



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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February 13, 2023

Charles Monte Royall
12703 Redburn Place
Fort Washington, Maryland 20744
Plaintiff, Pro Se

Ryan A. Nelson
1233 20th Street N.W., Suite 800
Washington, D.C. 20036
Counsel for Defendants

Re: *Charles Monte Royall v. Maria Theresa Martinez, et al.*
Case No. CL-2022-8873

Dear Mr. Royall and Counsel:

This case came before the Court on January 13, 2023, for a hearing on the Defendants' Demurrer to Plaintiff's one-count defamation lawsuit. A primary question before the Court is whether Virginia law recognizes a cause of action for defamation *per se* based upon a false allegation that an individual is gay. The Court concludes that the answer is "no."

Defendants' Demurrer is sustained with leave to amend within twenty-one days for the reasons set forth below.

BACKGROUND

According to the Complaint, Charles Monte Royall ("Plaintiff") is a management accountant who previously worked for KSJ & Associates, Inc. (hereinafter "KSJ"). Compl. ¶ 1. On October 7, 2021, Defendant Martinez, acting in her capacity as President of KSJ, stated to a KSJ corporate owner "that Plaintiff was a 'gay.'" Compl. ¶ 6. Defendant Martinez reiterated to a

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KSJ vice president and another employee that “Plaintiff was homosexual.” Compl. ¶¶ 7–8. Plaintiff asserts that the claims are false and defamatory *per se*. Compl. ¶ 10.

Plaintiff claims he incurred career-related and reputational damages, generally asserting lost business opportunities, scorn from colleagues, embarrassment, humiliation, and emotional distress. Compl. ¶ 13. He asserts that the statements were demonstrably false and made with actual malice and the intent to harm Plaintiff’s career. Compl. ¶¶ 10–12, 17–19.

Defendants filed this Demurrer to Plaintiff’s Complaint on October 17, 2022, and an accompanying memorandum on December 27, 2022. The Demurrer makes three legal arguments. First, the facts alleged in the Complaint do not establish that a publication occurred. Second, the alleged statements are not actionable. Third, the facts alleged do not warrant punitive damages. While Defendants’ memorandum makes other legal arguments not addressed in the Demurrer, the Court’s consideration of legal arguments is limited to those stated in the Demurrer. Va. Code § 8.01-273(A).

In addition, the Demurrer denies that Defendant Martinez made the alleged statements. However, the Court on demurrer treats as true “any facts that may be reasonably and fairly implied or inferred” from the Complaint. *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 102 (2001). Unlike a motion for summary judgment, a demurrer does not decide the merits of a case, as demurrers are not intended to end litigation prematurely before the parties can reach a trial on the merits. *See Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 143 (2013) (citing *Fun v. Virginia Military Inst.*, 245 Va. 249, 252 (1993)).

ANALYSIS

I. Demurrer Standard of Review

“The purpose of a demurrer is to determine whether a complaint states a cause of action upon which relief may be granted.” *Bell v. Saunders*, 278 Va. 49, 53 (2009). A demurrer tests the legal sufficiency of a pleading and should be sustained if the pleading fails to state a valid cause of action even taking all the factual allegations as true. Va. Code § 8.01-273(A); *see also Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 303 (2005). A court is limited to review of a complaint and any attachments to such complaint. *TC MidAtlantic Dev., Inc. v. Commonwealth, Dep’t of Gen. Servs.*, 280 Va. 204, 212 (2010).

II. Defamation

In Virginia, the elements of defamation are: (1) publication; of (2) an actionable statement; with (3) the requisite intent. *Schaecher v. Bouffault*, 290 Va. 83, 91 (2015) (quoting *Tharpe v. Saunders*, 285 Va. 476, 480 (2013)). Defendants do not demur to the Complaint on the third element, namely, the requisite intent. Therefore, the Court only will analyze the challenges to the first two elements, followed by an analysis of the Demurrer to punitive damages.

A. Publication

Publication is the first element of a defamation claim and occurs when the defamatory words uttered by a defendant are heard by another person who understands the words as referring to the plaintiff. *See Food Lion, Inc. v. Melton*, 250 Va. 144, 150–51 (1995) (“[A] plaintiff may prove publication of defamatory remarks by ...evidence that the remarks were heard by a third party who understood these remarks as referring to the plaintiff in a defamatory sense.”). Defendants demur on the basis that there was no publication because all alleged recipients of the statements were corporate officials or employees of KSJ at the time. Defendants analogize to conspiracy law, arguing that a single entity (*i.e.*, its agents acting within the scope of their employment) cannot publish to itself.

Plaintiff’s Complaint sufficiently pled the issue of publication. Defendants cite no law for the proposition that the “single entity” principle of conspiracy applies equally to defamatory publication. Instead, Defendants seem to implicitly rely upon the qualified privilege of the intracorporate immunity doctrine. This privilege, however, is an affirmative defense inappropriate to consider at the demurrer stage. *See Larimore v. Blaylock*, 259 Va. 568, 574–75 (2000) (describing the intracorporate immunity doctrine in the defamation context); *Givago Growth, LLC v. iTech AG, LLC*, 300 Va. 260, 264–65 (2021) (holding affirmative defenses like privilege cannot be raised on demurrer); Restatement (Second) of Torts § 613(2) (“In an action for defamation the defendant has the burden of proving, when the issue is properly raised, the presence of the circumstances necessary for the existence of a privilege to publish the defamatory communication.”).

B. Actionable Statement

The requirement of an “actionable” statement is the second element of a defamation claim, which means the statement must be both false and defamatory. *Schaecher*, 290 Va. at 91. Preliminarily, the Complaint sufficiently asserts multiple times the falsity of the statement that Plaintiff is gay. Compl. ¶¶ 9, 11, 12, 17.

As for the defamatory component, a statement must have a “requisite defamatory ‘sting’ to one’s reputation.” *Schaecher*, 290 Va. at 92. Four categories of statements are considered defamatory *per se* and are actionable without further proof of special damages:

- (1) Those which impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished.
- (2) Those which impute that a person is infected with some contagious disease, where if the charge is true, it would exclude the party from society.
- (3) Those which impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment.
- (4) Those which prejudice such person in his or her profession or trade.

Carwile v. Richmond Newspapers, 196 Va. 1, 7 (1954). Proof of special damages is not required because injury is presumed for statements that fall within these categories. See *Poulston v. Rock*, 251 Va. 254, 261 (1996) (citing *Great Coastal Exp., Inc. v. Ellington*, 230 Va. 142, 152 (1985)).

At the hearing on Defendants' Demurrer, Plaintiff confirmed his one-count Complaint alleged only defamation *per se*, and not defamation *per quod*. The Court's analysis here is accordingly limited to whether the Complaint states a claim of actionable defamation *per se*.

As to the first category of *per se* actionable statements, the Court finds that an allegation of someone being gay does not impute the commission of a criminal offense under Virginia law. The Circuit Court case of *Starks v. McCabe* is instructive. 49 Va. Cir. 554 (Norfolk Cir. Ct. 1998). It involved a plaintiff suing for defamation *per se* based on an allegation that plaintiff was a lesbian. *Id.* at 555–56. The Circuit Court noted a division among courts across the country as to whether a claim of homosexuality imputes the commission of a sexual crime but concluded that Virginia defamation law does not make such an imputation. *Id.* The Court recognized that a false allegation of someone violating Virginia's criminal prohibitions on fornication and sodomy would constitute defamation *per se*. *Id.* However, insofar as the offenses can be violated by individuals who are heterosexual or homosexual, the Court concluded that the mere status of someone being a lesbian does not clearly impute her committing sodomy. *Id.*

Almost twenty-five years have passed since the *Starks v. McCabe* decision. Since that time, Virginia has repealed its criminal statute prohibiting fornication. See Va. Code § 18.2-344 (1950) (repealed 2020). Moreover, Virginia decriminalized non-commercial sodomy between consenting adults in private by amending the relevant criminal statute. See Va. Code § 18.2-361(A); S.B. 14, 2014 Gen. Assemb., Reg. Sess. (Va. 2014). These legislative changes to Virginia criminal law further support the proposition that an allegation of someone being gay does not impute criminal conduct.

As to the second category of actionable statements, there is no alleged statement that remotely imputes to Plaintiff being infected with a contagious disease that would exclude him from society.

As to the third category of actionable statements, the Court does not find that a false statement of being gay imputes to Plaintiff an unfitness or want of integrity in performing the duties of an office or employment. In reaching this conclusion, the reasoning set forth in the Virginia Supreme Court case of *Fleming v. Moore* is instructive. 221 Va. 884 (1981). In *Fleming*, the plaintiff brought suit for defamation *per se* after the defendant placed paid newspaper advertisements that identified plaintiff by name and were captioned "RACISM." *Id.* at 887–88. Applying the same defamation *per se* categories used today, the Court emphasized that such words, to be *per se* actionable, "must contain an imputation that is 'necessarily hurtful' in its effect upon plaintiff's business and must affect him in his particular trade or occupation." *Id.* at 889–90 (quoting *James v. Haymes*, 160 Va. 253, 261 (1933)). Specifically, "[t]here must be a nexus between the content of the defamatory statement and the skills or character required to carry out the [plaintiff's] particular occupation." *Id.* at 890. The Court reversed the trial court

and concluded that the accusation of racism was not defamatory *per se* because, while it may have adversely impacted the plaintiff's work, the statements did not necessarily affect him in his particular profession as a teacher. *Id.* at 891.

Here, the Complaint alleges Plaintiff suffered injury to his reputation and career, lost business opportunities, and faced scorn from colleagues. Compl. ¶¶ 13, 18. However, nowhere in the Complaint does Plaintiff assert the alleged defamation was necessarily harmful to him due to his specific profession. *See Fleming*, 221 Va. at 891. Plaintiff is a management accountant. Plaintiff fails to allege, and the Court does not find, any nexus between the content in Defendant Martinez's alleged statements and the skills or character required for Plaintiff to perform his job as an accountant. *Id.* at 890. Contrast these facts to the example of an attorney accused of unethical conduct. Because an attorney is required to adhere to the profession's disciplinary rules, a charge of unethical conduct in violation of those rules would be defamatory *per se*. *See id.*

As to the fourth category of actionable statements, the Court finds that a false statement of Plaintiff being gay does not prejudice him in his profession as a management accountant. In reaching this conclusion, it is undisputed and worth noting that there have been significant developments in our protective laws regarding sexuality, including in the context of professional employment. To begin with, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination because of "sex." 42 U.S.C. § 2000e-2(a)(1). More recently, in *Bostock v. Clayton County*, the United States Supreme Court expressly clarified that this protection encompasses both sexual orientation and gender identity. 140 S. Ct. 1731, 1742, 1754 (2020). Thus, under federal law, sexual orientation (including being gay) is included in the protected class of sex in the employment context. *See id.*

In sum, the Court concludes that a false statement of someone being gay is not actionable as defamation *per se*, for it imputes neither the commission of a crime nor the infection of a contagious disease. It does not impute a professional unfitness or lack of integrity, and it does not prejudice Plaintiff in his profession.

III. Punitive Damages

In a defamation action brought by a private individual in Virginia, punitive damages may be recovered based on a defendant's "actual malice," *i.e.*, knowledge of falsity or reckless disregard for the truth. *Fleming*, 221 Va. at 893; *see also Gazette, Inc. v. Harris*, 229 Va. 1, 13 (1985). When a plaintiff successfully proves defamation *per se*, damages are presumed and the plaintiff is relieved of the need to prove the amount. *Poulston*, 251 Va. at 261 (quoting *Great Coastal Exp., Inc.*, 230 Va. at 152).

The Complaint seeks \$350,000 in punitive damages in addition to compensatory damages. Because Plaintiff has not identified an actionable statement for defamation *per se*, the Complaint lacks a factual basis for an award of punitive damages.

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CONCLUSION

The Demurrer is sustained with the leave to amend on the basis of the Complaint failing to state a claim for which relief can be granted. The Complaint does not allege an actionable statement for defamation *per se* or sufficient grounds for seeking punitive damages. A copy of the Circuit Court's Order is enclosed.

Sincerely,



Stephen C. Shannon
Judge, Fairfax County Circuit Court
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CHARLES MONTE ROYALL)
)
 Plaintiff,)
)
 v.)
)
 MARIA THERESA MARTINEZ,)
 ET AL.)
)
 Defendants)

Case No. CL-2022-8873

ORDER

THIS MATTER came before the Court on January 13, 2023, upon Defendants' Demurrer.

IT APPEARING that the Court has written a Letter Opinion dated February 13, 2023; it is therefore

ORDERED that the Demurrer is SUSTAINED WITH LEAVE TO AMEND within twenty-one (21) days or the cause shall be dismissed with prejudice.

ENTERED this 13th day of February 2023.



JUDGE/STEPHEN C. SHANNON

ENDORSEMENT OF THIS ORDER IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.