Circuit Court for Allegany County
Case No. C-01-CV-18-000253

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2221

September Term, 2019

ROBERT L. CANDY, ET AL.

v.

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., ET AL.

Graeff,
Kehoe,
Zic,

JJ.

Opinion by Zic, J.

Filed: April 12, 2021

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellants Robert L. Candy, Tri-State Zoological Park of Western Maryland, Inc. ("Tri-State"), and Animal Park, Care and Rescue Inc. ("Animal Park") (collectively "Candy") instituted this action in the Circuit Court for Allegany County against appellee People for the Ethical Treatment of Animals, Inc. ("PETA") and Chris Fontes along with six other defendants. Primarily, Candy alleges that they were defamed and placed in a false light by statements made by PETA in connection with its federal lawsuit against the three appellants for violations of the Endangered Species Act ("ESA"). PETA and Mr. Fontes filed motions to dismiss, which the court granted as to the defamation and false light claims but denied as to the other five claims. Following the court's dismissal of the other six defendants for lack of service, Candy voluntarily dismissed with prejudice the remaining claims against PETA and Mr. Fontes. Subsequently, the defendants filed a joint notice of consent to the dismissal and the court entered an order in accordance with that filing. Candy then noted this appeal, contesting the court's grant of PETA's motion to dismiss.

QUESTIONS PRESENTED

Candy presents the first question for our review and PETA raises the second question. Both questions have been reworded as follows:

1. Did the circuit court err in dismissing the defamation and false light claims on the ground that PETA's allegedly defamatory statements are absolutely privileged?

2. Do the U.S. District Court's factual findings and legal conclusions in PETA's federal action against the three appellants establish that its allegedly defamatory statements are substantially true, thereby providing an independent ground for affirmance?

For the reasons that follow, we answer the first question in the affirmative and do not reach the merits of the second question. Accordingly, we vacate the circuit court's judgment as to both the defamation and false light claims and remand the case for further proceedings consistent with this opinion.

BACKGROUND

Mr. Candy, Tri-State, and Animal Park own and operate a small-sized zoo located in Cumberland, Maryland. PETA is a nonprofit animal rights organization and Mr. Fontes, who is not a party to this appeal,[1] is one of its employees.

On July 31, 2017, PETA filed a complaint against the three appellants in the U.S. District Court for the District of Maryland, alleging that they violated the ESA[2] by subjecting certain federally protected animals located at the Cumberland facility to harm and harassment. The specific animals at issue included two ring-tailed lemurs, five tigers, and two lions. On that same day, PETA published a blog post on its website titled "PETA Sues Over Treatment of Animals Suffering at Tri-State Zoo," which reads as follows:

> PETA is suing Tri-State Zoological Park in Cumberland, Maryland, and its owner, Bob Candy, in U.S. federal court under the Endangered Species Act (ESA) over the mistreatment and abuse of lemurs, tigers, and a lion currently held there. Below is a description of PETA's allegations.

[1] Despite Candy's assertion that "Appellee Fontes remains in the case as a technical matter," Mr. Fontes is not an appellee—Candy does not challenge the dismissal of the defamation and false light claims as to Mr. Fontes and he did not file a brief in this appeal.

[2] 16 U.S.C. §§ 1531–1544.

This dismal roadside zoo has a long history of animal welfare violations. It was cited last year for failing to provide an ailing, dramatically underweight lion named Mbube with adequate veterinary care, and in February 2017, the zoo announced that he had died.

At Tri-State, two ring-tailed lemurs are kept in a woefully inadequate enclosure devoid of any environmental enrichment. Social animals by nature, they are deprived of appropriate companionship, and their living conditions are unsafe and unsanitary.

Five tigers are kept at this roadside zoo in decrepit enclosures without proper enrichment, food, potable water, shelter, or sanitation. Free-roaming animals expose them to the risk of diseases, and staff force them to engage in inappropriate and dangerous interactions with the public. In addition, three of the tigers—Kumar, Cayenne, and India—are housed together despite evidence of incompatibility, which causes them significant stress and puts them at risk of injury.

Since the death of Mbube, another lion named Peka has been held at the zoo in complete isolation, which is particularly harmful since lions are social animals. Like the other animals imprisoned at this zoo, Peka doesn't receive proper enrichment, food, shelter, housing, or sanitation, and she, too, is forced into unnatural interactions with visiting tourists.

In addition to addressing the concerns above, PETA's lawsuit asks the court to prohibit Candy and the zoo from owning or displaying endangered or threatened species in the future and to require that the current animals be relocated to reputable sanctuaries.

Help us get these long-suffering animals to a reputable sanctuary.

PETA has been tracking the chronic neglect of the animals at this roadside zoo for years. In 2013, the USDA suspended its license for 45 days and ordered it to cease and desist from violating the federal Animal Welfare Act. But even though the agency subsequently rubber-stamped its license renewal,

> the citations have continued to pile up, and in 2015, the U.S. Department of Agriculture issued an official warning.
>
> Since then, the zoo has continued to prove that it is either unwilling or incapable of addressing the animals' most basic welfare needs. Join us in our efforts to stop this cruelty.
>
> TAKE ACTION: URGE TRI-STATE ZOOLOGICAL PARK TO RETIRE ANIMALS TO REPUTABLE SANCTUARIES

Importantly, the record is unclear as to whether the federal complaint was filed at the time PETA published the blog.

Within the blog post, PETA included a link to an additional article titled "Factsheet: Tri-State Zoological Park." In the fact sheet, PETA provided a short summary of the following information: "citations" issued between 2005 to 2017 by the U.S. Department of Agriculture ("USDA") for Tri-State's failure to meet the standard of care set by the Animal Welfare Act[3] ("AWA"); an administrative decision issued by the USDA in March 2013 finding that Tri-State violated the AWA and suspending its AWA license; and a USDA warning issued in May 2015 for additional AWA violations by Tri-State.[4] The ESA action eventually proceeded to trial and the federal court issued its final

[3] 7 U.S.C. §§ 2131–2159.

[4] The introduction of PETA's fact sheet reads:

> The Tri-State Zoological Park of Western Maryland (aka "Tri-State Zoo") is owned by Bob Candy. Tri-State Zoo has repeatedly failed to meet minimum federal standards for the care of animals as established in the Animal Welfare Act (AWA). The USDA has cited Tri-State Zoo repeatedly for failing to provide animals with adequate veterinary care, failing to maintain enclosures, failing to provide primates

decision on December 26, 2019. *See PETA v. Tri-State Zoological Park of W. Md., Inc.*, 424 F. Supp. 3d 404 (D. Md. 2019), *aff'd*, No. 20-1010, 2021 WL 305546 (4th Cir. Jan. 29, 2021). It ruled "in favor of PETA on all theories of liability," finding that Candy violated the ESA by, among other misconduct, failing to provide the federally protected animals with adequate living conditions and veterinary care. *See id*. at 430-33. Candy appealed and, after oral arguments in the instant action, the U.S Court of Appeals for the Fourth Circuit affirmed the federal court's judgment. *See PETA*, 2021 WL 305546, at *2.

On May 23, 2018, Candy filed this lawsuit against PETA, Mr. Fontes, and six other individuals allegedly involved in PETA's efforts to monitor the Cumberland zoo.[5]

> who are held alone with environmental enrichment, failing to keep lions and tigers in secure enclosures, failing to provide adequate shelter from wind and cold temperatures, and allowing the buildup of excessive amounts of feces and waste in multiple enclosures. In March 2013, the USDA suspended the facility's AWA license for 45 days and ordered it to cease and desist from violating the AWA. In May 2015, the USDA issued an official warning to the Tri-State Zoo for violating the AWA. Contact PETA for documentation.

The fact sheet then lists multiple instances where the USDA "cited" Tri-State for AWA violations, providing the date and a brief description of the particular violation. The following is an example:

> September 24, 2015: The USDA cited Tri-State Zoo for repeat violations for failing to repair broken wires in the fence surrounding animals used in a petting zoo, failing to keep the grounds free of excessive amounts of excreta and debris, and failing to repair a wooden ramp—which had holes, splinters, and protruding nailheads—in an enclosure housing a wild cat. The facility was also cited for failing to clean water bowls that contained a buildup of dark brown-green material.

[5] The other six defendants are Casey Brown, Holly Brown, Colin Henstock, Brittany Peet, Delcianna Winders, and Kristine Staser.

Candy alleged seven counts in its amended complaint: defamation, false light, tortious interference with business relations, civil conspiracy, trespass, fraud, and invasion of privacy. The defamation and false light claims are based on PETA's publication of the blog post and fact sheet.[6] Specifically, Candy argues that the blog post statements accusing the appellants of mistreating the two lemurs, five tigers, and two lions held at the Cumberland facility in violation of the ESA are false. Additionally, they argue that the fact sheet mischaracterizes USDA inspection reports noting Tri-State's AWA violations as "citations."

On March 11, 2019, PETA moved to dismiss the amended complaint for failure to state a claim. Regarding the defamation and false light claims, PETA argued that the blog post statements summarizing its federal pleading are immune from liability under the absolute judicial privilege and that the terms "citation" and "cited" in the fact sheet are an accurate way of referring to USDA inspection reports finding noncompliance with the AWA. Mr. Fontes also moved for dismissal of Candy's amended complaint.

Following a hearing, on June 20, 2019 the court granted the motions to dismiss as to the defamation and false light claims but denied the motions as to the other five claims. It also granted Candy leave to amend its defamation and false light claims against Mr.

[6] In the amended complaint and within the Statement of Facts of the appellate brief where a large portion of the complaint is quoted, Candy also cited the following statement as defamatory: "PETA . . . falsely published a story that Dodger, the capuchin monkey at the zoo, pulls his fur out from distress." The source of this allegedly defamatory statement is unclear—it does not appear in PETA's blog post or fact sheet. Because Candy fails to articulate any argument concerning this specific statement, we will not address it on appeal. *See* Md. Rule 8-504(a), (c).

Fontes within thirty days, though these counts were never amended. In its separate memorandum, the court explained that the absolute privilege for out-of-court statements connected to a pending proceeding, specifically the ESA litigation, applied to all of PETA's allegedly defamatory statements and thus dismissed the defamation claim. It reasoned that PETA's statements were privileged because the federal action advanced a compelling public interest, namely the proper care of federally protected animals, there were suitable procedural safeguards in that forum**,** and the challenged statements described the ESA allegations and were made while the lawsuit was ongoing. This same privilege analysis, the court explained, applied equally to Candy's false light claim, thereby warranting dismissal of that count.

PETA and Mr. Fontes both filed answers on August 2, 2019. At that point, Candy had not served the other six defendants. The court then dismissed those defendants for lack of jurisdiction. Several months later, on December 12, 2019, Candy filed a Notice of Dismissal of Remaining Claims with Prejudice, voluntarily dismissing the five surviving claims against PETA and Mr. Fontes.[7] The two defendants filed a Notice of

[7] By filing a notice of dismissal after the defendants answered the amended complaint, Candy failed to comply with the procedure for effectuating voluntary dismissal as set forth in Rule 2-506. *See* Md. Rule 2-506(a) ("[A] party who has filed a complaint . . . may dismiss all or part of the claim without leave of court by filing . . . a notice of dismissal at any time before the adverse party files an answer . . . ."). Instead, Candy should have either filed "a stipulation of dismissal signed by all parties to the claim being dismissed" or sought a court order. Md. Rule 2-506(a), (c). PETA and Mr. Fontes recognized this error, stating in their joint filing that they "consent to the dismissal of the Remaining Claims in accordance with Maryland Rule 2-506(a)," and the court subsequently entered a formal order of dismissal. Thus, the five remaining claims are deemed voluntarily dismissed. *See Pharmaceia Eni Diagnostics, Inc. v. Wash. Suburban*

Consent to Dismissal of Remaining Claims with Prejudice, attaching as an exhibit the federal court's decision in the ESA action. In accordance with that joint filing, the court entered an order dismissing with prejudice all the remaining claims against PETA and Mr. Fontes. Candy then timely noted this appeal.

DISCUSSION

In this appeal, Candy challenges the circuit court's decision granting PETA's motion to dismiss as to the defamation and false light claims, which are premised on two publications by PETA: (1) the blog post statements describing its allegations in the ESA action and (2) the fact sheet references to USDA inspection reports as "citations." The court concluded that all the challenged statements were absolutely privileged as out-of-court statements connected to a judicial proceeding. We disagree and hold that the absolute privilege is inapplicable to the circumstances of this case.

As a threshold matter, we address Candy's arguments premised on the fact sheet, specifically that it is a non-privileged, defamatory publication, which we deem inadequate under Rule 8-504. *See* Md. Rule 8-504(a) (requiring a brief to supply an "[a]rgument in support of the party's position on each issue"). The majority of the appellants' brief focuses on the allegedly defamatory statements contained in the blog post. There appears to be only one sentence supporting the contention that the fact sheet

Sanitary Comm'n, 85 Md. App. 555, 563-65 (1991) (holding that plaintiff's dismissal notice filed after defendant answered the complaint was effective because defendant's failure to object to the notice and to participate further in the action demonstrated its consent to the dismissal, rendering a formal order or signed stipulation "unnecessary").

is not privileged—that it "does not even purport to reference a lawsuit that has been filed or any judicial proceeding at all." Similarly, the brief contains a single sentence devoted to the argument that the fact sheet is defamatory based on its mischaracterization of USDA inspection reports as "citations." Namely, Candy claims, without citing any legal authority, that "a USDA inspection report that notes a defect is not a citation, as a matter of law." In response, PETA argues that the fact sheet is not actionable because the "use of the terms 'cited' and 'citation' to describe USDA inspection reports is truthful and identical to the manner in which administrative law judges and federal courts use these terms in official publications." PETA does not, despite the court's ruling, contend that the fact sheet is privileged. We need not reach the merits of these issues—whether this particular publication is privileged or whether the "citation" references are false—because we conclude that Candy's arguments concerning the fact sheet as the basis of its defamation and false light claims are not adequately briefed as required by Rule 8-504(a). *See Silver v. Greater Balt. Med. Ctr., Inc.*, 248 Md. App. 666, 688 n.5 (2020) ("A single sentence is insufficient to satisfy [Rule 8-504(a)]'s requirement [that a brief contain an argument in support of the party's position on each issue]."); *Rollins v. Cap. Plaza Assocs., L.P.*, 181 Md. App. 188, 202 (2008) (explaining that when a party fails to cite any controlling law, the appellate court cannot be expected to seek out law to sustain that party's position).

The remainder of this opinion focuses on the blog post as the basis of Candy's defamation claim by first addressing the applicability of the absolute privilege and then

the issue raised by PETA for the first time on appeal regarding whether the blog post statements are substantially true. Importantly, our analysis of the defamation claim applies equally to the false light claim. *See Piscatelli v. Van Smith*, 424 Md. 294, 306 (2012) ("An allegation of false light must meet the same legal standards as an allegation of defamation."); *Steer v. Lexleon, Inc*., 58 Md. App. 199, 204-10 (1984) (applying privilege discussion identically to both defamation and false light claims).

I. STANDARD OF REVIEW

When reviewing the grant of a motion to dismiss for failure to state a claim under Rule 2-322(b)(2), the applicable standard of review is "whether the [circuit] court was legally correct." *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 350 (2019) (quoting *Blackstone v. Sharma*, 461 Md. 87, 110 (2018)). The appellate court "must determine whether the [c]omplaint, on its face, discloses a legally sufficient cause of action." *Pittway Corp. v. Collins*, 409 Md. 218, 234 (2009). In doing so, the "court must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them." *Wireless One, Inc. v. Mayor of Baltimore*, 465 Md. 588, 604 (2019) (quoting *Floyd v. Mayor of Baltimore*, 463 Md. 226, 241 (2019)).

The appellate court's review is "limited generally to the four corners of the complaint and its incorporated supporting exhibits." *Wireless One*, 465 Md. at 604 (quoting *Floyd*, 463 Md. at 241). As explained in Rule 2-322(c), "[i]f . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as

one for summary judgment." There is, however, an exception to this Rule—when "an extraneous document merely supplements the allegations of the complaint, and the document is not in dispute, consideration of the document [filed as an exhibit to the] motion to dismiss does not convert it into one for summary judgment." *Kemp v. Nationstar Mortg. Ass'n*, 248 Md. App. 1, 30 n.13 (2020). The Court applied this exception in *Smith v. Danielczyk*, 400 Md. 98 (2007), a defamation action based on statements in a search warrant application, when the appellees alleged additional facts in and appended extraneous materials to their motion to dismiss. 400 Md. at 103-05. The Court reasoned that because there was no apparent dispute regarding the materials or factual averments, it would "regard the exhibits and additional averments as simply supplementing the allegations in the complaint and consider the relevant facts pled in the complaint, as so supplemented." *Id.* at 105; *see also Margolis v. Sandy Spring Bank*, 221 Md. App. 703, 710 n.4 (2015) ("Although [plaintiff] did not attach the Deposit Account Agreement to his complaint, he expressly referred to it and repeatedly alleged that its disclosures did not satisfy the [Consumer Protection Act]. . . . Because there was no dispute that the . . . Agreement was the agreement between [the parties], the circuit court could and did regard it as 'simply supplementing the allegations in the complaint.'" (quoting *Smith*, 400 Md. at 105)).

PETA attached five extraneous documents to its memorandum in support of its dismissal motion: the blog post, the ESA federal complaint, a chart comparing the allegedly defamatory statements in the blog post with the allegations made in the ESA

complaint ("comparison chart"), and two USDA decisions concerning the operation of Tri-State. Because the record does not indicate that these materials were excluded by the circuit court, we must assume that they were considered and determine whether PETA's motion should be reviewed as one for dismissal or summary judgment. *See Smith*, 400 Md. at 105. As the basis of the defamation and false light claims, Candy, in the amended complaint, repeatedly quoted from PETA's blog post, which in turn detailed PETA's ESA allegations using similar, if not identical, language as the federal complaint. Given that the blog post and ESA complaint were referenced in, but not appended to, the amended complaint, PETA attached those documents as motion exhibits as well as a comparison chart comprised solely of statements from those two attachments and Candy's pleading. The fact sheet, which was attached to the amended complaint, described a USDA judicial officer's decision affirming an administrative law judge's decision finding that Tri-State violated the AWA. Both of those decisions, which PETA also included as motion exhibits, further detailed many of the USDA "citations" mentioned in the fact sheet and challenged by Candy as defamatory. Recognizing that these materials do not appear to be controverted by the parties, we believe that they can be fairly regarded as supplementing the allegations in Candy's amended complaint. *See Smith*, 400 Md. at 104-05. Consequently, we will not treat PETA's motion to dismiss as one for summary judgment.

II. ABSOLUTE PRIVILEGE

We start our analysis with an overview of the doctrine of absolute privilege. At least since 1888, Maryland courts have recognized an absolute privilege for certain defamatory statements made by participants in judicial proceedings, including attorneys, judges, witnesses, and parties to a litigation. *Keys v. Chrysler Credit Corp*., 303 Md. 397, 403-04 (1985) (first citing *Hunckel v. Voneiff*, 69 Md. 179, 186-193 (1888); and then citing *Bartlett v. Christhilf*, 69 Md. 219, 222-27 (1888)). In *Norman v. Borison*, 418 Md. 630 (2011), the Court provided a breakdown of three categories of statements protected by this privilege: (1) statements made in a judicial proceeding, including statements in filed court documents; (2) statements made in a quasi-judicial proceeding; and (3) statements made extrinsic to a judicial or quasi-judicial proceeding. 418 Md. at 650-60. Regardless of the category at issue, "for the privilege to apply, the statement must be made to further a purpose falling within the public interest underlying the privilege, i.e.[,] the unfettered disclosure of information needed for a judicial or quasi-judicial decision-making process." *Woodruff v. Trepel*, 125 Md. App. 381, 399 (1999). Because PETA argues, as discussed below, that the blog post statements fall under the first and third categories, we limit our discussion of the doctrine to those types of statements.

The first category of privileged statements, as explained by the Court in *Norman*, encompasses both statements made in the courtroom and in filed court documents, such as pleadings and affidavits. *See* 418 Md. at 651. The primary prerequisite for immunizing defamatory content in a court document is that the document has been filed

in a judicial proceeding—documents published before they have been filed cannot qualify as privileged in-court statements. *See id.* at 661-62 (analyzing defendants' publication of the complaint to the press before it was filed as a privileged out-of-court statement rather than one made in a judicial proceeding). Once filed, the subsequent publication of that filing does not generally void its privileged status. *See id*. at 664. Notably, when the putative tortfeasor is a judge, witness, or party, rather than an attorney,[8] the challenged statement need not be related to the underlying proceeding and the speaker's purpose and motive are irrelevant to the privilege analysis. *Id.* at 650-52.

The third category of protected statements encompasses out-of-court remarks that are "connected contextually" to a pending proceeding.[9] *Id.* at 653. These statements "are not designed to be filed in a court action, but rather are simple communications by or between individuals connected to some pending or ongoing proceeding." *Id.* at 656.

[8] Attorneys seeking immunity for statements made in a judicial proceeding and for out-of-court statements (i.e., the third category of privileged statements) must demonstrate that the "defamatory statement [has] some rational relation to the matter at bar before unfurling the umbrella of absolute privilege." *Norman*, 418 Md. at 650-51, 656.

[9] This third category also includes two other types of out-of-court statements—statements made with the purpose or effect of producing a proceeding and statements prepared for possible use in a pending proceeding regardless of whether they have been filed. *Norman*, 418 Md. at 653. PETA does not argue that the blog post qualifies as these types of statements presumably because it recognizes that under *Norman* this would be a failing argument. There, the Court held that the complaint, which defendants shared with the press presumably before it was filed, was not a "statement made with the purpose or effect of producing a proceeding" because it was not communicated to any authorized investigating body. *Id.* at 661-62. Additionally, it held that the pleading was not "prepared for a pending proceeding" because the media is "uninvolved in the 'evaluation and investigation of facts and opinion.'" *Id.* at 662 (quoting *Adams v. Peck*, 288 Md. 1, 8 (1980)).

With respect to parties or other non-attorney participants, the privilege applies when three requirements are met: (1) there is a contemplated or ongoing proceeding at the time the statement is made; (2) the proceeding satisfies the two-part test of *Gersh v. Ambrose*, 291 Md. 188, 197 (1981), by advancing a compelling public interest and possessing suitable procedural safeguards that minimize the occurrence of defamatory statements; and (3) the statement was "made 'during the course of' the proceeding (i.e., while the putative tortfeasor was participating in the proceeding)." *Norman*, 418 Md. at 656-58. When analyzing this last requirement, the court should "ask[], among other things: what was the overall or general reason for the instrument or letter [containing the challenged statement] . . . ; what was the defendant doing when he or she made the statement; and to whom did he or she make the statement." *Id.* at 658. It is important to highlight that while the challenged statement need not be related to the proceeding, the context in which it was made must have some connection to the litigation. *Id*. at 658 n.17. For example, in *Woodruff v. Trepel*, 125 Md. App. 381 (1999), this Court held that the absolute privilege applied when an attorney in a custody dispute sent a letter to opposing counsel in which he referenced in-court testimony alleging that the opposing party, who filed the defamation action, was abusive, reasoning that his letter was "related to and reference[d] the underling [child custody] litigation." *Id.* at 392-95. This Court, however, refused to extend the privilege to the attorney's client who forwarded the letter to the child's school because "[t]he school's knowledge [of the letter's contents] . . . did not have any actual or potential effect upon the custody proceeding." *Id.* at 395-401.

With these principles in mind, we turn to the parties' arguments. Candy alleges that the absolute privilege for out-of-court statements is inapplicable because the blog post was "not [a] necessary communication[] in furtherance of the litigation," which the appellants view as an element set forth in *Norman*, and instead was only posted "to foster public contempt and ridicule . . . and to raise money and unmerited support for PETA." According to Candy, such publications are not entitled to immunity because, as explained in *Kennedy v. Cannon*, 229 Md. 92 (1962), and later emphasized in *Norman*, "an attorney who wishes to litigate his case in the press will do so at his own risk." *Kennedy*, 229 Md. at 99; *see Norman*, 418 Md. at 665. In *Kennedy*, which the appellants claim is controlling, the Court refused to extend the absolute privilege to an attorney who, fearing that his African American client accused of raping a Caucasian woman would be lynched, told the press that the woman consented, characterizing the attorney's action as merely an attempt to set up a slanderous defense in the press. *See* 229 Md. at 95-100. Similarly, Candy argues that PETA published the blog post "for publicity without any legitimate purpose related to the litigation" and thus should not be protected by the absolute privilege.

Alternatively, PETA argues that the blog post statements are absolutely privileged for two reasons: (1) they constitute a republication of the allegations in PETA's ESA complaint, thereby qualifying as statements made in a judicial proceeding (i.e., category one statements) and (2) they are extrinsic statements connected contextually to a pending proceeding (i.e., category three statements). Regarding the former contention, PETA

relies on one of the Court's holdings in *Norman*—that the internet publication of a filed complaint is a privileged in-court statement—as authority for its contention that publications that accurately summarize allegations made in a filed complaint are also privileged. 418 Md. at 664. In that case, the plaintiff, a member of a limited liability company who was a defendant in a proposed class action alleging mortgage fraud, instituted a defamation action against the attorneys who filed the separate lawsuit. *Id.* at 638. The plaintiff's defamation claim was based in part on the attorneys' posting of a redacted version of the mortgage fraud complaint on their website after it was filed and their comments to reporters about the underlying lawsuit. *Id*. The Court held that the internet publication of the filed complaint was privileged as an in-court statement, reasoning that "Maryland law does not limit who, where, or the extent to which one may view [a filed court] document." *Id*. at 664.

In support of its second privilege argument, PETA again cites to *Norman*, highlighting the Court's conclusion that the attorneys' comments to the media, which PETA characterized as statements summarizing the mortgage fraud complaint, qualified as third category statements. *Id.* at 664-66. The Court reviewed the articles quoting the attorneys' statements, such as "[w]e're talking about bad people" and "Metropolitan Money Store[, one of the defendants,] was out stealing the equity in people's homes." *Id*. The articles also detailed how the mortgage scam worked, who was potentially involved, and who was likely targeted. *Id*. at 665. Ultimately, the Court held that the attorneys appeared to have "made the statements while promoting public awareness of their

proposed class action claim and, thus, while participating in the course of the proceeding." *Id.* Analogizing to the public commentary at issue in *Norman*, PETA argues that the blog post was "plainly" made in the course of the ESA litigation because it "clearly informs the reader [of the lawsuit] in its headline and introduction."

We hold that the circuit court erred in granting PETA's motion to dismiss on privilege grounds. The court's decision rested on the absolute privilege for out-of-court statements "connected contextually" to a pending proceeding. PETA, however, has not established that the blog post was "made in the course of the proceeding," which is an element of the absolute privilege for third category statements.[10] *Norman*, 418 Md. at 658. PETA argues that the blog post's reference to the ESA litigation in its headline and introduction satisfies this requirement. We disagree. Based on the caselaw outlined above, a defamatory statement is "made in the course of a proceeding" when it is made by or to an individual participating in or having an actual or potential effect on the action. *See id.* In our view, the readers of the blog post play no role in the federal action and their knowledge of the allegations has no apparent effect on that case. The mere fact that the blog's headline and introduction indicate that the subject of the article is PETA's ESA action is insufficient. Although PETA claims that its statements "fall far more squarely in the rule set forth in *Norman* than did the [attorneys' public commentary] at issue

[10] Because we conclude that this third element is not met, we need not address the other two elements of the absolute privilege for out-of-court statements—that there is a contemplated or ongoing proceeding and the *Gersh* test is satisfied. *See Norman*, 418 Md. at 656-58.

there," the Court concluded that those comments were intended to promote public awareness of the proposed class action. *Id*. at 665. Conversely, PETA's publication of the blog post has no apparent connection to the ESA litigation for purposes of the absolute privilege. Although the blog did raise awareness of the federal action, in *Norman* the purpose of the public commentary was to make other potential class members aware that they could join the class of plaintiffs. *See id.* No such purpose exists in regard to PETA's posting. As such, we hold that the statements were not made in the course of that proceeding, rendering the absolute privilege for out-of-court statements inapplicable. Additionally, we cannot immunize the blog post as a statement made in a judicial proceeding because the record is unclear as to whether the ESA complaint was filed at the time the blog was published, which is required to qualify under the first category of privileged statements.[11] *See id.* at 651.

In its brief, Candy misstates the doctrine of absolute privilege as outlined in *Norman* by claiming that extrinsic statements must be "necessary[ily] . . . in furtherance of the litigation." The Court in *Norman* did not limit the privilege to "necessary" out-of-court statements and instead set an arguably lower bar, requiring that the defamatory

[11] In reaching this conclusion, we need not decide whether the absolute privilege as discussed in *Norman* extends to summaries of allegations in a filed complaint rather than the complaint itself. We note, however, that *Norman* could be read as endorsing the application of the absolute privilege for out-of-court statements to accurate explanations of a complaint's allegations in light of its holding that the attorneys' public commentary, which described the defendants in the underlying action and their allegedly illegal conduct, fell under the third category. 418 Md. at 664-66. But recognizing this does not necessitate a ruling in PETA's favor as it still must establish that its statements were "made in the course of the proceeding" to be immune from liability.

remark was made "'during the course of' the proceeding." 418 Md. at 658. Nonetheless, Candy appears to effectively argue that the blog post statements do not satisfy this requirement—that PETA's blog was not sufficiently connected to the prosecution of the ESA action. As explained above, we agree with that conclusion. We do not, however, agree with Candy's reliance on PETA's allegedly illegitimate motive for posting the blog as Maryland courts have repeatedly held that the absolute privilege applies regardless of the speaker's motive or purpose. *See Smith v. Danielczyk*, 400 Md. 98, 117 (2007).

In sum, for the reasons outlined above, we hold that the circuit court erred in dismissing the defamation and false light counts based on the absolute privilege.

III. FAIR REPORTING PRIVILEGE

During oral arguments, the fair reporting privilege was raised and the parties were invited to, and later did, submit supplemental briefs on this issue. Briefly, the fair reporting privilege is a qualified privilege protecting reports of legal proceedings and information within court files that are themselves defamatory as long as the account is "fair and substantially accurate." *Piscatelli v. Van Smith*, 424 Md. 294, 309 (2012) (quoting *Chesapeake Publ'g Corp. v. Williams*, 339 Md. 285, 296 (1995)). A report is fair and substantially accurate when it is "substantially correct, impartial, coherent, and bona fide," which is ultimately a question of fact for the factfinder. *Piscatelli*, 424 Md. at 310 (citing *Batson v. Shiflett*, 325 Md. 684, 727 (1992)). A defendant abuses this privilege "not upon a showing of actual malice (as with other common law conditional privileges), but when the defendant's account 'fails the test of fairness and accuracy.'"

Piscatelli, 424 Md. at 309-10 (quoting *Chesapeake Publ'g Corp.*, 339 Md. at 297). The protections of the fair reporting privilege are also lost when a defendant who reported his or her own defamatory statement made in a proceeding is found to have "illegitimately fabricated or orchestrated events so as to appear in a privileged forum in the first place." *Rosenberg v. Helinski*, 328 Md. 664, 684-86 (1992).

PETA is free to raise the fair reporting privilege on remand.[12] We, however, decline to render a decision on the basis of this privilege because doing so involves deciding a question of fact—whether the blog post is an accurate and fair report of the ESA complaint. *See Piscatelli*, 424 Md. at 310. And such questions should not be decided on a motion to dismiss. *See Griesi v. Atl. Gen. Hosp. Corp.*, 360 Md. 1, 4 n.4 (2000) ("When ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the trial judge's task is to decide a question of law . . . ."); *Young v. Medlantic Lab'y P'ship*, 125 Md. App. 299, 303 (1999) ("It is clearly inappropriate in the context of a motion to dismiss for the judge to make a finding of fact."); *see also Piscatelli*, 424 Md. at 310 (noting that summary judgment on the basis of the fair reporting privilege is appropriate when "the plaintiff fails to point to evidence of unfairness and inaccuracy").

IV. SUBSTANTIAL TRUTH

As an alternative ground for affirmance, PETA argues that the federal district court's final decision in the ESA litigation, which was recently affirmed by the Fourth

[12] *See* Md. Rule 2-302; Md. Rule 2-341.

Circuit, establishes that the blog post statements are substantially true and thus cannot support a defamation claim.[13] Because PETA raises this argument for the first time on appeal, we note that this Court has discretion to consider such arguments and may affirm on those grounds if adequately shown by the record and legally correct. *See Unger v. State*, 427 Md. 383, 406 (2012). We hold that PETA's argument concerning the truth of its blog post statements is not the proper basis of a motion to dismiss and thus decline to consider it as a potential ground for affirming the grant of its dismissal motion.

The purpose of a "motion to dismiss (and formerly a demurrer) [is to] challenge[] the sufficiency of the complaint." *Williams v. Prince George's County*, 112 Md. App. 526, 558 (1996). In moving for dismissal for failure to state a claim upon which relief can be granted, the "defendant asserts . . . that, *despite the truth of the [well-pled factual] allegations*, the plaintiff is barred from recovery as a matter of law." *Porterfield v. Mascari II, Inc.*, 374 Md. 402, 414 (2003) (emphasis added). And, when reviewing the motion, the court must accept all well-pled facts as true. *Id*. Importantly, "[a] demurrer . . . for the purpose of determining [the legal sufficiency of the facts alleged in the declaration to state a cause of action], . . . cannot either contradict facts so alleged or add

[13] PETA raises issue preclusion as an additional basis for affirming the circuit court's decision—that Candy is collaterally estopped from proving falsity because the federal court's opinion established the truth of the blog post statements. This argument is made in a single conclusory sentence appearing in a footnote within the Statement of Facts. We conclude that this issue is not sufficiently briefed as required by Rule 8-504(a) and decline to address it on appeal. *See Oak Crest Vill., Inc. v. Murphy*, 379 Md. 229, 241 (2004) (determining that "[t]he three-line conclusory footnote in [the party]'s brief does not adequately present the issue" in accordance with Rule 8-504(a)).

others." *Walker v. D'Alesandro*, 212 Md. 163, 167 (1957); *see also Elliott v. Kupferman*, 58 Md. App. 510, 517 n.1 (1984) ("It is not the function of a demurrer to controvert the factual allegations in a complaint or to present new ones.").

PETA argues that the dismissal should be affirmed because the blog post statements, which detail its ESA allegations against Candy for mistreating certain federally protected animals, are substantially correct as established by the federal court's decision ruling in favor of PETA "on all theories of liability." *See PETA v. Tri-State Zoological Park of W. Md., Inc.*, 424 F. Supp. 3d 404, 433 (D. Md. 2019), *aff'd*, No. 20-1010, 2021 WL 305546 (4th Cir. Jan. 29, 2021). Put differently, PETA claims that Candy failed to prove falsity, which is defined as a statement "that is not substantially correct." *Piscatelli*, 424 Md. at 306 (quoting *Batson*, 325 Md. at 726); *see also Spengler v. Sears, Roebuck & Co.*, 163 Md. App. 220, 240 (2005) ("[I]f a plaintiff cannot prove the falsity of a particular statement, the statement will not support an action for defamation."). Candy counters that this matter should not be considered by this Court because it improperly places us in the role of fact finder.

We conclude that this particular argument is not appropriately raised in the context of a motion to dismiss because it is not premised on the assumption that the well-pled facts in Candy's complaint are true. In other words, PETA does not assume that Candy, for example, provided adequate veterinary care to their tigers as alleged in the amended complaint and then argue that dismissal is warranted despite that fact. Instead, PETA argues that Candy's factual allegations are not true—that Candy did not provide their

tigers with adequate veterinary care as found by the federal court—and this is the reason that dismissal is proper. PETA's argument offered in support of its dismissal motion seemingly contradicts the facts alleged in Candy's complaint, which the Court cautioned against in *Walker*. *See* 212 Md. at 167. This issue should be considered at the summary judgment, not the motion to dismiss, stage. Consequently, we decline to reach the merits of this issue on this appeal.

CONCLUSION

For the reasons stated above, we hold that the circuit court committed legal error in granting PETA's motion to dismiss as to the defamation and false light claims based on the absolute privilege. Because we do not reach the merits of PETA's additional argument in support of affirmance concerning the truth of its allegedly defamatory statements, we vacate the court's judgment and remand the case to the Circuit Court for Allegany County for further proceedings consistent with this opinion.

JUDGMENT VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR ALLEGANY COUNTY FOR ADDITIONAL PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.

The correction notice(s) for this opinion(s) can be found here:

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