* claim of defamation against Ruby and Right Action and, if so, did it also err by ruling that the statements in the article were privileged under the fair reporting and fair comment doctrines, and that Nevins Hawks failed to adduce evidence sufficient to overcome those privileges?

For the following reasons, we answer the first question in the negative and the second question in the affirmative. Accordingly, we shall affirm the judgment in favor of Bentz, reverse the judgment in favor of Ruby and Right Action, and remand the case to the circuit court for further proceedings consistent with this opinion.

BACKGROUND

Nevins Hawks is a licensed architect and member of Baltimore County's Landmarks Preservation Commission ("LPC" or "the Commission"). The LPC comprises fifteen volunteer members who live in Baltimore County ("the County") and "[p]ossess a demonstrated interest, knowledge, or training in historic preservation, history, architecture, conservation or related discipline." Baltimore County Code ("BCC") § 3-3-1202(b). As pertinent to the issues on appeal, the LPC recommends properties in the County for inclusion on the Preliminary Landmarks List and, if those recommendations are approved by the County Council, the properties are included on the Final Landmarks List. The LPC has jurisdiction over properties on the Preliminary and Final Landmarks Lists, and owners of such properties cannot make alterations to the exterior of their structures without prior approval of the Commission. BCC § 32-7-405. For such pre-approval, owners must obtain

a "Certificate of Appropriateness" from the Commission "indicating its approval of plans for construction, alteration, reconstruction, moving or demolition." BCC §§ 32-7-101 & 32-7-405. When an owner of a historically-designated property obtains pre-approval from the LPC for exterior renovations, tax credits are generally available. *See* BCC § 11-2-201(f). Making changes to historically-designated property without obtaining the necessary pre-approval, however, is a code violation that can result in both criminal and civil penalties. BCC § 32-7-504.

In November 2012, Nevins Hawks and her husband, John Hawks, purchased a 26-acre farm in Monkton ("the Property"). The Property is improved with a dwelling known as "the Bacon-Crosby House" that was designated as a historic landmark by the LPC in 1982 and appears on the Final Landmarks List. Also on the Property is a small stone accessory structure with a cedar shake roof known as "the Larder."

The next month, unaware of the historic designation, the Hawkses began extensive renovations to the interior and exterior of the Bacon-Crosby House, including replacing windows, damaged siding, and the roof. On March 27, 2013, they received a stop-work order from Vicky Nevy, the Secretary to the LPC. Nevins Hawks subsequently submitted an application for approval of the exterior renovations, and on April 11, 2013, the LPC voted to approve, *ex post facto*, exterior renovations already completed on the Bacon-Crosby House, as well as proposed future renovations. Although the LPC "chastised" Nevins Hawks and her husband for performing the repairs without prior approval, it did not sanction them because the renovations had maintained the historic integrity of the

house. However, the Hawkses' related request for tax credits for the work performed, amounting to roughly $30,000, was denied.

Ruby owns and operates Right Action, the publisher of *The Chronicle*, and is its editor and only on-staff reporter. *The Chronicle* circulates to 26,000 households throughout the northern part of the County. In May 2013, Ruby published an article in *The Chronicle* titled "Illegal Timber Harvest, Restoration Work Cited" ("the First Article"). The First Article discussed the Hawkses' violation of the LPC regulations and a completely unrelated illegal timber harvest of thirty-five acres by another County resident. The article stated that Nevins Hawks and her husband only "got a slap on the wrist," while the other resident was fined $ 40,000, suggesting unequal treatment. A month after the First Article was published, County Councilman John Huff appointed Nevins Hawks to the LPC in place of a commissioner whose term was expiring.

Over a year later, in July 2014, a storm damaged the roof of the Larder. On July 15, 2014, Nevins Hawks, believing that the Larder was a landmarked structure, applied to the LPC for approval of repairs to the roof and for a tax credit. After submitting her application, the LPC sent Nevins Hawks a letter instructing her that the renovations to the Larder could not commence until the LPC approved them. Her requests were placed on the preliminary agenda for the next LPC meeting, which was scheduled for September 11, 2014.[2]

[2] The LPC did not meet in August.

In the meantime, unbeknownst to Nevins Hawks, her husband hired someone to replace the roof of the Larder. In early September 2014, before the LPC took up Nevins Hawks's application, the Larder's roof was replaced with "better quality" cedar shake shingles. When Nevins Hawks found out about the roof replacement, she contacted Karin Brown, Chief of Preservation Services at the County Department of Planning, which staffs the LPC. Nevins Hawks asked that her application for a tax credit be withdrawn and that the LPC instead approve the roof replacement, which already had been completed.

The LPC met on September 11, 2014, and considered the application for *ex post facto* approval of the roof replacement. Nevins Hawks was not in attendance at the meeting. Ruby and Bentz were present. As mentioned, Bentz is the executive director of the Preservation Alliance, a non-profit organization that advocates to "conserve the historic fabric of" the County. The Preservation Alliance often works in conjunction with the LPC to protect historically designated properties. Bentz frequently attends LPC meetings and testifies on behalf of the Preservation Alliance.

At the meeting, Bentz and Ruby received a revised "final" agenda listing Nevins Hawks's request for *ex post facto* approval of the Larder roof replacement. Everyone in attendance, including the LPC members, believed that the Larder was landmarked. The LPC voted unanimously to approve the roof replacement without discussion. Bentz spoke at the meeting in opposition to the LPC's action. She expressed concern that the LPC

would tolerate a second violation of County regulations by one of its own members, and referred to the Larder work as "a blatant disregard for historic guidelines."[3]

At some point after the LPC meeting on September 11, 2014, but before October 2, 2014, LPC staff, Ruby, and Bentz learned that the Larder was not a designated landmark structure and, consequently, that the renovations at issue did not require approval by the LPC.

On October 2, 2014, Ruby and Right Action published in *The Chronicle* the article that became the basis for the instant defamation suit ("the Second Article"). It was titled "LPC's Nevins Again Violates Landmark Regs." The Second Article begins on the eighth page of *The Chronicle* as follows:

> *Oops, she did it again. But this time she can't say she didn't know - - which was her excuse last year - - because she was told then what she should have done this time.*
>
> Still, she did it again and this time is especially egregious, say historic preservationists, because she is supposed to be setting an example for others as she sits in judgment of others who are supposed to do what she didn't . . . again.
>
> Monkton resident *Faith Nevins Hawks once again made some exterior repairs to a structure on her property which includes historic landmarks*. And once again the right materials were used and the work was done properly. So the historic integrity was preserved for the property which includes the nearly 200-year-old Bacon-Crosby home and setting, a designated landmark by Baltimore County's Landmarks Preservation Commission.

[3] Prior to speaking at the meeting, Bentz had contacted her boss, Ruth Mascari, who is the chair of the Preservation Alliance's board of directors. Mascari advised Bentz to testify at the hearing and suggested some of the language Bentz later used.

That special designation makes it illegal for any changes to a building's exterior without prior approval by the Baltimore County Landmarks Preservation Commission (LPC).

At the September 11 meeting of the LPC, the commissioners voted unanimously to grant "ex post facto approval" to Nevins [Hawks] for the "in-kind replacement of [an] existing shingle roof on an accessory structure," according to the meeting's agenda notes.

There was no discussion on the request nor was there any acknowledgment by the commissioners of Nevins [Hawks's] involvement in or ownership of the property at 2939 Monkton Road though she has been a member of the commission since May 2013. Nevins [Hawks], an architect and appointee representing the Third Council District, was not in attendance at the September 11 LPC meeting.

After the fact

Not everyone attending the LPC meeting was so blase of the apparent violation especially in light of Nevins [Hawks's] history before the commission.

"This is a blatant disregard for historic guidelines," said Patricia Bentz, executive director of the Preservation Alliance of Baltimore County, in comments to the commissioners.

Bentz called upon the LPC members to take more punitive action - - especially against one of their own who should know better - - for ignoring the rules which are designed to preserve and protect our historic heritage.[4]

"You can't just say she did it again and it's OK," argued Bentz. "If she didn't know before, she certainly knows now that this is an historic structure."

Bentz's vitriol was incurred because Nevins [Hawks] did not get approval for the shingles replacement until after the work was done which is in violation of regulations governing buildings that are protected under Baltimore County's historic landmark laws. That's why the approval, as noted, was granted ex post facto which means after the fact.

[4] This remark by Bentz was the subject of a pretrial motion *in limine*. Bentz argued that it was a statement of opinion that could not be proven true or false. The circuit court agreed, ruling that the statement was inadmissible against Bentz in Nevins Hawks's case in chief.

(Bold in original) (italics added). Bentz did not discuss the statements she made at the LPC meeting with Ruby prior to publication of the article, nor did Ruby notify Bentz that he planned on quoting her in an article.

The Second Article continues:

> **Violating regulations**
>
> *Also, this is the second time in less than 18-months that Nevins [Hawks] has been before the LPC for performing work on a landmark without prior consent.* At the April 11, 2013 LPC meeting, the commissioners chastised Nevins [Hawks] for not getting approval for restoration work she did on the Bacon-Crosby house which had become neglected and in disrepair.
>
> * * *
>
> *The Bacon-Crosby house, along with other outbuildings on the property, is one of the original historical sites placed on the Baltimore County Final Landmarks List* when it was created in the late 1970's . . . .

(Bold in original) (italics added). Ruby then recaps the 2013 LPC proceedings discussed in the First Article, explaining, among other things, that "[b]ecause of the quality of the work performed [on the Bacon-Crosby House], the LPC commissioners did not impose any penalties but ruled that Nevins [Hawks] was not eligible for tax credits usually available for historic restoration work."

The Second Article next focuses on Nevins Hawks's application for a tax credit and for the roof replacement of the Larder:

> **Unbeknownst to her**
>
> *Once again however, because approval for the shingle roof repairs had not been granted earlier, Nevins [Hawks] again was unable to claim the tax credits for the latest round of restoration work.*

> According to county officials, Nevins [Hawks] originally submitted a request for approval of the work and accompanying tax credits to Baltimore County Department of Planning staffers, who administer the LPC. But the LPC did not hold a meeting in August so the request was scheduled for consideration at the regularly scheduled monthly meeting in September.
>
> About a week before the September 11 meeting, planning staffers were notified by Nevins to change the request from seeking the tax credits to obtaining ex post facto approval.
>
> Unbeknownst to Nevins [Hawks], the repair work was undertaken and completed by her husband, according to planning staffers, prior to the September LPC meeting which necessitated the change.
>
> *Planning staffers later said that the item should not have been included on the Sept. 11 agenda because the work was not performed on a designated landmark structure**.** Instead, the matter should have been considered for approval of tax credits only.*
>
> But when the work was done without prior approval, the tax credits were not available, according to county regulations, and the matter should not have been included on the agenda, no vote by the commissioners was required and no "ex post facto" approval should have been granted.
>
> Attempts to reach Nevins [Hawks] for comment were unsuccessful.
>
> **Whistle blower replaced**
>
> This recent incident *further damages Nevin[s] [Hawks]'s ability to serve on the LPC*, say local historic preservationists who contend her appointment to the commission was the result of a political favor, at best, or bullying, at worst.

(Bold in original) (italics added). Finally, Ruby discusses Nevins Hawks's attendance record at the monthly LPC meetings. He states that Nevins Hawks "has further sullied her service on the LPC" by attending only five out of the ten LPC meetings since her

appointment, tied for the second worst attendance record on the LPC. He also points out that lack of attendance can be a basis for termination from a County board or commission.

By the time the Second Article was published, Brown also had informed Nevins Hawks that the Larder was not included in the historic designation of the Bacon-Crosby House. By email dated October 22, 2014, Brown confirmed this information to Nevins Hawks. The email explained that, because "only the principal dwelling is on the Final Landmarks List . . . only alterations on the house are subject to LPC review." Brown further stated that the Commission "assumed the accessory structure was part of the landmark and put [Nevins Hawks] on the agenda for an ex post facto approval." Brown apologized and took full responsibility for not having verified whether the Larder was included in the Final Landmarks List prior to the meeting.

Around six months later, on May 13, 2015, Nevins Hawks filed the instant defamation suit in circuit court. The operative complaint is the second amended complaint, which names Bentz, Ruby, and Right Action as defendants and asserts four counts, only two of which are pertinent to the issues on appeal. In Count I, Nevins Hawks alleged that Ruby and Right Action defamed her through numerous false statements published in the Second Article, most significantly were the statements claiming that the roof replacement to the Larder was made in violation of County law. In Count IV, she alleged that Bentz defamed her by her public comments at the September 11, 2014 LPC meeting, which were republished in the Second Article. In both counts, she alleged that the defamatory statements were made with knowledge of their falsity and/or in reckless disregard of the

truth; and that the statements were intended to, and did in fact, damage Nevins Hawks's business reputation and expose her to public scorn. Nevins Hawks sought $75,000 in compensatory damages and $75,000 in punitive damages in each count.[5]

Motions for summary judgment were denied, and the case was tried to a jury beginning on October 12, 2016. In her case-in-chief, Nevins Hawks testified and called five witnesses: Mr. Hawks; Brown; Mascari, who, as noted, is Bentz's boss; former Councilman Huff; and James Constable, a neighbor and friend of Nevins Hawks. Her attorney also read into the record extensive excerpts from the deposition testimony given by Ruby and Bentz. We summarize some of the pertinent testimony below.

Nevins Hawks testified about the events leading up to the publication of the Second Article consistent with the above facts. She explained that she learned about the Second Article when her son brought a copy to her and said, "Mom, you're in the paper again." After reading the article, Nevins Hawks was "shocked" and "felt attacked." She said that she felt the need to explain to friends that she was "not a scofflaw," she had "not sullied [her] service," she was "not a criminal," and she did not do "anything intently [sic] illegal." Nevertheless, she could "tell from people's comments that they read the article," and she felt embarrassed that they thought she broke the law. Nevins Hawks stayed home from work the day after the Second Article was published, foregoing $1,800 in billed time,

[5] The remaining two counts stated claims against Ruby for injurious falsehood (Count II) and interference with economic relations (Count III) relative to a statement that he made at a subsequent LPC meeting. The circuit court granted Ruby's motion for judgment at the close of Nevins Hawks's case as to those two counts. Nevins Hawks does not challenge those rulings in this appeal.

because she was upset and "wanted to be isolated." In the weeks and months that followed, Nevins Hawks's emotional state was akin to how she felt after she had been mugged, "where you feel attacked." She experienced anxiety and lack of sleep. At work, Nevins Hawks learned that her architecture firm saw the article as a "problem," and her partner told her "to take care of the problem." Although it was impossible to determine whether she lost clients because of the article, Nevins Hawks testified that reputation is "everything" in the field of architecture because jobs are won or lost based upon "word of mouth."

Constable and Huff testified as to Nevins Hawks's good reputation. Huff "never considered removing [Nevins Hawks] from the LPC" after the Second Article was published. Constable had known Nevins Hawks for fifteen or twenty years as a "very highly respected architect" and had selected her to serve on the board of his organization, the Manor Conservancy, which works to preserve the rural character of northern Baltimore and Harford Counties. He did not consider asking Nevins Hawks to step down from her position at the Manor Conservancy.

Brown testified that, when Nevins Hawks submitted her July 2014 application for repairs to the Larder, the County Department of Planning never verified that the Larder was a landmarked structure, because "a lot of [the] time the farmsteads would have accessory buildings which would then also [ ] be part of the landmark." Her office assumed that, because "[the Larder] was on the tax credit application, that it was a landmark." Likewise, everyone at the LPC meeting on September 11, 2014, labored under the mistaken

belief that the Larder was a historically landmarked structure, and therefore, that Nevins Hawks violated the BCC by replacing the roof without prior approval. Brown, who was present at that meeting, testified that she heard Bentz's remarks and did not understand them to suggest that Nevins Hawks was a criminal, a bad architect, or that she should not be serving on the LPC.

Mascari testified that she instructed Bentz to make public comments on behalf of the Preservation Alliance after learning about Nevins Hawks's apparent successive violation of the County Code.

In his deposition, Ruby agreed with the statement that he "knew before [the Second Article] was published that [the Larder] was not a designated historic structure." He claimed that, irrespective of whether the Larder was historically designated, Nevins Hawks "still [wa]s in violation of landmark regulations, which is why she could not get the tax credits."

Bentz testified that at the time of the LPC meeting, she believed that the Larder was landmarked based upon Nevins Hawks's application for pre-approval and tax credits. According to Bentz, Ruby did not tell her "that he was going to publish the comments" that Bentz made at the LPC meeting, nor did she ever discuss the comments prior to the publication of the Second Article. After she learned that the Larder was not actually landmarked, Bentz did not take any steps to notify Ruby or to retract the public comments that she made before the LPC on September 11, 2014.

At the close of Nevins Hawks's case-in-chief, Bentz, Ruby, and Right Action moved for judgment. Bentz argued that Nevins Hawks failed to make out a *prima facie* case of defamation because she presented no evidence that Bentz's public comments would reasonably have been understood by any third person to expose Nevins Hawks to public scorn, hatred, contempt, or ridicule; and that the evidence undisputedly showed, in light of the information available to her, that Bentz's statements were true at the time that she made them. Alternatively, Bentz argued that, because her comments were made on behalf of the Preservation Alliance, an organization that shares a "very large overlap" with the LPC's mission, she was protected by the conditional common interest privilege. She asserted that Nevins Hawks had not adduced evidence that Bentz acted with actual malice, a prerequisite to overcome that conditional privilege.

Ruby and Right Action adopted Bentz's arguments relative to the *prima facie* defamation case, emphasizing that at the time of the LPC meeting, "everyone thought that there had been a violation." They argued, relying upon *Piscatelli v. Van Smith*, 424 Md. 294, 306 (2012), that the statements in the Second Article were protected by the fair reporting privilege. They argued, moreover, that such conditional privilege permitted them to "publish statements that are otherwise defamatory if they were made during [a] proceeding[] or [a] public meeting," as long as the reporting is "fair and substantially accurate." They asserted that Ruby had "reported on what occurred" and "reported on what people understood at the time." Because Ruby "expressly included" an explanation that

the Larder was not in fact landmarked, "the [Second] [A]rticle as a whole was in fact fair and accurate."

After considering these arguments and Nevins Hawks's opposition, the circuit court granted appellees' motions for judgment. The court reasoned that Nevins Hawks failed to satisfy her burden to prove that the statements made by Bentz and Ruby and published by Right Action were defamatory. The court explained that "no one has gotten on that witness stand except, of course, [Nevins Hawks] herself, to suggest that she has in any way been defamed." The court stated that Nevins Hawks also did not adduce any evidence that she lost business because of the Second Article. Furthermore, the court determined that Bentz was under no legal duty to correct or retract her statements after finding out that they were false. Consequently, the court held that "as a matter of law with regard to defamation, I find that [Nevins Hawks] has not met [her] burden of proof to require that the case move forward to the jury." Additionally, the court held that Ruby and Right Action were entitled to the fair reporting and fair comment privileges, as discussed in *Piscatelli*. Reading the Second Article as a whole, the court reasoned that it "was fairly reported," and "[t]here were fair comments." The court entered judgments to that effect on October 17, 2016. Nevins Hawks filed a motion for new trial, which was denied without a hearing.

This timely appeal followed. We will include additional facts as necessary to the resolution this appeal.

STANDARD OF REVIEW

We review the trial court's grant of a motion for judgment *de novo*, "considering the evidence and reasonable inferences drawn from the evidence in the light most favorable to the non-moving party." *Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 393–94 (2011) (citing Md. Rule 2-519). In so doing, we are concerned "with whether the plaintiff has met the burden of *prima facie* production, as a matter of law, and not with the weight of the evidence, as a matter of fact." *Terumo Medical Corp. v. Greenway*, 171 Md. App. 617, 623 (2006). "The case must be submitted to the jury for decision if there is any legally sufficient evidence to support the claim." *Elste v. ISG Sparrows Point, LLC*, 188 Md. App. 634, 647 (2009), *cert. denied*, 412 Md. 495 (2010). The "'party who has the burden of [proof] . . . cannot sustain this burden by offering a mere scintilla of evidence, amounting to no more than surmise, possibility, or conjecture . . . .'" *Id.* (quoting *Cavacos v. Sarwar*, 313 Md. 248, 259 (1988)).

LEGAL BACKGROUND

In order to establish a *prima facie* defamation claim under Maryland law, a plaintiff must establish 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.

Offen v. Brenner, 402 Md. 191, 198 (2007). "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 from associating or dealing

with, that person." *Batson v. Shiflett*, 325 Md. 684, 722–23 (1992). "The test is whether the words, taken in their common and ordinary meaning, in the sense in which they are generally used, are capable of defamatory construction." *Id.* at 724 n.14.

As to the second element, "[a] false statement is one that is not substantially correct." *Id.* at 726. "The burden of proving falsity is on the plaintiff. . . ." *Id.* Furthermore, "minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Id*. (citations and internal quotation marks omitted).

The third element requires proof that the defendant was at fault "based either on negligence or constitutional malice." *Shapiro v. Massengill*, 105 Md. App. 743, 772 (1995), *cert. denied*, 341 Md. 28 (1995). Constitutional malice, often referred to as actual malice, "is established by clear and convincing evidence that a statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Batson*, 325 Md. at 728 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964)). In actions for defamation brought by a public official plaintiff or a public figure plaintiff, he or she must show that the defendant made the false and defamatory statements with actual malice, whereas a private person plaintiff ordinarily need only establish fault under a negligence standard. *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 584–85 (1976); *Seley-Radtke v. Hosmane*, 450 Md. 468, 489–90 (2016).

There is significant overlap between fault and the fourth element of damages. Maryland continues to recognize the distinction between defamation *per se* and defamation

per quod. *Hearst Corp. v. Hughes*, 297 Md. 112, 125 (1983); *Shapiro*, 105 Md. App. at 773. A statement is defamatory *per se*, when its "'injurious character is a self-evident fact of common knowledge of which the court takes judicial notice and need not be pleaded or proved.'" *Metromedia, Inc. v. Hillman*, 285 Md. 161, 163 (1979) (quoting *M & S Furniture v. DeBartolo Corp*., 249 Md. 540, 544 (1968)). Consequently, harm is presumed and "a jury may award general damages for false words that are actionable per se, even in the absence of proof of harm." *Shapiro*, 105 Md. App. at 774. In order to recover presumed damages, however, a plaintiff must prove fault under the heightened actual malice standard, even if he or she is a private person. *See id.* at 774 ("the plaintiff must prove actual damages if the defendant was merely negligent in making the false statement"). Alternatively, a statement is defamatory *per quod* where "'the injurious effect must be established by allegations and proof of special damage and in such cases it is not only necessary to plead and show that the words or actions were defamatory, but it must also appear that such words or conduct caused actual damage.'" *Metromedia*, 285 Md. at 164 (quoting *M & S Furniture*, 249 Md. at 544)).

Likewise, punitive damages are allowable in a defamation case only if the plaintiff meets the heightened actual malice standard, even if the plaintiff is a private person. *Jacron*, 276 Md. at 587. Thus, to be entitled to punitive damages, a plaintiff must "'establish[ ] that the defendant had actual knowledge that the defamatory statement was false.'" *Seley-Radtke*, 450 Md. at 495 (quoting *Le Marc's Mgmt. Corp. v. Valentin*, 349 Md. 645, 653 (1998)).

DISCUSSION

I.

Claim Against Bentz

Nevins Hawks contends that the circuit court erred by granting Bentz's motion for judgment because she presented evidence satisfying all four elements of a *prima facie* defamation case. As discussed, Nevins Hawks alleged that Bentz defamed her by her public comments at the September 11, 2014 LPC meeting, which were republished later in the Second Article. Specifically, Bentz stated that the repairs to the Larder were made in "blatant disregard for historic guidelines" and "[y]ou can't just say [Nevins Hawks] did it again and it's okay . . . . If she didn't know before, she certainly knows now that this is a historical structure." According to Nevins Hawks, "the plain meaning" of those statements was that Nevins Hawks was "an historic preservation scofflaw who did not obey [t]he LPC's regulation designed to protect landmarked structures, that her predilection was chronic and that she was unfit to serve on [t]he LPC." She further asserts that Bentz's statements were false, and that Bentz "should have known," that they were false, because "she was a professional researcher of landmarked structures in Baltimore County." Bentz was at fault, in Nevins Hawks's view, because "she did nothing to correct or address her false statements or otherwise prevent their publication," once she learned that they were false.

For the following reasons, we hold that Nevins Hawks failed to adduce sufficient evidence that Bentz was legally at fault in making her statements at the LPC meeting. We

thus decline to address the other factors. For purposes of our discussion, we shall assume without deciding, that Bentz's public comments were defamatory. It is also undisputed that the statements were false.

There can "be no recovery without fault in any defamation action." *Telnikoff v. Matusevitch*, 347 Md. 561, 593 (1997). As discussed, the degree of fault a plaintiff must prove turns upon whether he or she is a private person, on the one hand, or a public official or figure, on the other hand. Although not explicitly addressed below, we conclude as a matter of law that Nevins Hawks, an architect who also was an unpaid, volunteer appointee to the LPC, is a private person, not a public official or public figure. *See Waicker v. Scranton Times Ltd. P'ship*, 113 Md. App. 621, 629 (1997) ("Whether a plaintiff is a public figure is solely an issue of law."); *St. Luke Evangelical Lutheran Church, Inc. v. Smith*, 74 Md. App. 353, 366–70 (1988), *rev'd in part on other grounds*, 318 Md. 337 (1990) (associate director of community ministry for a church involved in a controversy did not "thrust herself into the controversy" or otherwise give up her status as a private figure). Thus Nevins Hawks had the burden to produce evidence that, if credited, could support a jury finding that Bentz failed to act as "a reasonable person under like circumstances" in making the false and defamatory statements. Restatement (Second) of Torts § 580B, comment g (Am. Law Inst. 1977). Nevins Hawks failed to satisfy that burden.

Nevins Hawks concedes that at the time of the LPC meeting on September 11, 2014, everyone, including Nevins Hawks, the LPC members, the County Planning Department staff, and Bentz believed that the Larder was a historic landmark, and thus it was a violation

of the County Code to make exterior alterations to the structure without first obtaining pre-approval from the LPC. To overcome such universal misunderstanding, Nevins Hawks contends that Bentz had a duty to retract her statements once Bentz learned of their falsity, because it was reasonably foreseeable to her that Ruby would republish them. We reject Nevins Hawks's contention, because she points to no authority for her theory, and our research has revealed none. Consequently, we shall analyze whether Bentz was at fault based upon the facts known to her at the time the statements were made, not at the time Ruby and Right Action republished her statements in the Second Article.

At the time of the LPC meeting, Bentz was not negligent in making her public statements on behalf of the Preservation Alliance. She had no obligation to independently research the landmarked status, *vel non*, of the Larder. Rather, she could reasonably rely upon Nevins Hawks's own attestation in her application and the expertise of the LPC, which had placed the application on the preliminary agenda for approval of the roof repairs and tax credits and on the final agenda for *ex post facto* approval of the roof replacement. Therefore, Nevins Hawks failed to adduce any evidence that Bentz was negligent, much less that she acted with actual malice necessary for presumed and punitive damages. Accordingly, the circuit court did not err by granting Bentz's motion for judgment.

II.

Claims Against Ruby and Right Action

Nevins Hawks contends that the circuit court erred by granting Ruby and Right Action's motion for judgment because she met her burden of production as to each element

of a claim for defamation and adduced evidence sufficient to generate a jury question as to whether Ruby and Right Action abused the conditional fair reporting and fair comment privileges. For the reasons to follow, we agree.

a.

In assessing whether a publication is defamatory, we read it "as a whole[.]" *Piscatelli*, 424 Md. at 306. In so doing, we consider "whether a publication is defamatory in and of itself, or whether, in light of the extrinsic facts, it is reasonably capable of a defamatory interpretation[.]" *Chesapeake Publ'g Corp. v. Williams*, 339 Md. 285, 295 (1995). We are mindful of the fact that "words have different meanings depending on the context in which they are used and a meaning not warranted by the whole publication should not be imputed." *Id*. If a publication is "capable of both defamatory and non-defamatory meanings, the resolution of the question must be put to the jury." *Embrey v. Holly*, 48 Md. App. 571, 581 (1981), *aff'd in part, rev'd in part*, 293 Md. 128 (1982).

The Second Article was, at the very least, capable of defamatory interpretation, generating a jury issue on that element.[6] The title of the Second Article – "LPC's Nevins Again Violates Landmark Regs" –accuses Nevins Hawks of being a repeat violator of the County Code by failing, a second time, to obtain the approval of the LPC before making repairs or changes to the exterior of a landmarked building. The first two paragraphs set forth this accusation in detail:

[6] We decline to decide at this juncture whether the Second Article was defamatory *per se* because that issue was not decided below, nor was it briefed in this Court.

> *Oops, she did it again. But this time she can't say she didn't know - - which was her excuse last year - - because she was told then what she should have done this time.*
>
> Still, she did it again and *this time is especially egregious*, say historic preservations, because she is supposed to be setting an example for others as she sits in judgment of others who are supposed to do what she didn't . . . again.

(Emphasis added). The thrust of the Second Article was that Nevins Hawks's violations of the historic landmark regulations evidenced more than ignorance of the law, but rather defiance of it. This content, taken as a whole, was capable of "expos[ing] [Nevins Hawks] to public scorn . . . or ridicule" and could "discourage[ ] others in the community from having a good opinion of, or from associating or dealing with [her]." *Batson*, 325 Md. at 722–23.

Ruby and Right Action emphasize that Nevins Hawks did not present any evidence that "members of the community viewed her as a 'scofflaw' or otherwise had a negative opinion about her." They point out that Nevins Hawks's witnesses at trial testified that she had a good reputation and that the article did not change their opinion of her. Nevins Hawks testified, however, that her friends and neighbors in northern Baltimore County, where she lived and socialized, had read the article and had asked her about it; she said that she was embarrassed when people asked about the article. Further, considering Nevins Hawks's occupation as an architect, the Second Article could damage her business reputation as a trustworthy, intelligent, and competent professional. *See Shapiro*, 105 Md. App. at 775 ("[I]t is defamatory 'to utter any slander or false tale of another . . . which may impair or hurt his trade or livelyhood.'" (quoting *Leese v. Baltimore Cnty.*, 64 Md. App.

442, 473-74 (1985), in turn quoting 3 W. Blackstone, *Commentaries on the Laws of England* 123 (special ed. 1983))). Thus the evidence was more than sufficient to create a jury question as to the defamatory nature of the Second Article.

Turning to the second element, the headline of the Second Article and the numerous references therein to Nevins Hawks's having violated the landmark regulations for the second time were clearly false. *See Batson*, 325 Md. at 726 ("A false statement is one that is not substantially correct."). As discussed, because the Larder was not a landmarked structure on the Property, Nevins Hawks did not need permission before making exterior renovations or repairs to it. Therefore, although Nevins Hawks (and others) mistakenly believed that she had violated the landmark regulations, she, in fact, did not.

On the issue of fault, as discussed, *supra*, a private person plaintiff, like Nevins Hawks, ordinarily need only show that the defendant was negligent in making the false and defamatory statements. *See Telnikoff*, 347 Md. at 594 (in defamation actions not brought by a public figure or public official, "the plaintiff must by a preponderance of the evidence establish that the defendant was at least negligent"). Because Nevins Hawks also seeks punitive damages, however, we shall analyze whether she adduced sufficient evidence of fault under the heightened actual malice standard. *See Seley-Radtke*, 450 Md. at 495–96. We conclude that under either standard, Nevins Hawks generated a jury issue as to the issue of fault.

Unlike Bentz, who only made defamatory statements at the September 11, 2014 LPC meeting, when everyone involved mistakenly believed the Larder was landmarked,

Ruby and Right Action published the Second Article three weeks later. By then, as Ruby admitted in his deposition, which was read into the record at the trial, Ruby knew that the Larder was not landmarked.[7] Further, as we shall discuss in more detail, *infra*, the Second Article did not merely report on what happened at the meeting or republish comments made by persons present at the meeting. Rather, Ruby stated affirmatively that Nevins Hawks had violated the County Code for a second time by failing to obtain pre-approval from the LPC before replacing the roof of the Larder. In light of Ruby's actual knowledge of the falsity of those statements, Nevins Hawks clearly presented evidence sufficient to create jury question as to whether Ruby and Right Action acted with actual malice in publishing the Second Article.

Turning to damages, if the statements were defamatory *per se* and were made with actual malice, Nevins Hawks was not obligated to produce evidence of actual damages. *See Shapiro*, 105 Md. App. at 774 ("[W]here the statement is actionable *per se*, damages are presumed if a plaintiff can demonstrate constitutional malice; the jury may award general damages for false words that are actionable *per se*, even in the absence of proof of harm."). We need not decide that issue, however, because Nevins Hawks's testimony at trial that she lost confidence in herself as a result of the Second Article, that she experienced embarrassment in social settings when it was apparent that acquaintances had read the Second Article, that the article caused her anxiety and loss of sleep, and that it

[7] Ruby and Right Action also concede this fact in their brief in this Court.

caused her to miss a day of work because she "was upset" and could not "focus" was evidence of emotional distress sufficient to put the issue of damages before the jury.

b.

Even if a statement is defamatory, an absolute or qualified privilege may apply to defeat a claim of defamation, if the defendant did not abuse that privilege. *Piscatelli*, 424 Md. at 307. "An absolute privilege is distinguished from a qualified privilege in that the former provides immunity regardless of the purpose or motive of the defendant, or the reasonableness of his conduct, while the latter is conditioned upon the absence of malice and is forfeited if it is abused." *Id.* (internal quotation marks and citations omitted). Courts recognize the defense of privilege based "upon the value that sometimes, as a matter of public policy, to foster the free communication of views in certain defined instances, a person is justified in publishing information to others without incurring liability." *Hosmane v. Seley-Radtke*, 227 Md. App. 11, 24, *aff'd*, 450 Md. 468 (2016).

In the instant case, the circuit court held that two conditional privileges—the fair reporting and fair comment privileges—shielded Ruby and Right Action's allegedly defamatory statements. "[W]e employ a two step analysis to determine whether a conditional privilege applies." *Id*. at 25. First, we consider whether the asserted privilege applies. *Piscatelli*, 424 Md. at 307. Second, "we determine whether the privilege was abused, *i.e.*, whether the publisher acted with actual malice." *Hosmane*, 227 Md. App. at 25. "Step one is a question for the court; step two is a question for the trier of fact, unless there are no material facts in dispute." *Id.*

Under the first step, we conclude that the circuit court correctly ruled that the fair reporting and fair comment privileges applied to the communications made by Ruby and published by Right Action. "The fair reporting privilege is a qualified privilege to report legal and *official proceedings* that are, in and of themselves defamatory, so long as the account is 'fair and substantially accurate.'" *Piscatelli*, 424 Md. at 309 (quoting *Chesapeake Publ'g*, 339 Md. at 296) (emphasis added) (citation omitted). Such privilege is recognized based on the "public's interest in having access to information about official proceedings and public meetings." *Id.*

The fair comment privilege immunizes a "'newspaper like any member of the community . . . [from] liability, [when it] honestly express[es] a fair and reasonable opinion or comment on matters of legitimate public interest.'" *Id.* at 314 (quoting *A.S. Abell Co. v. Kirby*, 227 Md. 267, 272 (1961)). Thus, unlike the fair reporting privilege, which protects reporting on what happened and what was said during an official proceeding, the fair comment privilege protects the right of newspapers to editorialize about "matters of legitimate public interest." *Id*.

The Second Article reported on the September 11, 2014 LPC meeting, detailing the LPC's approval of Nevins Hawks's application for *ex post facto* approval of the replacement of the Larder's roof and public comments made by Bentz at that meeting. The LPC is a County-sponsored commission that works to preserve designated historic landmarks in the area. The monthly meetings, including the one on September 11, 2014, are public, and the LPC considers matters of public concern. Ruby's reporting on the

meeting and his expressions of opinion about the substance of the meeting and related matters fell within the scope of the fair reporting and fair comment privileges.

Turning to the second step, we must determine if Nevins Hawks met her burden of adducing evidence that Ruby and Right Action abused those privileges, thus creating a jury question as to whether the qualified privileges had been abused. "A defendant abuses his or her fair reporting privilege, not upon a showing of actual malice, . . . but when the defendant's account 'fails the test of fairness and accuracy.'" *Id.* at 309–10 (quoting *Chesapeake Publ'g*, 339 Md. at 297) (footnote omitted). A publication is fair and accurate "when the reports are substantially correct, impartial, coherent, and bona fide." *Id.* at 310. Though ordinarily a question of fact, this issue may be withdrawn from the jury if there is no evidence of "unfairness or inaccuracy." *Id.*

In the instant case, Nevins Hawks's clearly adduced evidence that the Second Article was inaccurate and unfair and thus was sufficient to generate a jury question on abuse of the fair reporting privilege. Although the quotes of Bentz's statement and the description of the actions taken by the LPC were substantially correct, the headline of the Second Article coupled with the entire first page inaccurately and unfairly reported that Nevins Hawks had violated the landmark regulations for a second time. As already discussed, this was false, and Ruby knew it was false at the time of the Second Article's publication. Ruby's reporting did not merely recount that the LPC found that Nevins Hawks had violated the landmark regulations for a second time, but stated that she did, in fact, do so. The single paragraph buried two pages later stating that, "Planning staffers

later said that the item should not have been included on the Sept. 11 agenda because [the Larder was not landmarked]" did not render accurate the earlier sections of the article.

Likewise, there was evidence that the fair comment privilege had been abused. Whether a publication is entitled to the fair comment privilege "often turns on whether or not it contains misstatements of fact as distinguished from expression of opinion." *Id.* at 315. "Derogatory opinions based on false and defamatory or undisclosed facts are not privileged." *Id*. at 316. Ruby's statement "Oops, she did it again. But this time she can't say she didn't know -- which was her excuse last year -- because she was told then what she should have done this time," falls into that category as do many other "comments" within the Second Article. These "comments" rely on the false and defamatory premise that Nevins Hawks violated the County Code for a second time, as well as pervade the entire Second Article. In sum, having adduced evidence that could support a finding that Ruby and Right Action abused the fair reporting and fair comment privileges, Nevins Hawks generated "a triable issue for the fact-finder." *Id.* at 308.

For all of these reasons, the circuit erred by granting Ruby and Right Action's motion for judgment. Accordingly, we reverse the judgment of the circuit court as to the claims against Ruby and Right Action and remand for further proceedings consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND APPELLEES RUBY AND RIGHT ACTION.