Circuit Court for Baltimore City
Case No. 24-C-17-004748 CN

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3495

September Term, 2018

NICHOLAS EUGENE

v.

STATE OF MARYLAND, et al.

Meredith,
Arthur,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: April 24, 2020

Dr. Nicholas Eugene, appellant, an associate professor of mathematics at Coppin State University, filed a three-count complaint, later amended, against the appellees, namely, the State of Maryland, the University System of Maryland Board of Regents ("the University System"), Coppin State University ("Coppin"), and the following four individual defendants: Dr. Maria Thompson, Dr. Lisa Horne-Early, Dr. James Takona, and Dr. Keith Williamson. The amended complaint asserted the following three claims: "Breach of Contract," against all defendants (Count II), "Torts Arising from Breach of Contract," against the four individual defendants (Count III), and "Defamation," against the four individual defendants (Count IV). The Circuit Court for Baltimore City granted summary judgment in favor of all defendants. Appellant noted this appeal.

QUESTIONS PRESENTED

1. Did the Circuit Court err in its finding that the claim [in Count III] was "one sounding in negligence" and granting summary judgment for appellees on this claim[?]

2. Did the Circuit Court improperly grant summary judgment on appellant's claim for torts arising from contract (Count III) when it held that there was no evidence of malice?

Perceiving no error by the Circuit Court, we shall affirm.

FACTS AND PROCEDURAL HISTORY

The events that precipitated Dr. Eugene's suit took place in 2017.

By way of background, Dr. Eugene was first hired by Coppin as an Assistant Professor of Mathematics in 2001 at an annual salary of $55,000 for ten months of work.

Dr. Eugene was granted tenure in 2007. In 2009, he was promoted to Associate Professor.

Prior to the beginning of each academic year, Coppin sent Dr. Eugene what the parties have called a "salary letter" or a "reappointment letter," which notified Dr. Eugene of his re-appointment to a faculty position and the terms of his compensation. The reappointment letter dated 9/18/12 for the 2012-2013 academic year stated:

> Dear Dr. Eugene:
>
> This is to inform you of your reappointment for the 2012-2013 academic year to the position of Associate Professor at an annual salary of $67,235.00 for ten (10) months of service.
>
> University System of Maryland employees will receive a 2% cost-of-living increase on January 1, 2013, at which time your base salary will be adjusted to $68,580.00.
>
> Please sign the original ACCEPTANCE AGREEMENT and return it to the Office of Human Resources by October 5, 2012. . . .

Dr. Eugene's salary letter for the following academic year was generally the same. It was dated 7/16/13, and provided:

> Dear Dr. Eugene:
>
> This is to inform you of your reappointment for the 2013-2014 academic year to the position of Associate Professor at an annual salary of $69,498.00 for ten (10) months of service.
>
> University System of Maryland employees will receive a 3% cost-of-living increase on January 1, 2014, at which time your base salary will be adjusted to $71,583.00.
>
> Please sign the original ACCEPTANCE AGREEMENT and return it to the Office of Human Resources by August 2, 2013. . . .

In the amended complaint, Dr. Eugene alleged that, in the spring of 2013, he had been recruited by Coppin to serve as the STEM Coordinator for the Department of Mathematics and Computer Science, and that he had "negotiated a 10 month tenured faculty appointment of $95,000" with a reduced course load to offset the administrative time he would be spending coordinating the STEM program. In the record are two e-mails—dated June 19, 2013, and June 23, 2013—from Dr. Sadie Gregory, the then-Provost, to appellee Dr. Lisa Early, the Vice President for HR, reflecting that Coppin's then-President, Dr. Mortimer Neufville, had "just approved a [10]-month contract for Dr. Nicholas Eugene, effective July 1, 2013. He will serve as the STEM Coordinator with an annual salary of $95,000." The record also contains a Personnel Action Form from Coppin's Office of Human Resources reflecting that, effective July 1, 2013, Dr. Eugene's salary was being adjusted from $69,498.00 to $95,000.00. This increase coincided with Dr. Eugene's appointment to the position of STEM Coordinator.

Dr. Eugene's salary letter for the academic year 2014-15 was dated June 27, 2014. It was signed by Dr. Neufville and provided, in part:

> Dear Dr. Eugene:
>
> > This is to inform you of your reappointment for the 2014-15 academic year to the position of Assoc Prof & STEM Coordinator. Your salary will be $102,804, which includes a $2,508 merit adjustment, effective July 1, 2014. . . .

Dr. Eugene's salary letter for the 2015-16 academic year was similar. Dated July 1, 2015, it provided:

Dear Dr. Eugene:

> This letter is to inform you of your reappointment for the 2015-16 academic year to the position of Associate Professor & STEM Coordinator at an annual salary of $104,860 for ten (10) months of service. . . .

But Dr. Eugene's 2016-17 reappointment letter made no reference to STEM. Unlike both of the two prior years' salary letters, the 2016-17 salary letter did not say that Dr. Eugene was being reappointed as the STEM Coordinator. Instead, the letter dated July 1, 2016, provided:

Dear Dr. Eugene:

> This is to inform you of your reappointment for the 2016-17 academic year to the position of Associate Professor at an annual salary of $107, 482.00 for ten (10) months of service. Your salary includes a 2.50% merit increase of $2,622.00, effective July 1, 2016. [. . .]

Midway through the 2016-2017 academic year, on February 16, 2017, Dr. Eugene was removed from his position as STEM Coordinator, and the position was eliminated, in part because of dissatisfaction with the manner in which he had handled certain aspects of the job. Dr. Eugene was notified of these developments by letter dated February 16, 2017, from appellee Dr. James Takona. The letter stated:

Dear Dr. Eugene:

> This letter is to inform you that, effective immediately, your concurrent administrative appointment as the STEM Program Director will end. The position of STEM Director will be eliminated and the funds will be directed for student support. You will, however, retain your position as Associate Professor with collateral duties as Chair of the Department of Mathematics and Computer Science. Beginning fall 2017, your base salary will be adjusted to $81,980.00 plus your $2,000 Chair's stipend each semester, as you will no longer be entitled to additional compensation as the STEM Director.

> You are also advised that you will no longer have any duties and responsibilities for the management and oversight of the STEM student scholarships. The Office of the Dean of the College of Arts & Sciences, and Education, in conjunction with the Office of the Provost and Vice President for Academic Affairs, will reorganize the STEM Program. An immediate change is that all STEM-related scholarship nominations previously delegated to the STEM Office will be coordinated through the Dean for [the] College of Arts and Sciences. All recommendations/approval[s] will be processed through the Office of Financial Aid as required by Federal regulation CFR 668.16.

Payroll records reflected that Dr. Eugene was paid, in accordance with the July 1, 2016 letter, $107,482.00 for the 2016-17 academic year, even though he was relieved of serving as STEM Coordinator as of February 16, 2017.[1]

[1] Appellee Dr. Lisa Early, the Assistant Vice President for Human Resources and Coppin's Chief Human Resource Officer since 2009, filed an affidavit in support of appellees' motion for summary judgment, affirming:

> 10. For the 2016-2017 academic year, and in addition to his faculty position as a tenured Associate Professor, Dr. Eugene held a concurrent, administrative position as the Chair of the Department of Mathematics and Computer Sciences for which he was paid a stipend in the amount of $6,000.00. For the 2017-18 academic year, Dr. Eugene again held [a] concurrent, administrative position as Chair of the Department of Mathematics and Computer Sciences.
>
> 11. In 2013, and pursuant to a contract negotiated with [Coppin's] then-interim President, Dr. Neufville, Dr. Eugene was appointed to the concurrent, administrative position as STEM Coordinator. In February 2017, Dr. Eugene's appointment as STEM Coordinator was terminated.
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> 12. Beginning with the 2013-14 academic year and through the 2016-2017 academic year, Dr. Eugene received additional compensation above his faculty compensation for his concurrent, administrative appointment as STEM Coordinator.

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But Dr. Eugene took issue with Dr. Takona's statement advising him that his base salary for the 2017-2018 academic year would be reduced to $81,980.00 (plus $2,000.00

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> 13. In 2016, by a Salary Letter dated July 1, 2016, Dr. Eugene was notified that his total compensation for the 2016-17 academic year was $107,480.00. Although not specifically set forth in the letter, the compensation stated in the letter included Dr. Eugene's salary as a tenured Associate Professor, and payment for his concurrent, administrative position as STEM Coordinator.
>
> 14. For the 2016-2017 academic year, Dr. Eugene's total compensation comprised of $81,980.00 due to him for his position of tenured Associate Professor, $25,502.00 due to him for his concurrent, administrative position [of] STEM Coordinator, and an additional $6,000.00 due to him for his concurrent, administrative position as Chair of the Department of Mathematics and Computer Sciences.
>
> 15. **For the 2016-2017 fiscal year, I have reviewed the payroll records for Dr. Eugene, and, based upon those records, Dr. Eugene was paid the full compensation as set forth in the July 1, 2016 Salary Letter for the 2016-17 academic year.**
>
> 16. After his concurrent, administrative position as STEM Coordinator was eliminated, Dr. Eugene filed a salary grievance asserting that the reduction in his salary was improper. In response, I reviewed his employment records and made a determination that the reduction was appropriate and consistent with the applicable University policies. I notified Dr. Eugene of my determination and the basis of that determination by letter dated November 28, 2017. [. . .]
>
> 17. The reduction of Dr. Eugene's salary due to the elimination of the STEM Coordinator position was the result of a business decision by [Coppin] taken to ensure appropriate oversight of the STEM Scholarship funds.

(Emphasis added.) Supporting payroll records were attached to Dr. Early's affidavit.

for each semester he served as Department Chair), in contrast to the 2016-17 reappointment letter dated July 1, 2016, that had appointed him to serve as an Associate Professor at a salary of $107,482.00 for ten months of work without any mention of STEM duties. Dr. Eugene contends that he actually was owed additional compensation for serving as the STEM Coordinator over and above his Associate Professor salary of $107,482. He claimed he should have been paid a total of $132,982.00 for the 2016-17 academic year, and therefore should have been paid at least $107,482 after his position as STEM Coordinator was eliminated.[2] Dr. Eugene's grievance asserting this claim was

[2] In his Brief, appellant asserts:

> In response to the motion for summary judgment, Appellant argued that the University System [sic] on Concurrent Faculty and Administrative Appoints [sic] required a separate letter from any tenured faculty appointment, or appointment letter. Neither President Thompson nor Appellee Early, Assistant Vice President for Human Resources, produced any separate contract for the concurrent administrative position, nor can they. Appellant rebutted Appellee Early's claims in her sworn statement that Appellant received a concurrent, administrative position as STEM Coordinator which "was not specifically set forth in the July 1, 2016 letter." There is nothing to show that Appellant received payment for his concurrent administrative position as STEM Coordinator, as sworn to by Appellee Early. Appellee Early stated in paragraph 14 of her Affidavit that Appellant was paid $25,502.00 due him for his concurrent, administrative position as STEM Coordinator. Based upon the policy referenced in her affidavit, Appellant was entitled to $107,482.00 for ten (10) months of service as an Associate Professor, and not [sic] $25,502.00 for STEM for a total of $132, 982.00 based upon the University System of Maryland Board of Regent[s] ("BOR") Policy 11.100 and BOR Policy II-1.03. Appellant argued that such a statement by Appellee Early was not credible on its face and the affidavit of the Appellant Dr. Eugene contradicted the logic of Appellee Early's sworn affidavit.

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unsuccessful. (A version of this claim was asserted as a breach of contract action in Count II of Dr. Eugene's amended complaint.)

On September 22, 2017, Dr. Eugene filed his complaint (later amended) against appellees in the Circuit Court for Baltimore City alleging claims of breach of contract, "torts arising from breach of contract," and defamation. The State filed a motion to dismiss or for summary judgment. On December 21, 2017, Dr. Eugene filed an amended complaint with the same three causes of action against the same entities and individual defendants.

In Count II of the amended complaint, Dr. Eugene alleged that he had been hired as an Assistant Professor at Coppin, and had been appointed Chair of the Mathematics and Computer Science Department in December 2016. He alleged in Paragraph 26: "Since February 2017 and continuing Defendants refused to pay and did not pay the faculty contract due to Plaintiff; and thereby materially breaching it's [sic] Contract with Plaintiff."

The appellees responded to the amended complaint with another motion to dismiss or for summary judgment. By order dated February 8, 2018, entered February 12, 2018,

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In his affidavit supporting his opposition to appellees' motion for summary judgment, appellant swore that he had "read Dr. Lisa H. Early's affidavit and f[ou]nd her statements relating to compensation as STEM Coordinator to be untruthful." He did not file any documentation that contradicted the payroll records attached to Dr. Early's affidavit.

the court granted summary judgment in favor of appellees on "Count II (Breach of Contract)" only.[3]

Discovery proceeded. On August 29, 2018, Dr. Williamson was dismissed pursuant to Maryland Rule 2-507.

The appellees filed another motion for summary judgment with respect to the remaining counts on December 17, 2018. In their motion, the appellees asserted, in part:

> Dr. Eugene has provided no evidence of any duty or any damages owed him by the Defendants independent of his employment contract with [Coppin]. In his defamation claim, Dr. Eugene relies on statements made by non-party employees of [Coppin] arising from his employment relationship with [Coppin]. However, Dr. Eugene has failed to provide any evidence that these statements are, in fact, defamatory and false or that he suffered any damages as a result of the statements. Even if the record supports a *prima facie* defamation claim, Dr. Eugene's claim is barred as a matter of law pursuant to the conditional privilege doctrine and the Maryland Tort Claims Act. Accordingly, the Defendants are entitled to Summary Judgment on all Dr. Eugene's claims.

The motion was supported by affidavits of Drs. Early and Takona, as well as Michael Freeman, and Joann Christopher-Hicks; answers to interrogatories and excerpts of the deposition of Dr. Eugene; and numerous copies of e-mails, correspondence, and other documents.

[3] At the January 25, 2019 hearing on appellees' subsequent motion for summary judgment on the remaining counts of the amended complaint, the parties agreed that the February 2018 grant of summary judgment on the breach of contract claim in Count II applied to all defendants. Dr. Eugene raised no issue in his brief with respect to the breach of contract claim he asserted in Count II.

Dr. Eugene filed a response opposing the motion on January 18, 2019, supported with his own affidavit and miscellaneous documents.

The court conducted a hearing on the appellees' motion for summary judgment, and granted the motion on January 25, 2019. Judgment was entered in favor of the appellees on February 4, 2019.

In granting summary judgment on Count III (which alleged "torts arising from contract") and Count IV (defamation), the court provided the following oral explanation:

> [BY THE COURT]: With respect to the defamation claim . . . a defamatory statement is a false statement about another that exposes that person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion or from associating or dealing with that person. . . .
>
> The alleged defamatory statements have been put forth as an e-mail by Dr. Freeman on January 19, 2017 at 5:52 p.m. to student SR. As well as an e-mail, I believe on the same day by Dr. Joann Christopher-Hicks at 18:13 . . . to the same student.
>
> I have reviewed these e-mails and looking at any inference in a light most favorable to the plaintiff, there is just simply no falsity to these e-mails.
>
> * * *
>
> **So I just find that just as a matter of law there's no genuine dispute that these statements are, you know, simply not false.**
>
> * * *
>
> Okay. So **let's move on to the tort arising from contract claim**. [Dr. Eugene's trial counsel] said effectively that **the cause of action is based upon the theory that the alleged individual tortfeasors** who are individual defendants here, Drs. Thompson, Horne-Early and Takona **had a duty to [follow] [U]niversity [S]ystem policy with respect to faculty**

contracts. And it appears that that policy requires a letter annually describing what your post is and what your salary is.

And that in the case of the plaintiff and other[s] similarly situated the letter should, as I said earlier, state if you have dual roles[,] it should state, effectively that you are being appointed [to] two roles, one as professor, and one as, in this instance, [STEM] coordinator, state the salary for each of those and give --- and provide you with a total salary. Okay. **And further alleges that the individual defendants did not do this in his case.**

So it is pretty clear to me that what [Dr. Eugene] is pursuing is a claim of negligence with respect to these individual defendants. And as we know as a state employee, an individual state employee cannot be found civilly liable or responsible under the Maryland Government Tort Claims Act for torts arising out of their employ [sic] unless there's also a finding of actual malice.

So we take into consideration hypothetically an automobile accident case, where a state employee is on the job and they're negligent in the operation of a motor vehicle and they strike another motor vehicle and there's a claim.

In that circumstance the individual[] employee would not be subject to suit, [that's] the whole function of the [T]ort [C]laims [A]ct, but the State of Maryland could be subject to suit. **In this instance, [Dr. Eugene] has sued the individual defendants and not the State of Maryland [in Count III].** And I just find that based upon the evidence presented thus far through the discovery process there is no --- this is an action sounding in negligence and the individual defendants cannot be found personally liable.

Okay. **Now, in order to find those individuals personally liable there must be some showing of malice or gross negligence and I agree with the defense that there's simply no evidence in the record to support this contention. There's simply speculation here.** And again, I don't know what the speculative or motive is in the first place. In other words, was there ill will in drafting these appointment letters over a period of three or four years, or was there ill will or malice with respect to Dr. Eugene's removal from the position of [STEM C]oordinator[?]

I mean, **we asked [Dr. Eugene's counsel] what is this claim about and it is effectively about the failure to properly do the paperwork with respect to the salary**. So I'm holding him to his words there; however, if

> in fact, the tort is based on some sort of malice associated with his removal as [STEM] director I find that there's simply no evidence in the record to support that contention. There's no reasonable inference that can be drawn.
>
> As we have --- as the briefing papers state, the position of [STEM] director is simply an at will position, plain and simple. Dr. Eugene or anyone else holding that position could be removed from that position for any reason, so long as [ ] there was no --- so long as the removal was not otherwise illegal. In other words, it was not based upon race, national origin, gender, here in Maryland sexual orientation and the like. And there's simply no, there's no evidence that his removal was based upon any of those factors.
>
> And, in fact, retaliation in my view would have to be based upon some form of violation of our employment laws. In other words, if there was some form of retaliation alleged because Dr. Eugene had complained of some issue regarding race or gender, hiring or firing or promotion or the like, either himself or on behalf of another, then he may have had some standing to say that my demotion, if you will, or the removal of these responsibilities was based on the kind of ill will cognizable under the law. In other words, there's none of that here, there's just simply none of that. This has not been countenanced as a civil rights claim.
>
> So for those reasons, I will grant summary judgment to all defendants as to the remaining two counts. . . .

(Emphasis added.)

The court also filed a written order granting summary judgment in which it reiterated its conclusion that tort claims "based upon the [i]ndividual [d]efendants' failure to follow proper procedures in setting his salary for his professorship and for his role as STEM Coordinator" could not succeed because the individual defendants were all State employees, and they were therefore immune from personal liability pursuant Maryland Code (1973, 2013 Repl. Vol., 2018 Supp.), Courts and Judicial Proceedings Article ("CJP"), § 5-522(b). The court ruled that, to recover against the individual defendants

would require a showing "that they acted with malice and the record is devoid of evidence supporting such a conclusion." (Citing CJP § 5-522(a)(4)(ii).) The same reasoning applied to the defamation claim, but, with respect to that count, the court also ruled that there was "no genuine dispute that the statements at issue were not false," and plaintiff's counsel had also "admitted" at the hearing "that no damages flowed from the falsity."[4]

[4] Despite numerous cases from the Court of Appeals addressing the "separate document requirement" of Maryland Rule 2-601(a)(1), the court's written "order" entered on February 4, 2019, combines an explanatory memorandum opinion with the court's dispositive order. We commented on this technical issue in *Wireless One, Inc. v. Mayor of Baltimore City*, 239 Md. App. 687 (2018), *aff'd*, 465 Md. 588 (2019), where we stated, 239 Md. App. at 695 n.3:

> We note that the format of the court's judgment did not strictly comply with the requirement of Maryland Rule 2-601(a)(1), which mandates: "Each judgment shall be set forth on a separate document and include a statement of an allowance of costs as determined in conformance with Rule 2-603." Here, the court's judgment of dismissal appears on the sixth page of the written opinion explaining the court's reasoning. The Court of Appeals discussed the rationale for adopting the rule requiring that each judgment be set forth on a separate document in *Byrum v. Horning*, 360 Md. 23, 26, 756 A.2d 560 (2000), noting that it was intended to "remedy the 'difficulty [which] ha[d] arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," ' . . . ." It was often difficult for the clerk to determine the precise nature of the judgment and the wording that needed to be included in the docket entry reflecting the court's judgment. There were also issues relative to determining the effective date of the judgment. The separate document rule, now set forth in Rule 2-601(a)(1), " 'eliminates these uncertainties by requiring that there be a judgment set out on a separate document --- distinct from any opinion or memorandum --- which provides the basis for the entry of judgment.' " *Id.* at 26-27, 756 A.2d 560.

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In Dr. Eugene's brief, he does not set forth a question challenging the court's ruling as to the defamation claim, and he makes no argument that the court's ruling on the defamation count was in error. *See* Maryland Rule 8-504(a)(3) and (6), which mandate: "A brief shall . . . include . . . (3) [a] statement of the questions presented, separately numbered, indicating the legal propositions involved and the questions of fact at issue . . . [and] (6) [a]rgument in support of the party's position on each issue."

STANDARD OF REVIEW

In *Livesay v. Baltimore County*, 384 Md. 1, 9–10 (2004), the Court of Appeals described the standard of appellate review applicable to the entry of summary judgment as follows:

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> Nevertheless, the separate document requirement is *not* jurisdictional, and strict compliance may be waived "where a technical application of the separate document requirement would only result in unnecessary delay." *URS Corporation v. Fort Myer Construction Corporation*, 452 Md. 48, 67, 156 A.3d 753 (2017). The Court of Appeals has held that strict compliance with the separate document rule can be "waived, at least where . . . the trial court intended the docket entries made by the court clerk to be a final judgment and where no party objected to the absence of a separate document after the appeal was noted." *Id*. at 68, 156 A.3d 753 (citing *Suburban Hospital v. Kirson*, 362 Md. 140, 154-56, 763 A.2d 185 (2000)). In this case, no party has objected to the form of the court's order of dismissal, and the docket entry of 9/14/17 accurately sets forth the substance of the court's judgment. Accordingly, we deem the lack of a separate document to be waived.

We will follow the same approach here with respect to the order entered by the clerk on February 4, 2019.

> Whether summary judgment was granted properly is a question of law. The standard of review is *de novo*, and whether the trial court was legally correct. *See Walk v. Hartford Casualty*, 382 Md. 1, 14, 852 A.2d 98, 105 (2004).
>
> Maryland Rule 2–501(e) states that a trial court "shall enter judgment in favor of or against the moving party *if the motion and response show* that there is *no genuine dispute* as to any *material fact* and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." In reviewing a grant of summary judgment under Rule 2–501(e), we independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. *Jurgensen v. New Phoenix*, 380 Md. 106, 114, 843 A.2d 865, 869 (2004). We review the record in the light most favorable to the non-moving party and construe any reasonable inferences which may be drawn from the facts against the movant. *Id.* In addition, it is well established in Maryland that an appellate court ordinarily will consider only the grounds relied upon by the trial court in granting summary judgment. *See, e.g.*, *Lovelace v. Anderson*, 366 Md. 690, 695, 785 A.2d 726, 729 (2001); *PaineWebber v. East*, 363 Md. 408, 422, 768 A.2d 1029, 1036 (2001).
>
> **To survive a motion for summary judgment, there must exist not just a dispute as to *any* facts, but rather as to facts which are material, *i.e.* necessary to the determination of the case.** *Remsburg v. Montgomery*, 376 Md. 568, 580, 831 A.2d 18, 25 (2003); *Lippert v. Jung*, 366 Md. 221, 227, 783 A.2d 206, 209 (2001); *Beatty v. Trailmaster*, 330 Md. 726, 737, 625 A.2d 1005, 1011 (1993). Because the instant case involves claims of governmental and public official immunity, **disputes as to facts surrounding the underlying causes of action will not be material if summary judgment was proper on the basis of immunity alone**. Immunity is a threshold issue that, once established, defeats a claim without inquiry into the underlying merits of the claim.

(Emphasis added.)

DISCUSSION

I.

In this appeal, Dr. Eugene attacks the ruling regarding Count III on two bases. First, he contends that the "court erred in concluding that the claim [in Count III] was one sounding in negligence." He states in his brief: "In fact the claim was based on a breach of the implied duty of good faith and fair dealing, which is an element of [a] breach of contract claim." Similar assertions are made in the reply brief:

> In Appellant's Opening Brief, Appellant quoted USM Policy II-1.03, clearly stating that concurrent administrative positions "***shall*** . . .[s]tate any additional salary and other forms of compensation to be paid the appointee for serving in the concurrent administrative position and the salary calculation method to be used upon termination of the concurrent administrative appointment." . . . Appellant Eugene cited case law showing that as a matter of law a university's employment contract can incorporate additional documents and policies, including the USM policy. . . .
>
> In such situations the breach of good faith and fair dealing constitute an element of the breach of contract claim for money damages.

We agree with the appellees that this breach of covenant argument is unpreserved. Count III was captioned "Torts Arising from Breach of Contract." At oral argument on the motion for summary judgment, the court asked Dr. Eugene's counsel: "What exactly is this tort you speak of in the second count?"[5] Counsel responded initially that there was tortious interference. The court pressed further, and the following colloquy transpired:

[5] Count I of both the complaint and amended complaint asserted no "claim," but was an introductory paragraph that was mislabeled as "Count I." The court's inquiry regarding "the second count" clearly referred to Count III.

THE COURT: So we have three individual defendants that are alleged to have committed torts arising from a breach of contract. All right. **Just explain to me what the tortious conduct was**.

COUNSEL FOR DR. EUGENE: Okay. So, Your Honor, . . . Dr. Eugene is a tenured professor, Your Honor. On a tenured professor there are certain policy and procedures that they all have to follow no matter what your, you know, what your renewed contract is ever, they have to follow these rules and procedures under state guidelines.

Those rules and procedures were not followed, okay. Based on them not being followed, there was – **they had a duty to follow them**. There was a breach. **These individual[s], Dr. Thompson, Dr. Early, and Dr. Takona all had a duty to follow the USM policy.**

Because they did not follow the USM policy, Dr. – they breached it. Dr. Eugene's salary was affected by more than 25,000. Not only that, his pension, you know, things that go into when you make 80 some thousand compared to when you make –

THE COURT: I understand. . . . **So they had a duty to do what, follow?**

COUNSEL FOR DR. EUGENE: **Yes, they had a duty to follow USM policy**, University System Maryland policy, Your Honor.

THE COURT: And what is the policy that you allege they did not follow? . . . University of Maryland System Policy with regard to what?

COUNSEL FOR DR. EUGENE: . . . that's Exhibit No. 2. . . . Exhibit No. 3. And I believe Exhibit No. 4. . . .

THE COURT: Well, **this goes to when one is appointed to – is a professor and also is appointed . . . to perform other . . . services or duties at the university that the appointment letter clearly state, if you will, that you are wearing two hats**. You're wearing your professor hat, and you're also wearing your hat as in this case, [STEM] director.

COUNSEL FOR DR. EUGENE: **Yes, Your Honor.** And –

THE COURT: So the assertion is that the individual defendants did not follow that, that they had a duty to inform Dr. Eugene at least in 2016 I think is the one at issue where he says he makes $107,000? . . . So I'm

looking at the July 1, 2016 letter to Dr. Eugene from President Thompson, that's your Exhibit 5. And it says that you're being appointed for the upcoming academic year to the position of associate professor at an annual salary of $107,000. All right.

COUNSEL FOR DR. EUGENE: Yes, Your Honor.

THE COURT: And then there are other . . . appointment letters in your exhibits . . . .

And then, of course, you have the – you know, you have the 2015 letter which says your salary is – both – also said associate professor and [STEM] coordinator, right?

COUNSEL FOR DR. EUGENE: Yes, Your Honor.

THE COURT: But none of these letters clearly indicate what portion of your salary is due to your professorship and what portion of your salary is due – is a result of [STEM] coordinator.

COUNSEL FOR DR. EUGENE: . . .

And I'll also state that under the procedure, if you are going to take away some type of payment or type of position from someone, there is supposed to be a letter or some type of - - that tells you that you're being taken off a position, and then there's supposed to be the reasons, it's supposed to be for some type of conduct or turpitude or state an actual petition.

The problem is, Your Honor, that no letter . . . was ever given.

THE COURT: I think I understand what the alleged tort is.

(Emphasis added.)

Later, during the argument on the motion, the court returned to the subject of the specific tortious conduct the individual defendants were alleged to have committed:

THE COURT: Well, but **you said earlier that it was a duty to follow the University policy with respect to faculty contracts**.

COUNSEL FOR DR. EUGENE: **Yes**.

THE COURT: We went through all the letters that they did not and it affected his salary.

COUNSEL FOR DR. EUGENE: Yes, and those - - that it - - it's not discretionary, it's - -

THE COURT: So it's in - - effectively, if I may say . . . Count III is one sounding in negligence. And if it's one sounding in negligence[,] the individual employees can they be personally liable under the Maryland Government Tort Claims Act, unless in addition to their negligence, there is evidence of actual malice.

COUNSEL FOR DR. EUGENE: . . . However, there is clear malice when they are totally disregard [sic] of what's explicitly stated should happen at the actual university.

So because they did not follow the actual law, . . .

THE COURT: **When you say follow the law, you're speaking about following USM protocol with respect to how the university informs a professor of his or her salary and their additional duties**.

COUNSEL FOR DR. EUGENE: **Yes**.

(Emphasis added.)

We agree with the appellees that the argument asserted in Dr. Eugene's brief on appeal—contending that Count III is actually a "breach of contract claim"—was not raised in, or argued to, the circuit court. Accordingly, this Court will not consider it. *See* Maryland Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue [except jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

II.

Dr. Eugene's remaining contention is that the motion court erred in failing to find that there was sufficient evidence of malice to maintain a cause of action against the individual employees. This was fatal to the claims against the individual defendants, who, without dispute, are "State personnel" protected by the statutory immunity granted in CJP § 5-522(b), and therefore, could be held liable in tort only if they were acting with malice or not within the scope of their employment. CJP § 5-522(b) provides to individuals who are State personnel conditional statutory immunity "from [personal] liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence . . . ."[6] The immunity provided to personnel under CJP § 5-522(b) protects State personnel from incurring personal liability for any tortious act or omission so long as their conduct is "within the scope of [their] public duties" and is "without malice or gross negligence."

In this case, Dr. Eugene does not assert that the individual appellees were not acting within the scope of their State employment or that they acted in a grossly negligent manner. But he contends in a conclusory manner that the individual appellees' failure to

[6] CJP § 5-522(b) states in full:

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

draft his salary letter for 2016-17 in a format that conformed with University System of Maryland Policy II-1.03 was conduct sufficient to permit a finder of fact to conclude that they were motivated by actual malice.

The appellees argue in their brief the motion court did not err in concluding that there was insufficient evidence of malice to find a genuine dispute on that issue, asserting:

> The circuit court properly concluded that Dr. Eugene presented no evidence that the Individual Defendants acted with malice, and Dr. Eugene fails to rebut that conclusion on appeal. In fact, Dr. Eugene's own brief describes the Individual Defendants' actions in terms of general negligence. For instance, he argues that Dr. Early "failed to take reasonable care to avoid acts or omission in Appellant's reappointment letter and had knowledge that her actions violated USM policy by the very nature of her position and by Appellant's repeated instructions to her regarding the issue." (Appellant's Brief at 16.) Similarly, he speculates that Dr. Takona "rationalized the ambiguity in his letter" terminating Dr. Eugene['s] appointment as STEM Coordinator by referring to Dr. Eugene's administrative position as Chair of the Mathematics Department as "collateral duties." (Appellant's Brief at 17) He baldly asserts that all of the Individual Defendants conspired to reduce his salary while claiming falsely that the reduction in salary was justified. (*Id*.) None of these "facts" amounts to evidence that the Individual Defendants acted with "evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill-will or fraud" sufficient to rise to the level of malice and strip the Individual Defendants of their immunity under the MTCA. *Barbre* [*v. Pope*], 402 Md. [157,] 182 [(2007)]. At most, the facts show an administrative mistake in failing to comply with the USM Policy requiring separate appointment letters for concurrent, administrative positions. A mere failure to comply with an administrative procedure to issue two letters, instead of one letter, does not constitute "malice."

We agree with the circuit court's conclusion that Dr. Eugene's malice theory resorts to pure speculation. If the conduct that Dr. Eugene contends was committed by the individual defendants in this case could satisfy the test for actual malice, then there would

be virtually no limit to situations that avoided the statutory immunity provided to State personnel pursuant to CJP § 5-522(b).

We agree that there was insufficient evidence of malice on the part of the individual defendants in this case to survive summary judgment.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.