DEFAMATION IS TERRIFYING

George Mason American Inn Of Court

October 20, 2014

CASELAW / RESEARCH

THARPE v. SAUNDERS

RECORD NO. 120985.

737 S.E.2d 890 (2013)
285 Va. 476

Jeffrey W. THARPE, et al. v. J. Harman SAUNDERS, et al.

Supreme Court of Virginia.
February 28, 2013.

John A. Conrad (Abbigale B. Fredrick; The Conrad Firm, Richmond, on brief), for appellees.

Present: All the Justices.

OPINION BY Justice ELIZABETH A. McCLANAHAN.

In this defamation case, Jeffrey W. Tharpe ("Tharpe") and Shearin Construction, Inc. ("Shearin"), appeal from the judgment of the circuit court sustaining the demurrer filed by J. Harman Saunders ("Saunders") and J. Harman Saunders Construction, Inc. ("Saunders Construction"). Because we find the circuit court erred in ruling that the alleged defamatory statement constituted an expression of opinion, we will reverse the circuit court's judgment.

I. BACKGROUND

Since this case was decided below on demurrer, we accept as true the well-pleaded facts sets forth in the amended complaint and all inferences fairly drawn therefrom. *Hawthorn v. City of Richmond*, 253 Va. 283, 284-85, 484 S.E.2d 603, 604 (1997); *Russo v. White*, 241 Va. 23, 24, 400 S.E.2d 160, 161 (1991).

Shearin, acting through its agent, Tharpe, contracted with the United States government to perform excavation work at Fort Pickett. During the excavation, Shearin encountered rock and entered into a change order for compensation above the amount of the original contract price upon the basis that encountering the rock was a changed condition. Subsequently, Shearin, also acting through Tharpe, contracted with the Southside Regional Service Authority (the Authority) to perform excavation work at Butcher's Creek Landfill in Mecklenburg County. A dispute arose between Shearin and the Authority after Shearin encountered rock during the excavation and requested a change order for compensation above the original contract price.

Saunders, owner and operator of Saunders Construction, a business competitor of Shearin, allegedly made the following statement to Wayne Carter, the Mecklenburg County Administrator and the Authority's Executive Director: "Tharpe told me that Tharpe was going to screw the Authority like he did Fort Pickett." This statement was allegedly made again by Saunders to Carter and another named individual, then repeated and republished by and to the Authority, people of the community, and the news media. Tharpe and Shearin assert that Tharpe never told

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Saunders "[he] was going to screw the Authority like he did Fort Pickett" and, therefore, such statement is false. They further assert that Saunders made the statement knowing it to be false, or in reckless disregard of whether it was false, because of personal spite, hatred, ill will, or a desire to hurt the business reputation of Tharpe and Shearin.

Tharpe and Shearin contend that the "clear meaning" of the statement as understood by the Authority, the community, and the general public "was that Tharpe, acting as agent for Shearin, intended to screw[1] the Authority by making a[n] unjustified change order request as a result of encountering rock on the Authority Project" and "that Tharpe, acting as agent for Shearin, previously screwed the United States, who contracted for the Fort Pickett Project, by making an unjustified change order request as a result of encountering rock on the Fort Pickett Project." Thus, Tharpe and Shearin contend that the words in the statement "in their normal usage" were understood by the Authority, the community, and the general public "to harm Tharpe's and Shearin's business reputation."

It is further alleged that as a "direct and proximate cause" of the statement, the Authority filed suit alleging fraud against Tharpe and Shearin causing them to incur "significant attorneys' fees." Additionally, Shearin has not been invited to "submit bids on several large construction projects," "the business reputations of Tharpe and Shearin have been severely and permanently damaged," and Tharpe and Shearin "have been and will continue to be financially harmed."

In this present defamation suit filed by Tharpe and Shearin, Saunders and Saunders Construction demurred to the amended complaint on the ground that the statement allegedly made by Saunders did not contain a provably false statement, but was an expression of opinion.[2] The circuit court agreed, explaining that "[w]hether the quoted statement was made or not is certainly factual subject to being disproved," but "the basis for the claim of defamation is not dependent upon that fact." The circuit court reasoned that the claim of defamation is dependent on the ability to prove that Tharpe was going to "screw" the Authority and that Tharpe had "screwed" Fort Pickett. According to the circuit court, because what is meant by the word "screw" is dependent upon the speaker's viewpoint, the alleged defamatory statement was an expression of opinion.

II. ANALYSIS

On appeal, Tharpe and Shearin argue that the circuit court erred in holding that the alleged defamatory statement by Saunders that "Tharpe told me that Tharpe was going to screw the Authority like he did Fort Pickett" was an expression of opinion.

The elements of defamation are "(1) publication of (2) an actionable statement with (3) the requisite intent." *Jordan v. Kollman,* 269 Va. 569, 575, 612 S.E.2d 203, 206 (2005). "To be actionable, the statement must be both false and defamatory." *Id.* "Causes of action for defamation have their basis in state common law but are subject to principles of freedom of speech arising under the First Amendment to the United States Constitution and Article I, Section 12 of the Constitution of Virginia." *Yeagle v. Collegiate Times,* 255 Va. 293, 295, 497 S.E.2d 136, 137 (1998).

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> The First Amendment to the Federal Constitution and article 1, section 12 of the Constitution of Virginia protect the right of the people to teach, preach, write, or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander. "[E]rror of opinion may be tolerated where reason is left free to combat it." Thomas Jefferson's First Inaugural Address (1801). "However pernicious an opinion may see[m], we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339-40 [94 S.Ct. 2997, 41 L.Ed.2d 789] (1974).

Chaves v. Johnson, 230 Va. 112, 119, 335 S.E.2d 97, 102 (1985). "But there is no constitutional value in false statements of fact." *Gertz,* 418 U.S. at 340, 94 S.Ct. 2997.

Accordingly, "pure expressions of opinion" are constitutionally protected and "cannot form the basis of a defamation action." *Williams v. Garraghty,* 249 Va. 224, 233, 455 S.E.2d 209, 215 (1995). "Statements that are relative in nature and depend largely upon the speaker's viewpoint are expressions of opinion." *Fuste v. Riverside Healthcare Ass'n,* 265 Va. 127, 132, 575 S.E.2d 858, 861 (2003). Furthermore, "[s]peech that does not contain a provably false factual connotation" is generally considered "`pure expression[] of opinion.'" *WJLA-TV v. Levin,* 264 Va. 140, 156, 564 S.E.2d 383, 392 (2002).[3]

"Whether an alleged defamatory statement is one of fact or of opinion is a question of law to be resolved by the trial court." *Id.* at 156-57, 564 S.E.2d at 392; *Tronfeld v. Nationwide Mut. Ins. Co.,* 272 Va. 709, 714, 636 S.E.2d 447, 450 (2006); *Fuste,* 265 Va. at 132-33, 575 S.E.2d at 861. Because this determination is an issue of law, we conduct a de novo review of the statement in question. *Raytheon,* 273 Va. at 304, 641 S.E.2d at 91. In conducting our review, we do not determine whether the alleged defamatory statement is true or false, but whether it is capable of being proved true or false. *Id.*

Applying these principles, Saunders' statement that "Tharpe told me that Tharpe was going to screw the Authority like he did Fort Pickett" is indisputably capable of being proven true or false. The statement can be disproved by evidence, if adduced, that Tharpe did not tell Saunders he "was going to screw the Authority like he did Fort Pickett." It is neither an expression of Saunders' opinion that Tharpe made this statement to Saunders, nor is it dependent on Saunders' viewpoint. *See, e.g., Tronfeld,* 272 Va. at 715-16, 636 S.E.2d at 451.[4] For that reason, the constitutional right to speak opinion "without inhibition by actions for libel and slander" is not implicated since it is Saunders' alleged false statement of fact, not any expression of his opinion, that subjects him to potential liability. *Chaves,* 230 Va. at 119, 335 S.E.2d at 102.

Although the circuit court recognized that "[w]hether the quoted statement was made or not is certainly factual subject to being disproved," it nevertheless required that the statement attributed to Tharpe by Saunders *also* contain a provably false connotation. However, Tharpe's and Shearin's

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claims of defamation are based solely on the false attribution to Tharpe of the quoted statement, which he denies having spoken, not the falsity of the assertion contained within that alleged statement.

> *[R]egardless of the truth or falsity of the factual matters asserted within the quoted statement,* [a false] attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold.

Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 511, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991) (emphasis added).[5] The gravamen of the amended complaint is that Saunders allegedly attributed a fabricated quotation to Tharpe that, as a quotation, caused injury to the reputations of Tharpe and Shearin. Such allegations give rise to a claim of defamation regardless of the truth or falsity of the matters asserted in the statement allegedly attributed to Tharpe or whether such assertions are fact or opinion. *Id.* at 511-12, 111 S.Ct. 2419 (where a public-figure psychoanalyst was falsely quoted as stating he was "the greatest analyst who ever lived," the Court explained that "one need not determine whether [he] is or is not the greatest analyst who ever lived in order to determine that it might have injured his reputation to be reported as having so proclaimed").

Although we have not previously addressed fabricated quotations, other jurisdictions have recognized that quotations falsely attributed to a plaintiff are actionable as defamation regardless of the truth or falsity of the substance of the quotation when it injures the plaintiff's reputation. *See, e.g., Levesque v. Doocy,* 560 F.3d 82, 89-90 (1st Cir.2009) (false attribution of comments to plaintiff encouraged listeners to form negative conclusions about plaintiff tending to harm his reputation); *Kerby v. Hal Roach Studios, Inc.:* 53 Cal.App.2d 207, 127 P.2d 577, 581 (1942) (defamation may be accomplished by falsely putting words into the mouth of the person defamed and imputing to such person a willingness to use them "where the mere fact of having uttered or used the words" would produce harm to plaintiff's reputation); *Selleck v. Globe Int'l, Inc.,* 166 Cal.App.3d 1123, 212 Cal.Rptr. 838, 845 (1985) (article containing both direct and indirect quotations of statements made by plaintiff imputing a betrayal of his son "[did] not merely express defendant's opinion that plaintiff made statements about his son" but "assert[ed] as a fact that plaintiff made the statements"); *Schmalenberg v. Tacoma News, Inc.,* 87 Wn.App. 579, 943 P.2d 350, 357 (1997) (a statement may be provably false because it is falsely attributed to a person who did not make it even if the matter asserted in the statement is true).[6]

Similarly, Tharpe's and Shearin's claims are not dependent on the ability to prove that Tharpe was going to "screw" the Authority and that Tharpe had "screwed" Fort Pickett. It is irrelevant to their claims

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whether these assertions are capable of being proven false. Rather, *Saunders' statement of fact* — "Tharpe told me that Tharpe was going to screw the Authority like he did Fort Pickett" — if believed by the hearer as coming from Tharpe, by its very nature is alleged to have defamed Tharpe and Shearin. Therefore, regardless of the truth or falsity of the matters asserted in the quote attributed to Tharpe, Saunders' statement is an actionable statement of fact.

III. CONCLUSION

In sum, we hold the circuit court erred in ruling the alleged defamatory statement was an expression of opinion and in sustaining the demurrer on that ground. Accordingly, we will reverse the circuit court's judgment and remand for further proceedings.

Reversed and remanded.

FOOTNOTES

1. Tharpe and Shearin contend that the "the word `screw' as used in the [s]tatement ... means to unfairly take advantage of another or to act dishonestly in the transaction of business" and that "the word `screw' was so understood by the Authority, people of the community, and the general public." Webster's Third New International Dictionary 2041 (1993)("to oppress or dispossess by unreasonable or extortionate actions or conditions" or "to extract by pressure of threat"); Oxford English Dictionary (2d ed.1989, rev. online ed. Dec.2012), http://www.oed.com/view/entry/173460 (last visited Feb. 6, 2013) ("[t]o defraud (a person, esp[ecially] of money), to cheat; to deceive").

2. Although the demurrer contained several alternative grounds for dismissal, the only issue addressed by the circuit court, which it found dispositive, was whether the alleged defamatory statement was an expression of opinion. Accordingly, this is the only issue before us on appeal.

3. "While pure expressions of opinion are not actionable, `[f]actual statements made to support or justify an opinion ... can form the basis of an action for defamation.'"

273 Va. 292, 303, , 90 (2007) (quoting 249 Va. at 233, 455 S.E.2d at 215). Because "expressions of `opinion' may often imply an assertion of objective fact," the United States Supreme Court has refused to "create a wholesale defamation exemption for anything that might be labeled `opinion.'" , 18, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); 273 Va. at 303, 641 S.E.2d at 91.

4. To illustrate this point further, if it were alleged instead that Saunders said "Tharpe is going to screw the Authority like he did Fort Pickett," one might argue that such a statement by Saunders is an expression of Saunders' opinion or dependent on his viewpoint. In contrast, the allegation in this case is that Saunders made a false statement of fact — he was going to "screw" the Authority like he did Fort Pickett.

5. In fact, "[a] self-condemnatory quotation may carry more force than criticism by another." 501 U.S. at 512, 111 S.Ct. 2419. As the Supreme Court noted,

6. In the court recognized at least three ways in which a statement may be provably false: because it falsely represents the state of mind of the person making it, because it is falsely attributed to a person who did not make it, or because the assertion made within the statement is false.

ECHTENKAMP v. LOUDON COUNTY PUBLIC SCHOOLS

NO. CIV.A. 03-538-A.

263 F.Supp.2d 1043 (2003)

Debra ECHTENKAMP, Plaintiff, v. LOUDON COUNTY PUBLIC SCHOOLS, Douglas Holmes, David Weisman, Elizabeth Young, Roberta Rehm, Kelly Trenary, Jacqueline Sakati, and John Lody, Defendants.

United States District Court, E.D. Virginia, Alexandria Division.
June 24, 2003.

Julia Bougie Judkins, Trichilo, Bancroft, McGavin, Horvath & Judkins, PC, Fairfax, VA, for Defendants.

MEMORANDUM OPINION

ELLIS, District Judge.

Plaintiff, a school psychologist, brings this action against the school system and several individual defendants, claiming violations of her Fourteenth Amendment due process rights, First Amendment retaliation, and defamation. More specifically, plaintiff alleges that she was placed on probationary status and threatened with dismissal without due process of law and in retaliation for her criticism of the school system's special education policies[1] and that she was defamed by her supervisors and co-workers. In essence, this case presents the not uncommon question of the degree to which the federal courts, in the name of vindicating federal constitutional rights, must intrude in the typical workplace frictions and disputes among personnel in a public school system.

I.

Plaintiff Debra Echtenkamp, a resident of Leesburg, Virginia, has served since August 1995 as a school psychologist for defendant Loudon County Public Schools (LCPS). On April 28, 2003, plaintiff filed this action against LCPS, four school officials, namely Douglas Holmes, the Assistant Superintendent of Pupil Services; David Weisman, Director of Student Services; Elizabeth Young, Supervisor of Student Services; and John Lody, Supervisor of Diagnostic Services, and three co-workers, namely Kelly Trenary, a Special Education counselor; Jacqueline Sakati, a school social worker; and Roberta Rehm, a Special Education teacher at Potomac Falls High School. All individual defendants are Virginia residents.

According to the facts as alleged in the complaint,[2] plaintiff had an excellent record of service, working with more than twenty schools and becoming a leader within her department, until September 2001, when the series of adverse actions alleged in the complaint commenced, allegedly in retaliation for plaintiffs criticism of certain changes in LCPS's special education policies. Plaintiff alleges (i) a pattern of interference with her job autonomy, authority, and responsibilities, (ii) false statements regarding her work performance, and (iii) unwarranted disciplinary action, culminating in her placement on an evaluation list, an unsatisfactory performance

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rating, and the threat of termination. Plaintiff claims that these actions were all part of an ongoing effort led by defendant Douglas Holmes, joined by other supervisors and co-workers, to discredit plaintiffs work and render her workplace intolerable.

Plaintiffs criticism of the LCPS's special education policies began some time prior to September 2001, when Holmes proposed changes to the policies that plaintiff believed violated professional standards for school psychologists, presented ethical conflicts, and were not in the best interests of those children entitled to the benefits of the ADA, 42 U.S.C. § 12101, *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 701 *et seq.* In the months after September 2001, plaintiff was involved in a number of committees challenging the proposed changes. In addition, during May and June of 2002, plaintiff advocated for the rights of a specific child with a disability, but the services she recommended were not placed in the child's Individualized Education Plan, allegedly on Holmes's instructions and, in plaintiffs view, in violation of the child's rights. Next, on July 8, 2002, plaintiff sent an email to the Eligibility Coordinators and her colleagues detailing how a directive from Holmes regarding § 504 of the Rehabilitation Act was overly restrictive, contrary to an earlier memorandum by the Department of Education, and contrary to law.

According to the complaint, plaintiffs continued challenges to LCPS's special education policies led to a series of allegedly retaliatory acts, summarized briefly as follows:

(i) On September 13, 2001, plaintiff was late for a meeting owing to heavy traffic. Thereafter, Holmes launched a two week investigation into plaintiffs absenteeism and unavailability, which plaintiff maintains was utterly unfounded and uncovered nothing. A letter of reprimand was placed in her file regarding her lateness on September 13, 2001. Plaintiff claims this is unusual treatment and unduly harsh for a single instance of tardiness.

(ii) On August 13, 2002, plaintiff was called to a meeting with Holmes and defendant Elizabeth Young, at which she was reprimanded for not being supportive of a certain counseling program, and was directed not to commit to other counseling initiatives and to obtain consent prior to starting new initiatives. Plaintiff alleges the reprimand and the subsequent restriction were baseless.

(iii) On September 6, 2002, Holmes called plaintiff to a meeting with him and defendant David Weisman, the new Director of Student Services. Holmes criticized plaintiffs handling of old cases and a single recent case, and plaintiff was put on an evaluation cycle for one year. Plaintiff alleges her handling of the cases was proper and according to policy and that this criticism was unsubstantiated and retaliatory.

(iv) On October 4, 2002, plaintiff received a letter from Weisman accusing her of altering a parent permission form created by Holmes, despite express instructions from defendant Kelly Trenary not to change the contents of the form. Plaintiff contends that such alterations were routine, that the alteration was not substantial, and that a co-worker can vouch for the fact that Trenary did not tell her not to alter the form.

(v) During the week of October 23, 2002, Weisman attempted to reach plaintiff with a question while she was in transition between schools. He reprimanded her for not returning his message, exaggerated the number of times he tried to call her, and implied that she used her lunchtime inappropriately. Again, plaintiff maintains that these charges are baseless.

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(vi) During a November 25, 2002 "emergency meeting" at Weisman's office, defendant Jacqueline Sakati accused plaintiff of being insulting to her during a counseling session, and plaintiff was reprimanded. Plaintiff alleges that she did not behave improperly during the session, and furthermore that she had previously complained to Weisman regarding Sakati's rude behavior, and no action was taken. Plaintiff also alleges that Sakati behaved unprofessionally during the November 25 meeting itself. Weisman told Young to observe plaintiff during the counseling group with Sakati. At a December 10, 2002 meeting to discuss Young's observation of the group counseling session, Young criticized plaintiffs counseling skills and suggested she be more passive and allow Sakati to lead the sessions.

(vii) On November 26, 2002, during a meeting between Weisman and plaintiff to discuss Weisman's concerns regarding plaintiffs handling of a student returning to school after the student had threatened to kill classmates, Weisman accused plaintiff of mishandling the case and not obtaining parental permission to conduct an evaluation of a student. Plaintiff alleges that Weisman had previously discussed the case with her and had not told her parental permission was required.

(viii) On December 12, 2002, Weisman informed plaintiff that, as a result of her unsatisfactory performance, she was being placed on the "December List" submitted to the Department of Personnel Services, which served as notification that plaintiff was in danger of not having her contract renewed the following year. She was presented with a memorandum reviewing prior complaints about her and informing her that her performance rating at that point was "unsatisfactory." Plaintiff alleges that in assigning her the unsatisfactory rating, Weisman had not contacted either the administrators at plaintiffs schools to obtain information regarding her performance, or any of the co-leaders who work with her.

(ix) In January of 2003, plaintiff was required to attend a meeting for all personnel on the December List. She was told that the consequences of an ultimately unsatisfactory evaluation would range from a freezing of her salary to a recommendation of termination. Plaintiff was provided resignation papers, pursuant to personnel policy. She was initially informed that if she received an unsatisfactory rating in March 2003 her supervisor "will be recommending" that her contract not be renewed, although a subsequent letter corrected this and stated that her supervisor "may be recommending" termination if her March 2003 rating is unsatisfactory. Plaintiffs improvement plan consisted almost solely of goals to improve her allegedly inappropriate behavior during clinical team meetings and the counseling group, which plaintiff maintains constituted only 5% of her duties. According to plaintiff, she was not provided a clear mechanism by which she would be measured, nor told how passing or failing would be determined, and the plan placed her in the position of being evaluated by the very people who she alleges had fabricated the complaints against her.

(x) Throughout February, March, and April, plaintiff continued to be subject to harassing acts, including being accused of misrepresenting the need to change her schedule to meet with children and being chastised for being out sick after she had followed proper procedures to inform the office of her condition. Plaintiff received neither an unsatisfactory nor a satisfactory rating on her March 2003 review which instead continued her evaluation for another year. Plaintiff alleges that all of this conduct was unwarranted and in retaliation for her actions in speaking out in favor of the rights of disabled children.

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As a result of these incidents, plaintiff sought relief through the LCPS's grievance procedures. On September 30, 2002, she filed a grievance regarding Holmes's allegedly retaliatory conduct and her placement on the evaluation cycle. Two days later, plaintiff, Nancy McManus, the principal of a school at which she worked, and Matthew Britt, the Assistant Superintendent of Personnel, met to discuss her grievance. Shortly thereafter, on October 4, 2003, plaintiff received a letter from Superintendent Edgar Hatrick, refusing to accept or address plaintiffs grievance. In response, plaintiff sent a letter to Hatrick requesting that the grievance be appealed to the school board. Subsequently, on October 23, 2002, plaintiff was informed by letter from Ned Waterhouse, the Deputy Superintendent, that plaintiffs grievance failed to comply with procedural requirements, including time limits and the failure to file a Step II Grievance Request with her immediate supervisor or principal as required, and that no just cause for this failure had been shown. On October 31, 2002, plaintiff responded that she had met the procedural requirements and that the policy was vague, and requested a response in writing that she had in fact exhausted all avenues available to her through the school system. In a November 2002 meeting, Hatrick again refused to investigate her complaints and informed plaintiff that she no longer had any remedies available through the school system to resolve her complaints. Thereafter, plaintiff did not take any further steps to try to invoke the LCPS's grievance procedures.

Plaintiff also provides specific information regarding the statements by individual defendants that she claims are defamatory. These statements are all related to the incidents discussed above and the criticism of her work, judgment, and behavior by her supervisors and co-workers. Plaintiff alleges that Holmes, as part of his campaign of retaliation against her, created an atmosphere encouraging the collection of false and defamatory evidence against plaintiff. These statements are summarized as follows: Plaintiff asserts that Trenary (i) falsely told Young that plaintiff presented a counseling model with which the staff was not comfortable, that the staff interpreted as an attempt to avoid providing services, and that the staff told her was unacceptable, (ii) falsely reported to Holmes and Weisman that plaintiff was abrasive, unprofessional and rude at a September 6, 2002 meeting, and (iii) falsely told Weisman that plaintiff had altered a permission form after Trenary had told her not to.[3] Plaintiff asserts that Sakati (i) falsely reported to Young and Weisman that plaintiff had behaved inappropriately in a counseling group by insulting and contradicting Sakati, (ii) falsely told Weisman and Young that plaintiff "misinterprets a lot and she lies," and (iii) falsely reported to Weisman that plaintiff was inept at handling a situation involving two disabled students returning to a classroom. Plaintiff asserts that defendant Roberta Rehm likewise falsely reported to Weisman that plaintiff was inept at handling that situation. Plaintiff alleges that these co-worker statements were not only false, but also made with malice, with a "motive of personal spite and revenge" and to "curry favor with Mr. Holmes and Ms. Young."

With regard to plaintiffs supervisors, Weisman and defendant John Lody, plaintiff asserts that a series of statements made in their evaluations and memoranda were defamatory. These include assertions by Weisman and Lody that plaintiff "failed to maintain an adequate line of communication with other staff members,"

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that two of her assessments did not meet "our professional standards," that plaintiff could be "abrasive and insulting to other committee members," that she substantially altered a student permission form "because she did not agree with the policy," that she "struggles to submit reports ... in a timely manner ... failed to provide requested information, to follow established departmental practices and to complete evaluation components," and that her "overall performance remains in need of improvement." Plaintiff alleges that these statements by her supervisors were not only false, but made with malice out of personal spite and revenge, and that the statements were directly contradicted by other observers.

Plaintiff filed this action on April 28, 2003, claiming (i) deprivation of her property interest in continued employment with the LCPS and her liberty interest in her good name and reputation without due process in violation of the Fourteenth Amendment, (ii) retaliation in violation of her rights under the First Amendment, and (iii) defamation under Virginia law.[4] Plaintiff claims as damages lost career and business opportunities owing to the restriction of her professional duties, loss of reputation, humiliation, embarrassment, inconvenience, mental and emotional anguish and distress, litigation costs and attorneys' fees, and other damages.

Motions to dismiss were filed on May 22, 2003. LCPS and the supervisor defendants, Holmes, Young, and Weisman filed one motion moving for dismissal of all counts in the complaint, while the co-worker defendants, Rehm, Trenary and Sakati, represented by the same counsel, filed a motion to dismiss the only count applicable to them, the defamation claim. At a June 6, 2003 hearing on the motion the matter was taken under advisement and is now ripe for disposition. Plaintiffs claims are addressed individually below.

II.

A. FOURTEENTH AMENDMENT DUE PROCESS—PROPERTY INTEREST

The first prong of plaintiffs Fourteenth Amendment claim is that she has been deprived of her property right to continued employment without due process of law. In order to state a § 1983 claim for deprivation of property without due process, plaintiff must show (i) that she has a constitutionally protected property interest, and (ii) that she has been deprived of that interest by state action. *See Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 172 (4th Cir.1988); *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Once these elements are established, the question turns to what process is due and whether it has been provided. *See Stone*, 855 F.2d at 172; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

To have a protected property interest, an individual "must be entitled to a benefit created and defined by a source independent of the Constitution, such as state law." *Huang v. Board of Governors*, 902 F.2d 1134, 1141 (4th Cir.1990); *Roth*, 408 U.S. at 577, 92 S.Ct. 2701. And, it is well settled that "[i]n the context of employment in public education," a protected property interest is established by "a contract which provides for continued

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employment, and which can be terminated only for good cause." *Royster v. Board of Trustees*, 774 F.2d 618, 620-21 (4th Cir.1985). With regard to the process due, it is well established that due process requires that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Loudermill*, 470 U.S. at 542, 105 S.Ct. 1487. More specifically, a "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 546, 105 S.Ct. 1487.

In this case, neither party disputes that plaintiff has been employed for more than three years and accordingly has continuing contract status pursuant to Va. Code § 22.1-303 and can only be terminated for good cause. Thus, plaintiff has a established a protected property interest in her continued employment with LCPS.

The next step in the Fourteenth Amendment analysis is to consider whether plaintiff has adequately alleged deprivation of this property interest. Here, she falters; plaintiff has alleged no facts sufficient to show any deprivation of that property interest, and thus cannot claim a violation of due process. The cases are clear that "any constitutionally protected interest [an employee has] as a result of his employment contract is satisfied by payment of the full compensation due under the contract." *Huang*, 902 F.2d at 1141 (citing *Royster*, 774 F.2d at 621). Thus, for example, "the transfer of tenured professors from one department to another, without loss or pay, does not implicate any property interest protected by the Due Process Clause." *Id.; see also Fields v. Durham*, 909 F.2d 94, 98 (4th Cir.1990) (holding that "the constitutionally protected property interest does not extend to the right to possess and retain a particular job or to perform particular services" and that "no deprivation exists so long as the employee receives `payment of the full compensation due under the contract'") (citation omitted). Significantly, it is clear from this complaint that plaintiff has not been terminated and remains a school psychologist employed by the LCPS. Although plaintiff alleges that she has suffered a loss of authority and responsibility as a result of defendants' criticism of her work and her placement on the evaluation track, plaintiff does not allege that her salary has been reduced or that she has not been provided "the full compensation due under her contract." Thus, she has not been deprived of her property interest in continued employment, and cannot allege a violation of her due process rights. *See Huang*, 902 F.2d at 1141.

In the face of this clear precedent to the contrary, plaintiff argues that she is entitled to due process protections because defendants *threatened* to deprive her of her continued employment. Plaintiff contends that defendants' actions—placing her on an evaluation cycle and the "December List," presenting her with resignation papers, and informing her that a continued "unsatisfactory" rating would result in termination—were sufficient to trigger her due process rights to a hearing and an opportunity to challenge the charges made against her. Specifically, plaintiff contends that Virginia law provides teachers the right to invoke grievance procedures in response to disciplinary actions short of termination, including placement on probationary status, and that the defendants did not properly follow those procedures. *See* Va.Code § 22.1-306 (defining "grievance" to include complaints relating to "disciplinary action[s] including dismissal or *placing on probation*").

Even assuming plaintiff has alleged facts sufficient to make out a claim

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that defendants violated state procedural rights in refusing to hear and process her grievance,[5] a violation of grievance procedures guaranteed under state law does not, by itself, constitute a failure to provide adequate due process under the standards of the federal Constitution. As the Fourth Circuit has made clear, so long as "minimal [Fourteenth Amendment] due process requirements of notice and hearing have been met," a claim that "an agency's policies or regulations have not been adhered to does not sustain an action for redress of procedural due process violations." *Goodrich v. Newport News School Bd*, 743 F.2d 225, 227 (4th Cir.1984).[6] In other words, "the fourteenth amendment does not require a local school board to adhere to its own guidelines as long as minimum due process is accorded." *Id.* The plaintiff in the *Goodrich* tenured school teacher, was provided only two interim conferences rather than the three required by the School Board's evaluation procedures. *Id.* at 226. Nonetheless, the *Goodrich* panel concluded that no constitutional violation of due process occurred, as the plaintiff in that case was provided the constitutionally guaranteed level of process before she was terminated, namely an "adequate notice, a specification of the charges against her, and a hearing at which she was able to present her defense." *Id.*, at 227. In short, *Goodrich* stands for the sensible proposition that "the enforcement of state regulations ... is to be done through the state system and not in an action under 42 U.S.C. §§ 1981 and 1983, where no federal constitutional guarantees have been violated." *Id.*[7]

In sum, the process required by the Due Process Clause is not measured by procedures provided for by state law. *Id.* Thus, plaintiffs right to invoke statutory grievance procedures in response to defendants' actions in placing her on probation is not a constitutionally protected right sufficient

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to support a due process claim. Rather, the minimum process she must be provided to satisfy the Due Process Clause is notice and a hearing before she is terminated. *See Loudermill*, 470 U.S. at 542, 546, 105 S.Ct. 1487. Clearly, plaintiff cannot allege that she has been denied such process, as she has not yet been terminated.[8] Accordingly, plaintiffs due process property interest claim must be dismissed.

B. FOURTEENTH AMENDMENT DUE PROCESS—LIBERTY INTEREST

Plaintiff's parallel claim under the Fourteenth Amendment—that she has been deprived of her liberty interest in her good name and reputation—must likewise be dismissed. It is well established that employees have a constitutionally protected liberty interest in their "good name, reputation, honor or integrity," and that this liberty interest "is implicated by public announcement of reasons for an employee's discharge." *Johnson v. Morris*, 903 F.2d 996, 999 (4th Cir.1990); *see also Roth*, 408 U.S. at 573, 92 S.Ct. 2701 (holding that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential"). In order to state a claim for violation of the liberty interest in her good name and reputation, plaintiff must allege facts sufficient to show (i) that "[her] superiors made charges against her that `might seriously damage [her] standing and associations in [her] community' or otherwise `imposed on [her] a stigma or other disability that foreclosed [her] freedom to take advantage of other employment opportunities,'" (ii) that the charges were made public by the employer, (iii) that the charges were false, and (iv) that the stigmatizing remarks were "made in the context of a discharge or significant demotion." *Stone*, 855 F.2d at 172 n. 5 (citing *Roth*, 408 U.S. at 573-75, 92 S.Ct. 2701; *Bishop v. Wood*, 426 U.S. 341, 348-49, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977); *Paul v. Davis*, 424 U.S. 693, 710-11, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976)). Plaintiff has failed to allege facts sufficient to show the second and fourth elements.

First, nothing in the complaint indicates that there has been any publication of the allegedly false criticism of her work performance and character. Plaintiff does not allege that defendants' allegedly stigmatizing statements or reports have been made public in any way; rather, the allegations in the complaint refer to statements and comments made only in internal memoranda, during private conversations, and at meetings not attended by the public. *Cf. Johnson*, 903 F.2d at 998 (noting that the reasons for plaintiffs demotion were published in local newspapers). Since the allegedly stigmatizing statements were not "made public," they "cannot properly form the basis for a claim that [plaintiffs] interest in [her] `good name, reputation, honor or integrity' was thereby impaired." *See Bishop*, 426 U.S. at 348, 96 S.Ct. 2074. Nor can the exposure of these statements "in the course of

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a judicial proceeding which did not commence until after [plaintiff] had suffered the injury for which [she] seeks redress... provide retroactive support for [her] claim." *Id.* In short, plaintiff has failed to allege that the false statements were published, and thus cannot state a claim for denial of her liberty interest without due process.[9]

Second, plaintiff has not asserted any facts indicating that the allegedly stigmatizing statements were made in the context of a "discharge or significant demotion." *Stone*, 855 F.2d at 172 n. 5. As the Fourth Circuit noted in *Johnson*, "[publication of stigmatizing charges alone, without damage to `tangible interests such as employment,' does not invoke the due process clause." *Johnson*, 903 F.2d at 999 (citing *Paul*, 424 U.S. at 701, 96 S.Ct. 1155). Rather, there must be "some damage to [plaintiff's] employment status." *Id.* The facts as alleged in the complaint indicate that plaintiff has not been discharged nor demoted; she remains employed in the

same position as a school psychologist in the LCPS. At most, plaintiff has suffered some minor restriction of her freedom and authority as a result of her placement on probation and the increased supervision of her activities. This falls well short of a "significant demotion," and thus, even were the allegedly false statements made public by defendants, plaintiff has not stated a claim for violation of due process with regard to her liberty interest. *See Stone,* 855 F.2d at 172 n. 5.

Accordingly, given plaintiffs failure to allege facts sufficient to show either publication of the statements or that they were made in the context of a discharge or significant demotion, the claim asserting a deprivation of her liberty interest in her good name and reputation without the due process guaranteed by the Fourteenth Amendment must be dismissed.

C. FIRST AMENDMENT RETALIATION

Plaintiff also asserts a constitutional claim under the First Amendment, claiming that defendants took disciplinary action against her in retaliation for her criticism of the LCPS's special education policies. In order to make out a claim for First Amendment retaliation, plaintiff must show (i) that she engaged in speech on a matter of public concern, (ii) that the retaliatory action deprived her of some valuable benefit, and (iii) that there is a causal connection between the protected action and the retaliatory speech, which would not have occurred "but for" the protected expression. *Holland v. Rimmer,* 25 F.3d 1251, 1254 (4th Cir.1994); *Huang,* 902 F.2d at 1140. As to the first element, in determining whether particular

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speech is protected under the First Amendment, courts consider "(1) whether a public employee's speech qualifies as a matter of public concern, and (2) what effect the speech has on the efficiency, discipline, and proper administration of the workplace." *Holland,* 25 F.3d at 1254. To determine whether speech involves a matter of public concern, courts examine the "content, context, and form of the speech at issue in light of the entire record." *Urofsky v. Gilmore,* 216 F.3d 401, 406 (4th Cir.2000). Clearly, speech that does not relate to "any matter of political, social, or other concern to the community" is not of public concern. *Holland,* 25 F.3d at 1254. More specifically, an employee's speech is protected as a matter of public concern when the employee speaks "as a citizen upon matters of public concern," not when the employee speaks "as an employee upon matters only of personal interest." *Connick v. Myers,* 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

Here, plaintiff alleges that she was retaliated against for her criticism of the LCPS's treatment of disabled students in the special education program and for her complaint that LCPS's special education policy did not comport with the ADA and the Rehabilitation Act. A school system's treatment of disabled students in a special education program and its compliance with federal law would appear at this juncture to be matters of public interest, not merely matters of personal interest to plaintiff.[10] Moreover, the fact that plaintiff made her critical statements privately to her supervisors and co-workers, not to the public at large, does not render the speech not of public concern. *See McVey v. Stacy,* 157 F.3d 271, 279, 280 (4th Cir. 1998) (panel opinion and Mumaghan, J., concurring) (holding that private protests may be protected speech); *Cromer v. Brown,* 88 F.3d 1315, 1326 (4th Cir. 1996) (same). Accordingly, plaintiff has alleged sufficient facts to state a claim that her criticism of the LCPS's special education policies was a matter of public concern.[11] Nor does it appear, under the facts as alleged by plaintiff, that her speech was disruptive of the efficiency, discipline or administration of the workplace. *See Holland* 25 F.3d at 1254. Thus, plaintiffs allegations are sufficient to state a claim that her statements were a protected under the First Amendment; indeed, defendants do not dispute this element in their motion to dismiss.

With regard to the second element, the question is whether the retaliatory acts alleged by plaintiff deprived her of "some valuable benefit." Not every restriction or adverse action by an employer against an employee rises to the level of a constitutional violation. *See DiMeglio v. Haines,* 45 F.3d 790, 806 (4th Cir.1995). Instead, the dispositive question is, sensibly, "whether the adverse actions complained of, under the particular

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circumstances of the case, would deter the employee from again exercising his constitutional right to publicly comment on matters of public concern." *Saleh v. Upadhyay,* 11 Fed.Appx. 241, 255-56 (4th Cir.2001) (unpublished *per curiam* opinion) (citing *ACLU of Md. v. Wicomico Cty.,* 999 F.2d 780, 784 (4th Cir.1993) (holding that "retaliatory actions may tend to chill individuals' exercise of constitutional rights")). Although dismissal is clearly sufficient under this test, the action need not be "the substantial equivalent of a dismissal," and "failure to rehire, a denial of promotion, or a denial of transfer, may constitute a deprivation of a valuable government benefit." *DiMeglio,* 45 F.3d at 806 (citing *Rutan v. Republican Party of Ill.,* 497 U.S. 62, 73-76, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990)). And indeed, something less onerous than an adverse employment action in the context of Title VII may be sufficient, because the key is whether the adverse action would operate to chill or deter speech on a matter of public concern. *Saleh,* 11 Fed.Appx. at 255.

Of particular relevance here is that a public employer is "prohibited from threatening to discharge a public employee in an effort to chill that employee's rights under the First Amendment." *Edwards v. City of Goldsboro,* 178 F.3d 231, 246 (4th Cir.1999); *Rankin v. McPherson,* 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (same). Thus, a threat to terminate, without any accompanying actual loss of a valuable job benefit, is sufficient to satisfy the second element of a First Amendment claim. This is so because a "threat of dismissal from public employment is a potent means of inhibiting speech." *Id.,* quoting *Rankin,* 483 U.S. at 384, 107 S.Ct. 2891. A retaliatory threat to terminate an employee because of protected speech is actionable as a constitutional violation even absent a showing that it has been carried out; for in precisely those situations the employer may have successfully "chilled" his employees' free speech rights.

From this, it follows that plaintiff has stated a viable First Amendment retaliation claim, as she has alleged in the complaint that defendants threatened to terminate her employment contract. Specifically, plaintiff alleges that she was placed on the evaluation cycle in September of 2002 and that she was subsequently given an "unsatisfactory" rating and placed on the "December List," which served as notice that her contract might not be renewed the following year. Most significantly, in January 2003, plaintiff alleges that she was presented with resignation papers and informed that if her rating remained "unsatisfactory" in March, her supervisor "will be recommending" that her contract not be renewed.[12] Clearly, such actions, provided they were caused by plaintiffs criticism of the special education policies, as she alleges, "may tend to chill [her] exercise of constitutional rights." *ACLU,* 999 F.2d at 785. Thus, the fact that plaintiff remains employed by the LCPS and has not actually been terminated is not fatal to her First Amendment retaliation claim as it is to her claims under the Fourteenth Amendment.

Finally, plaintiff must allege sufficient facts to show a causal relation between her protected speech concerning the special education policies and defendants' actions in threatening to terminate her contract. *See Huang,* 902 F.2d at 1140. This causation requirement is "rigorous" in

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that a "claimant must show that `but for' the protected expression the employer would not have taken the alleged retaliatory action." *Id.*

Here, plaintiff does not allege that defendants ever explicitly linked the termination threat to her protected speech. *Cf. Edwards,* 178 F.3d at 239, 248 (holding that where the plaintiff was explicitly threatened with termination if he continued to teach a concealed handgun safety course, the complaint left "no doubt" that the threat "was intended to chill his right to engage in ... protected expression"). Yet, neither does plaintiff merely assert, without more, that the threat was retaliatory. *Cf. Huang,* 902 F.2d at 1141 (dismissing a retaliation claim on summary judgment where there was "not a scintilla of evidence that [the decision to transfer plaintiff] was infected with a retaliatory motive traceable" to plaintiffs protected speech.) In this regard, the timing of the incidents may support an inference of a retaliatory motive, as the alleged retaliatory acts commenced at the same time as her criticism of the policies. According to the complaint, the retaliatory actions began in September 2001, when defendant Holmes launched the allegedly unfounded investigation into plaintiffs supposed "absenteeism" after a single instance of tardiness, shortly after she began criticizing his changes to special education policies. Moreover, under the facts as alleged, defendant Holmes, who appears to have borne the brunt of plaintiffs criticism, is the driving force behind the retaliatory actions. Further support for an inference of causation is furnished by plaintiffs allegations in the complaint that the defendants' grounds for the actions taken against her are pretextual. In this regard, plaintiff alleges (i) that her supervisors ignored positive comments from co-workers in giving her an unsatisfactory rating, (ii) that they did not conduct thorough investigations and did not interview her co-workers before taking action against her, and (iii) that her co-workers can vouch for the fact that many of the criticisms of her performance were false. In short, while the parties may vigorously dispute the factual causation question, plaintiff has sufficiently stated a claim on this element to survive a motion to dismiss.

Accordingly, plaintiff has alleged sufficient facts to state a First Amendment retaliation violation, and therefore her First Amendment claim, unlike her Fourteenth Amendment claims, survives defendants' motion to dismiss.[13]

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D. DEFAMATION

Alongside plaintiffs § 1983 constitutional tort claims, she also asserts a claim of defamation under Virginia state law. Under Virginia law, to state a claim for defamation, plaintiff must show (1) publication, (2) of an actionable statement with (3) the requisite intent. *Chapin v. Knight-Ridder, Inc.,* 993 F.2d 1087, 1092 (4th Cir. 1993). To be "actionable," the statement must not only be false, but defamatory, that is, it must "tend[ ] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* In other words, "[m]erely offensive or unpleasant statements" are not defamatory; rather, defamatory statements "are those that make the plaintiff appear odious, infamous, or ridiculous." *Id.* (citation omitted). Furthermore, "speech which does not contain a provably false factual connotation, or statements which cannot reasonably be interpreted as stating actual facts about a person cannot form the basis of a common law defamation action." *Yeagle v. Collegiate Times,* 255 Va. 293, 295, 497 S.E.2d 136 (1998). Such speech is sometimes referred to as "pure expressions of opinion." *Id.* at 295 n. 1, 497 S.E.2d 136. A statement is defamatory *per se* if it (i) imputes the commission of a crime of moral turpitude for which a party may be convicted, (ii) imputes that the person is infected with a contagious disease which would exclude the person from society, (iii) imputes an unfitness to perform the duties of a job or lack of integrity in the performance of duties, or (iv) prejudices the party in her profession or trade. *Id.* at 297 n. 2, 497 S.E.2d 136, citing *Fleming v. Moore,* 221 Va. 884, 889, 275 S.E.2d 632 (1981). And significantly, under Virginia law, whether a statement is actionable as defamatory and whether it is defamatory *per se* are matters of law for the trial judge to determine. *Id.* at 296, 497 S.E.2d 136; *Chapin,* 993 F.2d at 1092.

The publication requirement for defamation requires a dissemination of the statement to a third party where that dissemination does not occur in a privileged context. See *Montgomery Ward & Co. v. Nance,* 165 Va. 363, 379, 182 S.E. 264 (1935). In this regard, it is well settled under Virginia law that "Communications between persons on a subject in which the persons have an interest or duty are occasions of privilege," and that "statements made between co-employees and employers in the course of employee disciplinary or discharge matters are privileged." *Larimore v. Blaylock,* 259 Va. 568, 572, 528 S.E.2d 119 (2000); *see also Southeastern Tidewater Opportunity Project, Inc. v. Bade,* 246 Va. 273, 275, 435 S.E.2d 131 (1993) (holding that a letter was privileged because it "was written in the context of his employment relationship"). Thus, the privilege applies broadly to all statements related to "employment matters," provided the parties to the communication have a duty or interest in the subject matter. *Larimore,* 259 Va. at 574-75, 528 S.E.2d 119. And, employees have a general duty "to inform management of adverse or improper actions by fellow employees," just as management has a duty "to investigate and make decisions regarding matters of continued employment." *Id.* at 575, 528 S.E.2d 119. Accordingly, neither party disputes that the relevant statements in this case are privileged.

It is also settled that this privilege is qualified and is lost "if a plaintiff proves by clear and convincing evidence that the defamatory words were spoken with common-law malice." *Southeastern Tidewater,* 246 Va. at 276, 435 S.E.2d 131; see *also Larimore,* 259 Va. at 572, 528 S.E.2d 119. Common-law malice, in turn, is "behavior actuated by motives of personal spite, or ill-will, independent of the occasion

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on which the communication was made." *Southeastern Tidewater,* 246 Va. at 276, 435 S.E.2d 131. In other words, to avoid the qualified privilege plaintiff must show that "the communication was actuated by some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff." *Id.* Thus, in order to state a claim for defamation, plaintiff must allege facts sufficient ultimately to support a finding by clear and convincing evidence that the statements of her supervisors and co-workers were made with actual, common-law malice. *Id.* at 275-76, 435 S.E.2d 131.

In considering whether this complaint meets that burden, it must first be noted that plaintiffs repeated assertions that each defendant charged with defamation acted "with malice" and with a "motive of personal spite and revenge" are not, by themselves, sufficient to state a claim of malice sufficient to overcome the qualified privilege. Although the facts as alleged in the complaint must be taken as true for the purpose of this motion to dismiss, such conclusory allegations do not state a claim for malice if the facts as alleged cannot otherwise support a finding of malice. *See Young v. City of Mount Ranier,* 238 F.3d 567, 577 (4th Cir.2001) (holding that plaintiff does not state a claim requiring "deliberate indifference" merely by "throw[ing] in words and phrases such as `deliberate indifference,' `malicious,' `outrageous,' and `wanton' when describing the conduct"). Likewise, the allegations in the complaint that the defendants charged with defamation made the allegedly false statements with the intention of advancing their careers and currying favor with their supervisors also fall short of stating a claim of actual malice. After all, any time an employee reports misconduct by a co-worker one might say that the employee acted maliciously in trying to curry favor with supervisors at the expense of a co-worker. Were such bare allegations sufficient to state a claim of malice, virtually every claim of defamation based on a co-worker's report of misconduct would survive a motion to dismiss. Neither precedent nor common sense approve of such a result. *See Larimore,* 259 Va. at 575, 528 S.E.2d 119 (noting that employees have a duty "generally to inform management of adverse or improper actions by fellow employees" and that the qualified privilege rule serves "to encourage open communications on matters of employment").

Nonetheless, plaintiffs complaint contains more than these bare, insufficient allegations; it sufficiently states a claim of malice, insofar as it alleges a general pattern of retaliation against plaintiff and a larger conspiracy among the defendants to discredit plaintiff through false statements and unfounded disciplinary actions. More specifically, the complaint asserts that Holmes, in his campaign to retaliate against plaintiff, created an atmosphere which encouraged the collection of false and defamatory statements that could be used as evidence against plaintiff. The complaint further alleges that plaintiffs supervisors Weisman and Lody, and her co-workers Trenary, Sakati, and Rehm, came forward with false statements against plaintiff in response to Holmes's encouragement and thus joined in the retaliatory campaign. Accordingly, to the extent plaintiff ultimately shows that the defendants who made the allegedly defamatory remarks were aware of and part of a joint effort to discredit her and retaliate against her, plaintiff will be able to show the defendants acted with the required "sinister or corrupt motive." *Southeastern Tidewater,* 246 Va. at 276, 435 S.E.2d 131.

In this regard, the existence of this conspiracy to retaliate is stated with some detail in the complaint, as it is the heart of plaintiffs complaint and the basis for the surviving First Amendment claim. Less

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clear, however, is the extent to which each individual defendant was aware of, and a participant in, such a scheme. Thus, to provide clear and convincing proof of malice, plaintiff will have to come forward with far greater evidentiary detail supporting a finding of malice on the part of each individual alleged to have defamed plaintiff than is included in her complaint. *See, e.g., Oberbroeckling,* 234 Va. at 379-82, 362 S.E.2d 682 (affirming a jury's finding of malice where (i) the record showed that plaintiffs prior record was exemplary, (ii) that the defaming defendant took over plaintiffs job, (iii) that the defamatory charges against plaintiff were discredited and plaintiff was offered his job back, and (iv) that the defaming defendant was overheard saying that plaintiff "was a lying, cheating, SOB; that he ... got; that he crucified him; and he tacked him to the wall").

As plaintiff, at least at this stage, has stated sufficient facts to survive a motion to dismiss with regard to the existence of malice, it is next necessary to consider the individual statements alleged to be defamatory and to determine, as a matter of a law, whether they are actionable. *Yeagle v. Collegiate Times,* 255 Va. at 296, 497 S.E.2d 136. On a motion to dismiss a defamation claim, a court must credit plaintiffs allegations that the statements were factually false, and focus instead on whether the alleged statements could support a finding that they are actionable. *See Chapin,* 993 F.2d at 1092. Many of the statements plaintiff alleges were defamatory simply do not rise to the level of actionable defamation under Virginia law, even assuming the statements were false as plaintiff asserts. In this regard, criticism of plaintiffs job performance or manner, even if clearly damaging to the plaintiffs interests, does not necessarily constitute actionable defamation; instead, the alleged statements must be measured against the Virginia law standards for defamation that require that a statement either fit within a specific category of defamation *per se* or be sufficiently severe to meet the general defamation standard.[14]

The following statements do not rise to the level of actionable defamation because they are not defamatory *per se,* as they cannot be construed to imply that plaintiff is unfit for or lacks integrity in performing her duties or to prejudice plaintiff in her profession, nor are they severe enough to make plaintiff appear odious, infamous, or ridiculous under the general defamation standard:

(i) Trenary's statement that plaintiff presented a counseling model with which the staff was not comfortable, ¶¶ 86(a)(1) &(2),

(ii) Sakati's statement that plaintiff behaved inappropriately during a student-counseling group by "insulting" and "contradicting" her, ¶ 86(b)(1),

(iii) Sakati and Rehm's statements that plaintiff was inept at handling a situation involving two disabled students returning to a classroom, ¶¶ 86(b)(3) & (c)(1),

(iv) Weisman and Lody's statement that plaintiff must continue to become more accepting of others' opinions and that many colleagues perceive her as manipulative and defensive, ¶¶ 86(d)(6),

(v) Weisman's statement that plaintiff needs to develop greater sensitivity to the reactions of others and to monitor her behavior, ¶ 86(e)(2), and

(vi) Lody's statement that plaintiff has difficulty in her relationship with her colleagues, ¶ 86(f)(1).

Even assuming that these statements are provably false, rather than pure expressions of opinion, they do not sufficiently impugn plaintiffs abilities or character to suggest that she is unfit for her job, nor do they question her integrity. *See Chapin,* 993 F.2d at 1092; *Yeagle,* 255 Va. at 297 n. 2, 497 S.E.2d 136.

By contrast, the following alleged statements could be construed either to imply or to state directly that plaintiff lacks integrity or is unfit for her profession:

(i) Trenary's statement that plaintiff was abrasive, unprofessional, and rude, which implies that she is unfit for her position as a school psychologist, ¶ 86(a)(3),

(ii) Trenary's statement that plaintiff altered a permission form after being told not to, which implies that she lacks integrity in performing her duties, ¶ 86(a)(4),

(iii) Sakati's statement that plaintiff misinterprets a lot and lies, which implies that she lacks integrity in performing her duties, ¶ 86(b)(2),

(iv) Weisman and Lody's statements that plaintiff fails to meet professional standards and that her "overall performance remains in need of improvement," and, more specifically, that she failed to maintain an adequate line of communication with other staff members, struggled to submit reports in a timely manner, failed to provide requested information and complete evaluation components, failed to follow established departmental practices, and that she was abrasive and insulting to other committee members, which imply that plaintiff is unfit to perform her duties, ¶¶ 86(d)(1), (2), (4), (7) & (8),

(v) Weisman and Lody's statements that plaintiff failed on a certain occasion to obtain parental permission before conducting an evaluation and that plaintiff, on another occasion, altered a permission form because she did not agree with the policy, which imply that plaintiff lacks integrity in performing her duties, ¶¶ 86(d)(3) & (5), 86(e)(3) & (4), and

(vi) Weisman's statement that plaintiffs behavior is unprofessional and in need of corrective action, which implies that plaintiff is unfit to perform her duties, ¶ 86(e)(1).

Accordingly, plaintiff has alleged sufficient facts to support a defamation claim against defendants Trenary, Sakati, Weisman, and Lody, but not against defendant Rehm. Thus, the motion to dismiss must be granted with respect to defendant Rehm, but denied with respect to the remaining four defendants charged with defamation.[15]

III.

In sum, plaintiffs property interest and liberty interest claims under the Due Process Clause of the Fourteenth Amendment must be dismissed, as she has not alleged the deprivation of a property interest or liberty interest sufficient to invoke the protections of the Due Process Clause. Under these circumstances, the fact that plaintiff has not been terminated, but remains employed by LCPS is fatal to her due process claims. By contrast, plaintiff has stated a claim for First Amendment retaliation, even though no concrete adverse action such as termination has been taken against her. Here, the clear threat of termination is sufficient to chill her exercise of her First Amendment rights and this, under the law, justifies federal constitutional review of the defendants actions to ensure that they have not violated plaintiff's First Amendment rights. Finally, plaintiff has stated a claim for defamation against Trenary, Sakati, Weisman, and Lody, although she must yet provide significant additional evidentiary detail to prevail ultimately on this claim. Plaintiff's claim against defendant Rehm must be dismissed.

An appropriate order will issue.

FOOTNOTES

1. This term, used but not defined by plaintiff, refers generally to school system policies and programs for disabled children, as regulated by the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 and the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. § 701

2. On a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), Fed.R.Civ.P., the plaintiff's allegations must be taken as true and construed in the light most favorable to the plaintiff. , 783 (4th Cir. 1999).

3. Plaintiff concedes that she altered the form, but asserts that such alterations are routine and that she was not told not to alter the form.

4. Plaintiff's complaint also includes a claim for retaliation under the Fourteenth Amendment and a non-retaliation First Amendment claim. Yet, the legal and factual bases for these addifional claims are not clearly articulated. These additional claims are apparently the same as the non-retaliation Fourteenth Amendment claims and the First Amendment retaliation claim already asserted, and thus need not be separately treated.

5. The question whether plaintiff has stated facts sufficient to make out a violation of her state law grievance rights under Va.Code §§ 22.1-306-314 is not reached here, as it is irrelevant to the constitutional claims raised by plaintiff.

6. (2nd Cir. 1990) (citing and holding that "[a] breach of procedural requirements does not create a due process violation unless an individual was `denied a fair forum for protecting his state rights.'"); , 780 (10th Cir. 1981) (holding that "§ 1983 is not a vehicle for federal court correction of errors, committed by school administrators in exercise of their discretion, not rising to the level of violation of specific constitutional guarantees"); , 1257 (1994) (holding that defendants' failure to provide plaintiff notice "on Form 129-01-004, as specified in the personnel manual, can hardly support a finding that he was deprived of procedural due process").

7. is not of recent vintage and is infrequently cited. , 103 (D.D.C.1999) (citing); , 1337-38 (2nd Cir.1990) (same); (4th Cir. 1985) (same). Nonetheless, there is no reason to suspect that its authority has been undermined. Courts typically need not face the question squarely where it appears that Virginia procedural requirements have been met. 25 F.3d at 1259 (holding that the defendants complied with both the process required under the Constitution and the Virginia grievance procedures). Most significantly, the approach is clearly in accord with the Supreme Court's decision in issued one year after which held that procedures specified by state law do not determine the extent of process guaranteed under the Constitution. 470 U.S. at 539-41, 105 S.Ct. 1487 (considering the reverse of the question, namely whether state procedural law can the process due under Constitution and holding that the question of "what process is due" under the Fourteenth Amendment is a federal constitutional question that is not answered by state procedural law).

8. Plaintiff relies on language in requiring that "an individual must be given an opportunity for a hearing he is deprived of any significant property interest" to support her claim that due process requires a hearing at the point where an employee is threatened with termination but not yet terminated. at 542, 105 S.Ct. 1487. Yet, plaintiff simply cannot allege that defendants have failed to provide her a pre-termination hearing when she has not yet been terminated. In the event defendants decide at some future point that plaintiff ought to be terminated, they may then provide her the constitutionally required pre-termination hearing. If plaintiff is terminated without such a hearing, she may then have a Fourteenth Amendment claim.

9. Plaintiff contends that her personnel record contains false and stigmatizing information and that this information will be made available to any future employer, thereby limiting her prospects for future employment. Yet, the Fourth Circuit made clear in that an employee who has not been terminated is in a different situation from a terminated employee whose "opportunity for other gainful employment is thwarted by the publication of the reasons for his discharge." 903 F.2d at 999 (citation omitted). In other words, an employee who has not been terminated "cannot complain that he has been made unemployable; he remains employed." citing , 266 (7th Cir. 1984). Surely, then, plaintiff cannot rely here on the future publication of the allegedly false and stigmatizing statements to future employers to state a due process claim. To hold otherwise would allow any employee with potentially damaging information in her personnel file to assert a federal constitutional claim. Common sense and precedent preclude such a result, for it is well established that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." 426 U.S. at 349, 96 S.Ct. 2074.

10. To be sure, this issue may be revisited at trial or on summary judgment on the basis of the record as it develops. n. 11.

11. This threshold determination that plaintiff has sufficiently stated a claim that her speech involved matters of public concern does not, of course, ultimately resolve the difficult and determinative question, not addressed by either party nor made clear in the complaint, whether plaintiff spoke in her role as a private citizen or in her role as a public employee. 216 F.3d at 407-08 (holding that the determination whether the speech was made "primarily in the [employee's] role as citizen or primarily in his role as employee" is "critical," and providing examples of a public employee acting in each role). This determination requires a consideration of the "content, context, and form" of plaintiff's speech, at 406, details not provided in plaintiff's allegations. Because the determination is highly factual and contextual, a decision on this issue must await a more complete record, either on summary judgment or at trial.

12. This statement was later corrected by a letter indicating that her supervisor "may be recommending" termination in that event.

13. Defendants assert a defense of qualified immunity against the First Amendment retaliation charge. Qualified immunity protects government officials performing discretionary duties from civil suit so long as the officials' conduct does not violate clearly established statutory or constitutional rights. , 276 (4th Cir. 1998). Thus, to overcome defendants' claim to qualified immunity, plaintiff must claim a violation of a right pursuant to a statute or the Constitution which is "clearly established so that an objectively, reasonable officer would have known of it." The fact that a threat of termination can constitute actionable First Amendment retaliation is clearly established. 178 F.3d at 246; 483 U.S. at 383, 107 S.Ct. 2891. Yet, the determination that plaintiff's speech is constitutionally protected requires a sophisticated balancing of interests, and thus will "only infrequently" be clearly established. 157 F.3d at 277. And, as the record is not yet sufficiently developed to determine whether plaintiff's interests were clearly outweighed by defendants', the qualified immunity determination must be deferred until a more complete record is developed. at 279 (affirming the district court's deferral of the qualified immunity issue). Yet, because qualified immunity is properly addressed as soon as possible, defendants should move promptly in the event the record, as it develops, supports a finding of qualified immunity.

14. 230 Va. at 118-19, (holding that statements that an architect was "inexperienced" and his fees were "excessive" are mere statements of opinion and do not impute unfitness to perform the duties of his employment) 234 Va. 373, 379, (1987) (holding that a memorandum accusing plaintiff of "mismanagement of funds" was defamatory because it implied that plaintiff was unfit to perform the duties of his employment or lacked integrity or was dishonest in performing them).

15. Of course, this threshhold conclusion that plaintiff's allegations are sufficient to state a claim for defamation against four defendants is far from a conclusion that the alleged statements are, in fact, defamatory. Not only must plaintiff establish that the statements were false, she must also provide further evidence regarding the actual content and context of the statements to show that the statements are, in fact, actionable as defamatory. 993 F.2d at 1092. For example, Trenary's assertion that plaintiff acted "unprofessionally" may or may not constitute an actionable defamatory statement, depending on the nature and severity the charge of "unprofessionalism." After all, there is a wide range of behavior reasonably labeled "unprofessional," that could be as minor as chewing gum during a meeting or as serious as ridiculing or disparaging the students for whom she cares. The complaint provides little of the necessary detail regarding the context and exact content of the allegedly defamatory statements. In sum, plaintiff has yet many hurdles to overcome at the summary judgment and trial stages before she can prevail on this claim.

FUSTE v. RIVERSIDE HEALTHCARE ASS'N, INC.

RECORD NO. 020628.

575 S.E.2d 858 (2003)
265 Va. 127

Rosa FUSTE, M.D., et al. v. RIVERSIDE HEALTHCARE ASSOCIATION, INC., et al.

Supreme Court of Virginia.
January 10, 2003.

Brian N. Casey, Norfolk; Robyn Hylton Hansen, Newport News (John Franklin, III, Norfolk; Leonard C. Heath, Newport News; Gary A. Mills; Taylor & Walker; Jones, Blechman, Woltz & Kelly, on briefs), for appellees.

Present: All the Justices.

Opinion by Justice CYNTHIA D. KINSER.

In this appeal, the primary issue is whether alleged defamatory communications are statements of fact or expressions of opinion. Because we conclude that certain of the alleged statements contain provably false factual connotations while other alleged statements are dependent upon the speaker's viewpoint, we will reverse, in part, and affirm, in part, the judgment of the circuit court sustaining a demurrer.

[575 S.E.2d 860]

MATERIAL FACTS AND PROCEEDINGS

The circuit court decided this case on a demurrer. Consequently, we recite the facts as alleged in the pleadings. *McMillion v. Dryvit Systems, Inc.*, 262 Va. 463, 465, 552 S.E.2d 364, 365 (2001). However, since the court sustained a demurrer to a second amended motion for judgment, which is complete and does not incorporate by reference allegations in the prior motions for judgment, we address only the allegations presented in the second amended motion for judgment. *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 129, 523 S.E.2d 826, 829 (2000). In doing so, we consider not only the facts stated but also those that are reasonably and fairly implied in the light most favorable to the nonmoving parties, Rosa M. Fuste, M.D., and Tien L. Vanden Hoek, M.D., the plaintiffs. *McMillion*, 262 Va. at 465, 552 S.E.2d at 365; *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 102, 540 S.E.2d 134, 137 (2001).

Dr. Fuste and Dr. Vanden Hoek were employed as pediatricians by Riverside Healthcare Association, Inc. (RHA), from 1994 until 1999. In 1999, a dispute arose between the plaintiffs and RHA which resulted in both doctors terminating their employment with RHA. Drs. Fuste and Vanden Hoek did not open a new medical practice until February 2000.

Subsequently, the plaintiffs filed a second amended motion for judgment against RHA, Riverside Hospital, Inc. (Riverside Hospital), Riverside Physician Services, Inc. (RPS) (collectively the Riverside defendants), Peninsula Healthcare, Inc. (PHI), and Healthkeepers, Inc. (Healthkeepers). Although the plaintiffs asserted claims of wrongful discharge, defamation, and conspiracy to injure both doctors in the practice of their profession, the only issue on appeal concerns the allegations of defamation.

As to that claim, the plaintiffs asserted that, after they left their employment with RHA, the defendants and their agents defamed them in order to harm the plaintiffs' new medical practice. Specifically, Drs. Fuste and Vanden Hoek alleged that Barry Gross and Dr. Eugene Temple, acting within the course and scope of their employment with RHA and as agents of the other Riverside defendants, along with C. Burke King and Mae Ellis Terrebone, officers of Healthkeepers and PHI who were also acting in the course and scope of their employment, informed patients, agents of other hospitals, and credentialing officials at Mary Immaculate Hospital and Sentara Hampton General that Drs. Fuste and Vanden Hoek were "unprofessional" and "uncooperative," that they had "left suddenly" and "abandoned their patients," and that there were "concerns about their competence." The plaintiffs alleged that some of these false statements were made to individuals within the organizations who then repeated them to others outside the organizations.

Continuing, the plaintiffs alleged that one caller to Healthkeepers was told by someone named "Theresa" that Drs. Fuste and Vanden Hoek would "never be put back on the Healthkeepers list of providers because of the way they left Riverside." Parents and grandparents of the plaintiffs' former patients who inquired of "Riverside Pediatrics"[1] as to the plaintiffs' whereabouts were informed that Drs. Fuste and Vanden Hoek had "left suddenly," "were not able to work in the area," and "their whereabouts were unknown." One caller also asked an individual at Healthkeepers about the plaintiffs and was told that they had "left suddenly and that she should find another pediatrician."

Finally, the plaintiffs alleged that an employee of Riverside contacted one of their prospective staff members and stated that "Dr. Fuste's and Vanden Hoek's new practice would be immediately shut down the day it opened, and that if she took a job there she would never have a future job with Riverside." The plaintiffs alleged that all these statements were made intentionally, maliciously, and in bad faith to injure them in the practice of their profession.

The defendants filed demurrers to the second amended motion for judgment. After

[575 S.E.2d 861]

considering memoranda and argument of counsel at a hearing on the demurrers, the circuit court, recognizing that it must view the pleading in the light most favorable to the plaintiffs, nevertheless concluded that the second amended motion for judgment did not state claims for wrongful discharge, defamation, or conspiracy. Specifically with regard to the allegations of defamation, the court stated that "[the defamatory statements as alleged, on balance, appear to be opinion[s] by and between people involved in the health care field." Incorporating its reasons stated from the bench, the court subsequently entered an order sustaining the demurrers

and dismissing the case with prejudice. This appeal followed.

ANALYSIS

Our review of a circuit court's judgment sustaining a demurrer is guided by well-settled principles. The purpose of a demurrer is to test the legal sufficiency of a pleading. *Welding, Inc. v. Bland County Service Authority*, 261 Va. 218, 226, 541 S.E.2d 909, 913 (2001). "A demurrer admits the truth of all properly pleaded material facts. `All reasonable factual inferences fairly and justly drawn from the facts alleged must be considered in aid of the pleading.'" *Ward's Equipment, Inc. v. New Holland N. America, Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997) (quoting *Fox v. Custis*, 236 Va. 69, 71, 372 S.E.2d 373, 374 (1988)). However, a demurrer does not admit the correctness of the conclusions of law found in the challenged pleading. *Id.* On appeal, a plaintiff attacking a trial court's judgment sustaining a demurrer need show only that the court erred, not that the plaintiff would have prevailed on the merits of the case. *Thompson v. Skate America, Inc.*, 261 Va. 121, 128, 540 S.E.2d 123, 127 (2001).

The plaintiffs assert that the circuit court erred in finding that the defamatory statements alleged in the second amended motion for judgment were merely opinions and therefore not actionable as defamation or defamation *per se*. Conversely, the defendants claim that the alleged statements cannot form the basis of a cause of action for defamation because they were either mere expressions of opinion or privileged communications. The defendants also argue that the plaintiffs failed to identify the circumstances and details of the alleged defamatory communications and that such failure is fatal to their case.

At common law, defamatory words that "prejudice [a] person in his or her profession or trade" are actionable as defamation *per se*. *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 7, 82 S.E.2d 588, 591 (1954). A defamatory statement may be made "by inference, implication or insinuation." *Id.*, 82 S.E.2d at 592. However, "[p]ure expressions of opinion, not amounting to `fighting words,'" are protected by the First Amendment of the Constitution of the United States and Article 1, § 12 of the Constitution of Virginia. *Chaves v. Johnson*, 230 Va. 112, 119, 335 S.E.2d 97, 101-02 (1985). Thus, "speech which does not contain a provably false factual connotation, or statements which cannot reasonably be interpreted as stating actual facts about a person cannot form the basis of a common law defamation action."[2] *Yeagle v. Collegiate Times*, 255 Va. 293, 295, 497 S.E.2d 136, 137 (1998), accord *WJLA-TV v. Levin*, 264 Va. 140, 156, 564 S.E.2d 383, 392 (2002).

Statements that are relative in nature and depend largely upon the speaker's viewpoint are expressions of opinion. *Chaves*, 230 Va. at 119, 335 S.E.2d at 101. Whether an alleged defamatory statement is one of fact or opinion is a question of law and is, therefore, properly decided by a court instead of a jury. *Id.*, 335 S.E.2d at 102.

Applying these principles, we hold that the alleged statements that Drs. Fuste and Vanden Hoek "abandoned" their patients and that there were "concerns about their competence" not only prejudice the doctors in the practice of their profession, *see Carwile*, 196 Va. at 7, 82 S.E.2d at 591, but also contain "a provably false factual connotation."

[575 S.E.2d 862]

WJLA-TV, 264 Va. at 156, 564 S.E.2d at 392. In other words, they are capable of being proven true or false. For example, evidence could be presented to show whether there were, in fact, concerns about the plaintiffs' competence. Similarly, since the term "abandon" has a particular connotation in the context of a doctor's professional responsibility to a patient, *see Rosen v. Greifenberger*, 257 Va. 373, 380, 513 S.E.2d 861, 865 (1999) (a doctor has a duty to continue services to a patient after accepting employment and cannot thereafter voluntarily "abandon" a patient); *Vann v. Harden*, 187 Va. 555, 565-66, 47 S.E.2d 314, 319 (1948)(same), the statement that Drs. Fuste and Vanden Hoek "abandoned" their patients is demonstrably true or false. *See Blue Ridge Bank v. Venbanc, Inc.*, 866 F.2d 681, 685 (4th Cir.1989) (a speaker's choice of words and the context of an alleged defamatory statement within the speech as a whole are factors to consider when deciding if a challenged statement is one of fact or opinion).

Therefore, these alleged statements may form the basis of a cause of action for defamation *per se*. The remaining alleged statements are either dependent on the speaker's viewpoint and are, therefore, expressions of opinion, *see Chaves*, 230 Va. at 119, 335 S.E.2d at 101, do not prejudice the doctors in their professions, *see Carwile*, 196 Va. at 7, 82 S.E.2d at 591, or, taken "in their plain and natural meaning," are not defamatory. *Id.*

Nevertheless, the defendants argue that the circuit court did not err in sustaining the demurrer because the plaintiffs failed to allege that Gross, Temple, King and Terrebone were acting within the scope of their employment with, or as agents of, any of the named defendants. They also assert that the plaintiffs did not identify to whom, by whom, and under what circumstances the alleged defamatory statements were made. However, upon reviewing the second amended motion for judgment, we conclude that the plaintiffs sufficiently pled the circumstances and details of the alleged communications to withstand challenge at the demurrer stage of the proceeding below.

In paragraph 34 of the second amended motion for judgment, the plaintiffs alleged that "Defendants, through their agents, intentionally combined and conspired with each other to harm Plaintiffs' business maliciously and willfully." In that same paragraph, the plaintiffs identified Gross, Temple, King and Terrebone as those agents and alleged that each was acting within the scope of his or her employment. Further, the second amended motion for judgment gives the exact words allegedly used by Gross, Temple, King, and Terrebone, or those acting at their direction, i.e., that the doctors "abandoned their patients" and that there were "concerns about their competence."

Contrary to the defendants' argument, our decision in *Federal Land Bank of Baltimore v. Birchfield*, 173 Va. 200, 3 S.E.2d 405 (1939), does not require that a pleading alleging defamation identify to whom the statements were made and under what circumstances. In that case, we held that "[g]ood pleading requires that the exact words spoken or written must be set out in the declaration *in haec verba*. Indeed, the pleading must go further,—that is, it must purport to give the exact words." *Id.* at 215, 3 S.E.2d at 410. However, details such as the time and place of the alleged communication, the name of a defendant's agent, and the names of the individuals to whom the defamatory statement was purportedly communicated can be provided in a bill of particulars if not included in a plaintiff's pleading.[3] *Id.* at 217, 3 S.E.2d at 411.

Finally, the defendants argue that any statements allegedly made by them during their own credentialing process or to the credentialing officials at other hospitals were privileged and are, therefore, not actionable. While we have applied the doctrine of qualified privilege in cases involving alleged defamatory statements made "between

[575 S.E.2d 863]

persons on a subject in which the persons have an interest or duty," we have also held that this qualified privilege may be defeated by proof that the defamatory statements were made maliciously. *Larimore v. Blaylock*, 259 Va. 568, 572, 528 S.E.2d 119, 121 (2000); *accord Chalkley v. Atlantic Coast Line R.R. Co.*, 150 Va. 301, 306, 143 S.E. 631, 632 (1928). Malice sufficient to overcome a qualified privilege is "behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was made." *Gazette, Inc. v. Harris*, 229 Va. 1, 18, 325 S.E.2d 713, 727 (1985).

It is a court's duty to decide as a matter of law whether a communication is privileged. But, the question whether a defendant "`was actuated by malice, and has abused the occasion and exceeded [the] privilege' " is a question of fact for a jury. *Alexandria Gazette Corp. v. West*, 198 Va. 154, 160, 93 S.E.2d 274, 279-80 (1956) (quoting *Bragg v. Elmore*, 152 Va. 312, 325, 147 S.E. 275, 279 (1929)); *see also Federal Land Bank*, 173 Va. at 222, 3 S.E.2d at 414; *Chalkley*, 150 Va. at 306, 143 S.E. at 632. Considering all the allegations in the second amended motion for judgment, not only those with regard to the alleged defamation but also the allegations concerning the circumstances attending the doctors' decision to leave their employment with RHA, we hold that the plaintiffs pled sufficient facts to survive a demurrer with regard to the issue of malice if the two remaining communications, that the doctors "abandoned their patients" and that there were "concerns about their competence," were privileged. We express no opinion on the issue of privilege.[4]

CONCLUSION

For these reasons, we will affirm, in part, and reverse, in part, the judgment of the circuit court and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

FOOTNOTES

1. In several paragraphs of the second amended motion for judgment, the plaintiffs refer to "Riverside Pediatrics." However, they did not identify any of the named defendants by that term.

2. In , 18-21, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), the Supreme Court of the United States declined to exclude, in all instances, statements of opinion as the basis for a common law defamation cause of action.

3. In addition to the demurrer, Healthkeepers and PHI filed a motion for bill of particulars in response to the second amended motion for judgment. In part, they requested that the plaintiffs identify each officer and agent of Healthkeepers and/or PHI alleged to have made defamatory statements as well as the substance of those statements, the dates they were made, and to whom the statements were communicated. The circuit court took no action on this motion.

4. The defendants also assert that the federal Health Care Quality Improvement Act of 1986, specifically 42 U.S.C. § 11111(a) (2000), provides immunity to them in the context of a professional review action. However, that statute states that "no person ... providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State ... 42 U.S.C. § 11111(a)(2) (emphasis added). Similarly, Code §§ 8.01-581.16 and -581.19 provide immunity from civil liability only in the absence of bad faith or malicious intent. Thus, while we do not decide whether any of these statutory provisions are applicable in this case, we do hold that, for the reasons already stated, the plaintiffs pled sufficient facts to survive a demurrer.

WEBB v. VIRGINIAN-PILOT MEDIA COMPANIES

RECORD NO. 122024.

752 S.E.2d 808 (2014)

Phillip D. WEBB v. VIRGINIAN-PILOT MEDIA COMPANIES, LLC.

Supreme Court of Virginia.
January 10, 2014.

Amici Curiae: Virginia Press Association, Virginia Association of Broadcasters; Associated Press, World Media Enterprises, Inc., LIN Television Corporation, Media General, Inc., Shenandoah Publications Inc., Snowy Mountain Publishing Inc., and WP Company LLC, d/b/a The Washington Post (Craig Thomas Merritt; Christian & Barton, on brief), in support of appellee.

Present: KINSER, C.J., LEMONS, MILLETTE, MIMS, McCLANAHAN, and POWELL, JJ., and KOONTZ, S.J.

WILLIAM C. MIMS, Justice.

In this appeal, we consider whether a published article created a defamatory implication for which the plaintiff could recover compensatory and punitive damages.

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

Virginian-Pilot Media Companies, LLC publishes a newspaper of general circulation ("The Virginian-Pilot"). In December 2009, The Virginian-Pilot published an article written by Louis Hansen. According to the article, Patrick Bristol ("Patrick") and Kevin Webb ("Kevin") were students at Great Bridge High School ("Great Bridge") in Chesapeake, Virginia. Kevin's brother, Brian Webb ("Brian"), was a Great Bridge alumnus.

The article reported that on the evening of November 5, 2008, Patrick and a number of his friends drove to Kevin's home to confront him about school-related disagreements. Kevin's father, Phillip Webb ("Phillip"), sent them away. The article also reported that in the early morning hours of November 7, 2008, Kevin and Brian went to Patrick's home in retaliation. There they engaged in a physical altercation with Patrick's father.

[752 S.E.2d 810]

The article included several factual statements about Phillip. It stated that Phillip was an assistant principal at Oscar Smith High School, also in Chesapeake. It stated that he previously coached pole vaulting at Great Bridge and that one of his former team members had gone on to earn an Olympic medal in the sport. It described Kevin and Brian as "pole vaulting stars" at Great Bridge.

The article juxtaposed the effect the November incidents had on Patrick, Kevin, and Brian. It stated that Kevin and Brian were each charged with felonies and later convicted of and sentenced for misdemeanor offenses. Nevertheless, Kevin was allowed to remain at Great Bridge and compete in track events. He thereafter graduated and attended college on a track scholarship. By contrast, the article stated that the Chesapeake school system offered to allow Patrick to complete his final year at another high school. Instead, he dropped out, completed a General Educational Development certificate, and anticipated beginning a shipyard apprenticeship program.

Without expressly commenting on this disparity, the article paraphrased a deputy director at the Virginia High School League as stating that "a school principal typically determines whether a student is in good standing and allowed to participate in sports." It also referred to state regulations permitting a school system to suspend or expel a student charged with a felony. It included confirmation by the Chesapeake school system's spokesperson that a student there could be suspended or expelled if charged with a felony.[1] It further quoted the spokesperson verbatim as stating that "Kevin Webb 'did not get preferential treatment because of his dad's position.'" It noted that Phillip declined to comment for the story.

Phillip filed a second amended complaint against Hansen and The Virginian-Pilot alleging libel, libel per se, and libel per quod. He asserted that the article falsely implied that he "had engaged in unethical conduct by obtaining preferential treatment for his son," and that the false implication damaged his reputation. The defendants filed a demurrer in which, among other things, they denied that the article created such an implication. They argued that it did "not suggest in any manner that [Phillip] obtained preferential treatment for his son. In fact, the article expressly states that his son did not receive preferential treatment." The circuit court overruled the demurrer.

Thereafter, the defendants moved the court to declare Phillip a public official and thereby require him to prove malice under the standard articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The court granted the motion and the case proceeded to trial. The defendants moved to strike when Phillip rested his case and at the close of the evidence, arguing that the evidence was insufficient to prove *New York Times* malice. The court took the motions under advisement and submitted the case to the jury, which returned a verdict awarding Phillip $3,000,000 as compensatory damages. The court thereafter granted the defendants' motions to strike, entered a defense verdict, and dismissed the action with prejudice.

We awarded Phillip this appeal.

II. ANALYSIS

Phillip asserts that the circuit court erred by granting the defendants' motion to declare him a public official and by granting their motions to strike. In an assignment of cross-error, the defendants assert that the court erred by overruling their demurrer. We conclude that this assignment of cross-error is dispositive and thus we do not reach the arguments raised in a second assignment of cross-error and Phillip's assignments of error. *Deerfield v. City of Hampton,* 283 Va. 759, 764, 724 S.E.2d 724, 726 (2012); *Cuccinelli*

[752 S.E.2d 811]

v. Rector & Visitors of the Univ. of Va., 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012).

We review a circuit court's ruling on a demurrer de novo. *Schilling v. Schilling,* 280 Va. 146, 148, 695 S.E.2d 181, 183 (2010).

A common law complaint for libel or slander historically included three elements: the inducement, an explanation of the facts demonstrating that the allegedly defamatory statement is actionable; the colloquium, an explanation of how the allegedly defamatory statement refers to the plaintiff, if he is not explicitly named; and the innuendo, an explanation of the allegedly defamatory meaning of the statement, if it is not apparent on its face. Black's Law Dictionary 300, 845, 861 (9th ed. 2009); *see also Moseley v. Moss,* 47 Va. (6 Gratt.) 534, 549-50 (1850).

It is the innuendo that is at issue in this case. Phillip avers that the article created the defamatory implication that he acted unethically "by obtaining preferential treatment" for Kevin. It did so by juxtaposing an insinuation of special treatment with the reported facts that he was an assistant principal at another school in the same school system and that he had been a successful pole vaulting coach at Great Bridge where Brian and Kevin were successful pole vaulting team members. We disagree.

Where, as here, a plaintiff alleges that he has been defamed not by statements of fact that are literally true but by an implication arising from them, the alleged implication must be reasonably drawn from the words actually used. *Chapin v. Knight-Ridder, Inc.,* 993 F.2d 1087, 1092-93 (4th Cir.1993); *see also Hyland v. Raytheon Tech. Servs. Co.,* 277 Va. 40, 48, 670 S.E.2d 746, 751 (2009) (stating that a plaintiff may bring an action for defamation for "any implications, inferences, or insinuations that *reasonably could be drawn* from each statement" of fact (emphasis added)); *Union of Needletrades. Indus. & Textile Emples. v. Jones,* 268 Va. 512, 519, 603 S.E.2d 920, 924 (2004) (stating plaintiff may not bring a defamation action for "statements which cannot *reasonably be interpreted*" to impute a false fact about him (emphasis added)); *Carwile,* 196 Va. at 9, 82 S.E.2d at 592 (permitting an action for defamation where the injurious factual assertion "is *a reasonable implication*" of the published statements) (emphasis added). Thus, the question for the circuit court when ruling on the demurrer was whether, as a matter of law, the article is reasonably capable of the defamatory meaning Phillip ascribes to it.[2]

> In determining whether the words and statements complained of in the instant case are reasonably capable of the meaning ascribed to them by innuendo, every fair inference that may be drawn from the pleadings must be resolved in the plaintiff's favor. However, the meaning of the alleged defamatory language can not, by innuendo, be extended beyond its ordinary and common acceptation. The province of the innuendo is to show how the words used are defamatory, and how they relate to the plaintiff, but it can not introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain.

Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 8, 82 S.E.2d 588, 592 (1954). This is a question of law to be decided on demurrer. *See Perk v. Vector Resources Group,* 253 Va. 310, 316-17, 485 S.E.2d 140, 144 (1997). Ensuring that defamation suits proceed only upon statements which actually may defame a plaintiff, rather than those which merely may inflame a jury to an award of damages, is an essential gatekeeping function of the court.

The article draws a stark contrast between how Kevin and Patrick were affected in the aftermath of the incidents. This insinuates that Kevin may have benefited from special treatment. Nevertheless, the article does not create a reasonable implication that Phillip solicited or procured the insinuated special treatment. It does not state or suggest that Phillip undertook any affirmative action to arrange or endorse the school system's disciplinary response to the incidents.

[752 S.E.2d 812]

The information in the article may suggest that Phillip had an uncommon acquaintance with school administrators at Great Bridge because he formerly had coached there and currently was an administrator at another school. It may also suggest that they were favorably disposed towards Phillip because of his success as a coach there. One might reasonably infer from these facts that Kevin would have received harsher discipline if they were not true. But Phillip was not implicated as the instigator of any preferential treatment. The reasonable implication is that Great Bridge's administrators may have acted on their own initiative out of sympathy or regard for Phillip, not that he intervened in their disciplinary decisions. The article disclaimed even that implication by quoting the spokesperson's denial.[3]

Phillip also argues that several witnesses testified at trial that they inferred from the article that he had solicited or procured special treatment for Kevin. He also argues that the jury's verdict is conclusive because the fact-finder determined that the article created that implication. We again disagree. As noted above, the question of whether the article is reasonably capable of the defamatory meaning Phillip ascribes to it is a question of law, not fact. Resolving it is an essential threshold, gatekeeping function of the court before a case is submitted to the jury. *See Perk,* 253 Va. at 316-17, 485 S.E.2d at 144 (concluding that the alleged statements were not "sufficiently defamatory on their face to permit a fact finder to decide whether in fact the statements were actually defamatory" when determining whether a defamatory charge could be inferred); *Gazette, Inc. v. Harris,* 229 Va. 1, 29, 325 S.E.2d 713, 733 (1985) (concluding that a "publication was sufficiently defamatory on its face, under *Carwile,* to permit a jury to decide whether in fact the statement actually was defamatory" (emphasis omitted)); *Cook v. Patterson Drug Co.,* 185 Va. 516, 521, 39 S.E.2d 304, 307 (1946) ("It is the duty of the court to define what constitutes insulting words, and it is for the jury to say whether the particular words come within the definition.").

As a matter of law, the article is not reasonably capable of the defamatory meaning Phillip ascribes to it. The implication that may be reasonably drawn from the article does not defame Phillip. An implication defaming Phillip cannot be reasonably drawn. Accordingly, the circuit court erred by overruling the defendants' demurrer. However, the error is supplanted by its final judgment in favor of the defendants. We affirm that final judgment.

Affirmed.

FOOTNOTES

1. In actuality, the school system's policy was not to suspend or expel such students. Rather, according to an undisclosed policy administered by its supervisor of discipline, the school system reviewed the student's record, grades, and attendance, and then warned the student and his parent(s) that any subsequent violation of the rules and regulations would result in additional discipline. This policy was not known to the school system's spokesperson and was not disclosed to Hansen or The Virginian-Pilot until trial.

2. Phillip cites and several other cases, arguing that Virginia law recognizes a claim for defamation by inference, implication, or insinuation. E.g., 196 Va. at 7, 82 S.E.2d at 592. We agree that it does. However, that is not the question here.

3. Further, the testimony of the school system's supervisor of discipline established that the disciplinary decision in Kevin's case was not in the hands of Great Bridge's administrators at all.

561 S.E.2d 686 (2002)

263 Va. 485

Donald A. DEAN, Jr.

v.

M. Lee DEARING.

Record No. 011154.

Supreme Court of Virginia.

April 19, 2002.

*687 William W. Helsey (A. Gene Hart, on briefs), Harrisonburg, for appellant.

David P. Corrigan (Michelle P. Wiltshire, Richmond; Harman, Claytor, Corrigan & Wellman, on brief), for appellee.

Present: All the Justices.

LACY, Justice.

In this case, we are asked to determine whether a public official can use the "small group theory" to meet the "of and concerning" element of a claim for defamation.

Following his confrontation with and arrest by the Elkton chief of police, M. Lee *688 Dearing, the mayor of Elkton, made a number of statements alleging corruption, dishonesty, and felonious conduct by the Elkton police department. From February through November 1999, Dearing accused the police department of intimidating witnesses, stealing property, harassment, misappropriation of money, and improperly disposing of drug and gun evidence. These statements were published in newspapers serving the Elkton community. At that time, the Elkton police department had from five to eight members.

Donald A. Dean, Jr., a member of the Elkton police force, instituted this defamation action against Dearing on the basis of these statements, seeking compensatory and punitive damages. Dearing filed a demurrer asserting that the motion for judgment did not state a cause of action for defamation because, inter alia, the complained of statements referred to conduct of the Elton police force and were not "of and concerning" Dean specifically. In response, Dean, relying on Ewell v. Boutwell, 138 Va. 402, 121 S.E. 912 (1924), asserted that he met the "of and concerning" element through the application of the "small group theory."

The trial court sustained Dearing's demurrer and dismissed the motion for judgment, holding that under New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the

"small group theory" cannot be used to satisfy the "of and concerning" element of defamation when such defamation is directed at a governmental group. The trial court also concluded that the statements at issue referred to conduct by the Elkton police department rather than Dean's conduct and therefore Dean had not pled a cause of action for defamation.

[*] We awarded Dean an appeal and for the following reasons, we will affirm the judgment of the trial court.

To prevail in a defamation cause of action, a plaintiff must establish that the alleged defamatory statements published were "of or concerning" him. The Gazette, Inc. v. Harris, 229 Va. 1, 37, 325 S.E.2d 713, 738 (1985). The exception to this general rule, recognized in Ewell v. Bautwell, was that if the defamatory language is directed towards "a comparatively small group of persons... and is so framed as to make defamatory imputations against all members of the small or restricted group, any member thereof may sue." 138 Va. at 411, 121 S.E. at 914. Under this "small group theory" exception, a member of a small group need not show that the allegedly defamatory statements were directed specifically at the member bringing the action to satisfy the "of and concerning" element of common law defamation.

The continued viability of this exception has been called into question when the small group is a governmental agency. In New York Times v. Sullivan, the United States Supreme Court considered a defamation action brought by a city commissioner who supervised the police department based on conduct ascribed to the police force in a newspaper advertisement. The Alabama Supreme Court concluded that the "of and concerning" requirement was satisfied based on the "common knowledge" that a police commissioner was responsible for the actions of the police department, even though the police commissioner was not implicated by name or office in the offending advertisement. New York Times, 376 U.S. at 263, 84 S.Ct. 710. The United States Supreme Court opined that references to the "police" or the "Police Department" could not be considered personal criticism of the police commissioner, even if evidence was produced that some readers understood that the police commissioner was ultimately responsible for the police department and the alleged defamation, therefore, necessarily referenced the police commissioner. Id. at 289-90, 84 S.Ct. 710. Thus, the Supreme Court rejected the holding of the Alabama Supreme Court that the "of and concerning" element of a common law defamation action was met. Id. at 288, 84 S.Ct. 710. Central to the Supreme Court's decision was the principle that prosecutions for libel of government have no place in American jurisprudence. Id.

at 291-92, 84 S.Ct. 710. The Supreme Court reasoned that to read a *689 general reference to the police force as a reference to a specific person "would sidestep" this principle by "transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed." Id. at 292, 84 S.Ct. 710. Such a proposition "strikes at the very center of the constitutionally protected area of free expression." Id. Thus, the" Supreme Court concluded that "such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations." Id.

New York Times v. Sullivan did not specifically address the "small group theory" but it did establish that10/16/2014 Dean v. Dearing, 561 S.E.2d 686, 263 Va. 485 - a reference to a governmental group cannot be treated as an implicit reference to a specific individual even if that individual is understood generally to be responsible for the actions of the identified governmental group. The rationale of the Supreme Court in New York Times did, however, foreshadow the Court's holding in Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966), which directly addressed the "small group theory."

In Rosenblatt, the defendant published a column in a newspaper raising questions about the operation of a recreational area in prior years when the plaintiff, under the direction of two elected Commissioners, supervised the recreational area. There was no direct reference to the plaintiff, but the plaintiffs witnesses testified that they "read the column as imputing mismanagement and peculation" during plaintiff's term as supervisor. Rosenblatt, 383 U.S. at 79, 86 S.Ct. 669. New Hampshire law allowed recovery by a member of a group if the jury found that the defamatory publication "cast suspicion indiscriminately on the small number of persons who composed the former management group, whether or not it found that the imputation of misconduct was specifically made of and concerning [the plaintiff]." Id. at 79-80, 86 S.Ct. 669. The Supreme Court rejected this theory, stating that allowing recovery on such a basis is "tantamount to a demand for recovery based on libel of government, and therefore is constitutionally insufficient." Id. at 83, 86 S.Ct. 669.

Following the opinion in Rosenblatt, there is little question that the use of the "small group theory" alone as the basis for satisfying the "of and concerning" element of a common law defamation action against a governmental actor does not survive constitutional scrutiny. An allegedly defamatory statement which imputes misconduct generally to a governmental group

constitutes libel of government, for which there is no cause of action in American jurisprudence. New York Times, 376 U.S. at 291-92, 84 S.Ct. 710. A member of a governmental group against which an allegedly defamatory statement is made can sustain a common law action for defamation only if that member can show the statement specifically implicated that member or each member of the group. Rosenblatt, 383 U.S. at 81-82, 86 S.Ct. 669. Such implication can be shown by extrinsic evidence, but evidence that others "understood" the implication based solely upon a plaintiffs membership in the referenced group will not satisfy the "of and concerning" requirement.

Dean nevertheless asserts that alleging a cause of action based on the "small group theory" is sufficient to withstand a demurrer and that he should be allowed to proceed to trial to introduce evidence demonstrating that the statements in issue are "of and concerning" him. We disagree. A demurrer is based on the contention that a pleading does not state a cause of action or fails to state facts upon which the relief demanded can be granted. Code § 8.01-273. Dean's pleadings contain the defamatory statements referring to Elkton "law enforcement," police department, or police force, but contain no allegations, factual or otherwise, addressing how the articles reference Dean specifically or could be understood to do so, except based on his status as a police officer. As we have just discussed, the "of and concerning" element of common law defamation cannot be satisfied as a matter of law by either the "small group theory" or allegations and evidence that readers of allegedly defamatory statements understood *690 the statements referred to a member of the governmental group based solely on that person's membership in the identified governmental group. Rosenblatt, 383 U.S. at 79, 82-83, 86 S.Ct. 669; New York Times, 376 U.S. at 258, 288-89, 84 S.Ct. 710. The mere conclusory statement that the articles are "of and concerning" Dean does not satisfy the pleading requirement of alleging facts upon which relief can be granted in this case, and therefore Dean's pleading was insufficient to withstand a demurrer.

Accordingly, we conclude that the trial court did not err in sustaining Dearing's demurrer and dismissing Dean's common law action for defamation.

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Af irmed.

NOTES:[*] One statement did refer to Dean by name, but the trial court concluded that this statement was not defamatory as a matter of law and this finding is not challenged on appeal.

COURT OF APPEALS OF VIRGINIA

PUBLISHED

Present: Judges Frank, Petty and Senior Judge Haley
Argued at Alexandria, Virginia

YELP, INC.

v. Record No. 0116-13-4

HADEED CARPET CLEANING, INC.

OPINION BY
JUDGE WILLIAM G. PETTY
JANUARY 7, 2014

FROM THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA
Lisa B. Kemler, Judge

Paul Alan Levy (Scott Michelman; Raymond D. Battocchi; Public Citizen Litigation Group; Raymond D. Battocchi, P.C., on briefs), for appellant.

Raighne C. Delaney (James Bruce Davis; Rachelle E. Hill; Bean, Kinney & Korman, P.C., on brief), for appellee.

Amici Curiae: The Reporters Committee for Freedom of the Press, American Society of News Editors, Gannett Co., Inc., and The Washington Post (Kevin M. Goldberg; Bruce D. Brown; Gregg P. Leslie; Robert J. Tricchinelli; Barbara W. Wall; John B. Kennedy; James A. McLaughlin; Kalea S. Clark; Fletcher, Heald & Hildreth PLC, on brief), for appellant.

Yelp, Inc. ("Yelp") appeals from an order of the Circuit Court for the City of Alexandria holding it in civil contempt for failing to comply with a subpoena *duces tecum* served upon it by Hadeed Carpet Cleaning, Inc. ("Hadeed").[1] On appeal, Yelp assigns two errors to the circuit court's decision. First, Yelp argues that the circuit court "violated the First Amendment by ordering Yelp to identify seven anonymous Doe defendants, and then by holding Yelp in contempt for its failure to comply with the order, thus stripping the Doe defendants of their First

[1] We have jurisdiction over this appeal pursuant to Code § 19.2-318: "From a judgment for any civil contempt of court an appeal may be taken to the Court of Appeals. A writ of error shall lie from the Court of Appeals to a judgment for criminal contempt of court."

Amendment right to speak anonymously, all without requiring Hadeed to show that it had legally and factually sufficient claims against each defendant." Second, Yelp argues that the trial court erred "by asserting subpoena jurisdiction over Yelp, which is a non-party, foreign corporation." For the reasons stated below, we affirm the ruling of the circuit court.

I. BACKGROUND

Yelp is a Delaware corporation with its principal place of business in California. Yelp is a social-networking website that allows its users to post and read reviews on local businesses. In the first quarter of 2013, Yelp had an average of approximately 102 million monthly, unique visitors. Contributors to Yelp have written over thirty-nine million local reviews.

Yelp users must register to post reviews. The registration process requires users to provide Yelp with a valid email address. Users are then free to choose a screen name to use when posting their reviews. Yelp further allows users to designate a zip code of their own choosing as their location. Yelp does not require users to use their actual name or place of residence. Yelp typically records the Internet Protocol ("IP") address from which each posting is made. This information is stored in Yelp's administrative database, which is accessible to Yelp's custodian of records in San Francisco.

During registration, Yelp users are required to agree to Yelp's Terms of Service and Content Guidelines ("TOS"). The TOS require users to have actually been customers of the business in question before posting a review. The TOS further require users to base their reviews on their own personal experiences. Yelp may remove posts that it deems in violation of the TOS. Moreover, Yelp employs a proprietary algorithm to filter potentially less reliable reviews. These reviews are moved to a separate page that a user can access by clicking on a filtered reviews link at the bottom of a business listing.

Hadeed is a Virginia corporation doing business in the City of Alexandria. Hadeed takes customers' carpets to its premises for cleaning.

As of October 19, 2012, Yelp's website displayed seventy-five reviews about Hadeed and eight reviews about a related company, Hadeed Oriental Rug Cleaning. These reviews were posted by various Yelp users, and a number of the reviews were critical of Hadeed. Hadeed filed suit against the authors of seven specific critical reviews. In these reviews, the authors implicitly or explicitly held themselves out to be Hadeed customers. In its complaint, Hadeed alleged that it tried to match the negative reviews with its customer database but could find no record that the negative reviewers were actually Hadeed customers. Consequently, Hadeed alleged that the negative reviewers were not actual customers; instead, the Doe defendants falsely represented themselves to be customers of Hadeed. Hadeed's complaint further alleged that the negative comments were defamatory because they falsely stated that Hadeed had provided shoddy service to each reviewer.

Hadeed filed its complaint on July 2, 2012. On July 3, 2012, Hadeed issued a subpoena *duces tecum* to Yelp, seeking documents revealing information about the authors of each of the challenged reviews. On July 19, 2012, Yelp served written objections to the subpoena *duces tecum*. In its objections, Yelp contended that Hadeed had not complied with Virginia's procedure for subpoenas to identify anonymous Internet users, Code § 8.01-407.1, among other objections. On July 27, 2012, Hadeed served a renewed subpoena *duces tecum* on Yelp that complied with the procedural requirements of Code § 8.01-407.1. Yelp filed written objections to the renewed subpoena *duces tecum*. Hadeed moved to overrule the objections and cross-moved to enforce the subpoena *duces tecum*.

On November 19, 2012, the circuit court issued an order enforcing the subpoena *duces tecum*. The circuit court ruled that the service of the subpoena *duces tecum* on Yelp's registered

agent in Virginia provided jurisdiction. Furthermore, the circuit court ruled that Hadeed's subpoena *duces tecum* complied with both the First Amendment and the standards enumerated in Code § 8.01-407.1. In order to appeal the circuit court's order, and protect its users' rights, Yelp informed Hadeed that it would not comply with the circuit court's order. Hadeed moved to have Yelp held in contempt. The circuit court held Yelp in civil contempt, imposing a monetary sanction of $500 and awarding Hadeed an additional $1,000 in attorney's fees. This appeal followed.[2]

II. ANALYSIS

On appeal, Yelp presents two arguments. First, Yelp argues that the First Amendment requires a showing of merit on both the law and facts before a subpoena *duces tecum* to identify an anonymous speaker is enforced. Second, Yelp argues that the circuit court lacked jurisdiction to subpoena its documents.

A. Subpoena *Duces Tecum* and Code § 8.01-407.1

We usually review a "'trial court's refusal to quash the issuance of a subpoena *duces tecum* . . . under an abuse of discretion standard.'" America Online, Inc. v. Nam Tai Elec., Inc., 264 Va. 583, 590-91, 571 S.E.2d 128, 132 (2002) (quoting America Online, Inc. v. Anonymous Pub. Traded Co., 261 Va. 350, 359, 542 S.E.2d 377, 382 (2001)). On issues involving the First

[2] We recognize that, as a general rule, litigants may not refuse to comply with a valid order of a court and then challenge its validity when held in contempt. Rather, "where the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt. Such order, though erroneous, is lawful within the meaning of the contempt statutes until it is reversed by an appellate court." Local 33B, United Marine Div. of Int'l Longshoremen's Ass'n v. Commonwealth, 193 Va. 773, 784, 71 S.E.2d 159, 166 (1952) (quoting Robertson v. Commonwealth, 181 Va. 520, 537, 25 S.E.2d 352 (1943)). This is true "even if the statute upon which it is based is later declared to be unconstitutional." Id. at 783, 71 S.E.2d at 166. However, the Supreme Court has recognized an exception to this general rule when a witness is "compelled to divulge privileged matters which have been given to him in confidence." Robertson, 181 Va. at 538, 25 S.E.2d at 360; see also HCA Health Services v. Levin, 260 Va. 215, 530 S.E.2d 417 (2000). Neither party has addressed whether the customer names maintained by Yelp fall within this exception. Therefore, for purposes of this opinion, we will assume the exception applies.

Amendment, however, we have "an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Bose Corp. v. Consumers Union, 466 U.S. 485, 499 (1984) (quoting New York Times v. Sullivan, 376 U.S. 254, 284-86 (1964)).

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment was originally applied only to federal action; however, it was extended to the states via the Fourteenth Amendment. See Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[F]reedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").[3]

Anonymous speech is protected by the First Amendment. Buckley v. American Constitutional Law Found., 525 U.S. 182, 197-99 (1999); McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960).

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of

[3] Yelp's argument is that the subpoena *duces tecum* violated the First Amendment of the Constitution of the United States. Yelp does not mention the Virginia counterpart, Article I, § 12 of the Constitution of Virginia. Nevertheless, we note that "'[t]he freedom of speech guaranteed by Article I, § 12 of the Constitution of Virginia is co-extensive with the protections guaranteed by the First Amendment of the Constitution of the United States.'" Daily Press, Inc. v. Commonwealth, 285 Va. 447, 455 n.7, 739 S.E.2d 636, 640 n.7 (2013) (quoting Black v. Commonwealth, 262 Va. 764, 785, 553 S.E.2d 738, 750 (2001) (Hassell, C.J., dissenting)); see also Elliott v. Commonwealth, 267 Va. 464, 473-74, 593 S.E.2d 263, 269 (2004) ("We take this opportunity to declare that Article I, § 12 of the Constitution of Virginia is coextensive with the free speech provisions of the federal First Amendment."). Thus, for the purposes of this opinion, we make no distinction between the protections provided by the First Amendment of the Constitution of the United States and Article I, § 12 of the Constitution of Virginia.

> economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

McIntyre, 514 U.S. at 341-42 (quoting Talley, 362 U.S. at 64).

In Talley, there was a California statute that prohibited the distribution of "any handbill in any place under any circumstances" that did not identify the person who prepared, distributed, or sponsored the handbill. 362 U.S. at 60-61. The Supreme Court held that the statute was void on its face because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." Id. at 65.

Thirty-five years after Talley, the Supreme Court upheld the right to speak anonymously on election-related matters. In McIntyre, there was an Ohio law that prohibited the distribution of campaign literature that did not identify the person issuing the literature. 514 U.S. at 344. The Supreme Court held, "[U]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from the tyranny of the majority." Id. at 357. Four years after McIntyre, the Supreme Court heard a similar, election-related anonymous-speech case, and upheld the right to speak anonymously. See Buckley, 525 U.S. at 200 (invalidating, on First Amendment grounds, a Colorado statute that required initiative petition circulators to wear identification badges).

An Internet user does not shed his free speech rights at the log-in screen. The right to free speech is assiduously guarded in all mediums of expression, from the analog to the digital. The anonymous pamphleteer has the right to distribute literature without the looming specter of government interference. Similarly, the anonymous speaker has the right to express himself on

the Internet without the fear that his veil of anonymity will be pierced for no other reason than because another person disagrees with him.

1. The Rights of the Anonymous Speaker vs. The Right to Protect One's Reputation

The freedom of speech—and within this, the freedom to speak with anonymity—is not absolute. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("It is well understood that the right of free speech is not absolute at all times and under all circumstances."). If we assume that the Yelp reviews of Hadeed are lawful, then the John Does may remain anonymous. But if the reviews are unlawful in that they are defamatory, then the John Does' veil of anonymity may be pierced, provided certain procedural safeguards are met. This is because defamatory speech is not entitled to constitutional protection: "Our constitutional guarantees of free speech, as we have seen, protect expressions of opinion from action for defamation. Those constitutional guarantees have never been construed, however, to protect either criminal . . . or tortious conduct." Chaves v. Johnson, 230 Va. 112, 121-22, 335 S.E.2d 97, 103 (1985); see also Chaplinsky, 315 U.S. at 572 ("It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."); Sullivan, 376 U.S. at 269 ("[Defamation] can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."). The bottom line is that "[s]preading false information in and of itself carries no First Amendment credentials." Herbert v. Lando, 441 U.S. 153, 171 (1979).

Furthermore, courts have long recognized a distinction in the level of protection the First Amendment accords to literary, religious, or political speech as compared to that accorded to

commercial speech.[4] Where, as here, speech constitutes an "expression related solely to the economic interests of the speaker and its audience," Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980), "any First Amendment right to speak anonymously 'enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression,'" Lefkoe v. Jos. A. Bank Clothiers, Inc., 577 F.3d 240, 248-49 (4th Cir. 2009) (quoting Bd. of Trustees of SUNY v. Fox, 492 U.S. 469, 477 (1989)). Thus, the John Does' "First Amendment right to anonymity is subject to a substantial governmental interest in disclosure so long as disclosure advances that interest and goes no further than reasonably necessary." Id. (citing Central Hudson Gas & Elec. Corp., 447 U.S. at 566).

a. The Law of Defamation

"Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements." Milkovich v. Lorain Journal Co., 497 U.S. 1, 12 (1990). A person's, or business's, reputation is a precious commodity. Perhaps, Shakespeare said it best:

> "Good name in man and woman, dear my lord,
>
> Is the immediate jewel of their souls.
>
> Who steals my purse steals trash;
>
> 'Tis something, nothing;
>
> 'Twas mine, 'tis his, and has been slave to thousands;
>
> But he that filches from me my good name

[4] Neither party has addressed this distinction, nor has Yelp argued that the emails were anything other than commercial speech. That having been said, we find it difficult to conceive how these emails could be read as anything other than such an expression.

Robs me of that which not enriches him,

And makes me poor indeed."

Id. (quoting Shakespeare, Othello Act III, scene 3). Thus, "[d]efamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements." Id. The ability to obtain redress for harm caused by defamatory statements has also been extended to allow a person to vindicate the good name of his business. See Tronfeld v. Nationwide Mutual Ins. Co., 272 Va. 709, 713, 636 S.E.2d 447, 449-50 (2006) (providing that defamatory words which prejudice a person in his trade or business are actionable per se).

In order to state a cause of action for defamation in Virginia, one needs to allege that a statement is "both false and defamatory." Tharpe v. Saunders, 285 Va. 476, 481, 737 S.E.2d 890, 892 (2013). And the elements of defamation must be met: "'(1) publication of (2) an actionable statement with (3) the requisite intent.'" Id. at 480, 737 S.E.2d at 892 (quoting Jordan v. Kollman, 269 Va. 569, 575, 612 S.E.2d 203, 206 (2005)). Further, "[d]efamatory words that cause prejudice to a person in her profession are actionable as defamation *per se*." Hyland v. Raytheon Technical Serv. Co., 277 Va. 40, 46, 670 S.E.2d 746, 750 (2009). However, "'[c]auses of action for defamation . . . are subject to principles of freedom of speech arising under the First Amendment to the United States Constitution and Article I, Section 12 of the Constitution of Virginia.'" Tharpe, 285 Va. at 481, 737 S.E.2d at 892 (quoting Yeagle v. Collegiate Times, 255 Va. 293, 295, 497 S.E.2d 136, 137 (1998)). Within these principles is the protection of speech that is merely a matter of opinion.

> The First Amendment to the Federal Constitution and article I, section 12 of the Constitution of Virginia protect the right of the people to teach, preach, write, or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander. "[E]rror of opinion may be tolerated where reason is left free to combat it." Thomas Jefferson's First Inaugural Address (1801).

> "However pernicious an opinion may see[m], we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

Id. at 481, 737 S.E.2d at 893 (alterations in original) (citations omitted). It is important to note, however, that "'there is no constitutional value in false statements of fact.'" Id. (quoting Gertz v. Robert Welch, 418 U.S. 323, 340 (1974)). Therefore,

> "pure expressions of opinion" are constitutionally protected and "cannot form the basis of a defamation action." "Statements that are relative in nature and depend largely upon the speaker's viewpoint are expressions of opinion." Furthermore, "[s]peech that does not contain a provably false factual connotation" is generally considered "'pure expression[] of opinion.'"

Id. (citations omitted). Nevertheless, even though "pure expressions of opinion are not actionable, '[f]actual statements made to support or justify an opinion . . . can form the basis of an action for defamation.'" Id. at 481 n.3, 737 S.E.2d at 893 n.3 (quoting Raytheon Tech. Servs. Co. v. Hyland, 273 Va. 292, 303, 641 S.E.2d 84, 90 (2007)). With these basic defamation principles in mind, we turn to the standard for piercing the veil of anonymity of an Internet speaker.

b. Piercing the Veil of Anonymity

Yelp argues that the First Amendment requires a showing of merit on both the law and the facts before a subpoena *duces tecum*[5] to identify an anonymous speaker is enforced. This is an issue of first impression at the appellate level in the Commonwealth. Moreover, neither the United States Supreme Court nor the Fourth Circuit Court of Appeals has addressed this issue. Thus, Yelp relies upon persuasive authority from other states to support its argument. See Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001); Doe v. Cahill,

[5] A court order, such as a subpoena *duces tecum* that is issued at the request of a private party, constitutes state action and is subject to constitutional limitations. See Sullivan, 376 U.S. at 265. Accordingly, the subpoena power is necessarily limited to the extent that it impacts First Amendment rights. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461 (1958).

884 A.2d 451 (Del. 2005). In relying upon persuasive authority from other states, however, Yelp delicately glosses over Code § 8.01-407.1, which sets forth the standard in the Commonwealth for discovering the identity of persons communicating anonymously over the Internet. Instead of applying the standard set forth in Code § 8.01-407.1, Yelp argues that we should adopt and apply the standards enunciated in Dendrite, Cahill, and their progeny, when deciding whether a subpoena to identify an anonymous speaker is enforced. We decline to do so.

i. Code § 8.01-407.1

"'Statutory construction is a question of law which we review *de novo* on appeal.'" Lynchburg Div. of Soc. Servs. v. Cook, 276 Va. 465, 480, 666 S.E.2d 361, 368 (2008) (quoting Parker v. Warren, 273 Va. 20, 23, 639 S.E.2d 179, 181 (2007)). In construing statutes, we "'apply the plain language of a statute unless the terms are ambiguous.'" Id. (quoting Boynton v. Kilgore, 271 Va. 220, 227, 623 S.E.2d 922, 926 (2006)). Our "'primary objective . . . is to ascertain and give effect to legislative intent.'" Commonwealth v. Amerson, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011) (quoting Conger v. Barrett, 280 Va. 627, 630, 702 S.E.2d 117, 118 (2010)). Legislative intent is discovered "'by giving to all the words used their plain meaning, and construing all statutes *in pari materia* in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation.'" Thomas v. Commonwealth, 59 Va. App. 496, 500, 720 S.E.2d 157, 159-60 (2012) (quoting Lucy v. Cnty. of Albemarle, 258 Va. 118, 129-30, 516 S.E.2d 480, 485 (1999)). Finally, "'[W]e . . . presume that the legislature chose, with care, the words it used when it enacted the relevant statute.'" Seabolt v. Cnty. of Albemarle, 283 Va. 717, 720, 724 S.E.2d 715, 717 (2012) (quoting Addison v. Jurgelsky, 281 Va. 205, 208, 704 S.E.2d 402, 404 (2011)).

Virginia has developed an unmasking standard in Code § 8.01-407.1; it is one of many jurisdictions to develop its own unmasking standard.[6] On February 22, 2001, the General Assembly passed Senate Joint Resolution 334, which provided "for a study of the discovery of electronic data and proposal of a statutory scheme or rules of evidence to govern the discovery of electronic data in civil cases in the courts of Virginia." Discovery of Electronic Data, S. Doc. No. 9, at 7 (2002) (citing S.J. Res. 334, Va. Gen. Assem. (2001)). Pursuant to this Resolution, the Office of the Executive Secretary of the Virginia Supreme Court prepared a comprehensive, ninety-eight-page report that was submitted to the Governor and General Assembly. Id. at 4. The report included a summary, which set forth the results of its study:

> The Report first introduces the importance of the Internet and World-Wide Web as forums for communication protected by Constitutional free speech rights, as recognized by the United States Supreme Court and consistent with pre-existing Virginia law. The role of anonymous speech in this medium is discussed, along with federal and Virginia law relevant to an understanding of the importance that anonymity plays in the free expression of ideas, under protections for free expression, privacy and freedom of association with others.
>
> The Report canvasses the existing case law directly on the topic of requests for confidential information relating to electronic communications, which is not extensive. Analogies from other, more developed, bodies of law are sketched. The prevailing standards for decisions on contested applications to pierce the anonymity of protected communications in civil litigation are discussed: the key to this analysis is that in order for a trial court to perform the balancing of rights necessary for a determination of whether intrusion upon protected anonymous speech will be allowed, the court must first be provided with the information it needs to perform that balancing. To decide these issues, the trial

[6] There are at least nine unmasking standards—not including Virginia's statutory standard—that state and federal courts have created. See Doe I v. Individuals (AutoAdmit.com), 561 F. Supp. 2d 249, 254-56 (D. Conn. 2008); Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999); Mobilisa, Inc. v. Doe 1, 170 P.3d 712, 721 (Ariz. Ct. App. 2007); Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 244-45 (Ct. App. 2008); Doe No. 1 v. Cahill, 884 A.2d 451, 460-61 (Del. 2005); Solers, Inc. v. Doe, 977 A.2d 941, 954 (D.C. 2009); Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 457 (Md. 2009); Dendrite Int'l, 775 A.2d at 760-61.

> court in Virginia need not decide the merits of the case pending elsewhere, but must have sufficient considerations illuminated by the parties' submissions to permit assessment of the need for the contested information, on the one hand, and the severity of the intrusion on free speech, on the other. Tests applied in this situation by other courts, state and federal, are summarized and assessed in the Report.
>
> A brief summary of how the subpoena process now operates in the federal courts and the Virginia circuit courts is provided in the body of the Report, along with several analogous procedures and doctrines that suggest considerations for inclusion in any effort to provide a unified approach to subpoenas for electronic information.
>
> The relevant considerations and factors are specifically set forth and discussed, and a proposed statute or rule embodying the applicable provisions is then proposed.

Id. After considering the report, the General Assembly adopted Code § 8.01-407.1 as it was drafted in the report.

Code § 8.01-407.1 is titled, "Identity of persons communicating anonymously over the Internet." Code § 8.01-407.1 provides a procedure that must be followed when a person files a subpoena seeking information about the identity of an anonymous individual that engaged in Internet communications that are allegedly tortious or illegal. Code § 8.01-407.1(A). All such subpoenas must follow the procedure listed in the statute. That procedure is listed below in its entirety.

> 1. At least thirty days prior to the date on which disclosure is sought, a party seeking information identifying an anonymous communicator shall file with the appropriate circuit court a complete copy of the subpoena and all items annexed or incorporated therein, along with supporting material showing:
>
> a. That one or more communications that are or may be tortious or illegal have been made by the anonymous communicator, or that the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit was filed. A copy of the communications that are the subject of the action or subpoena shall be submitted.

> b. That other reasonable efforts to identify the anonymous communicator have proven fruitless.
>
> c. That the identity of the anonymous communicator is important, is centrally needed to advance the claim, relates to a core claim or defense, or is directly and materially relevant to that claim or defense.
>
> d. That no motion to dismiss, motion for judgment on the pleadings, or judgment as a matter of law, demurrer or summary judgment-type motion challenging the viability of the lawsuit of the underlying plaintiff is pending. The pendency of such a motion may be considered by the court in determining whether to enforce, suspend or strike the proposed disclosure obligation under the subpoena.
>
> e. That the individuals or entities to whom the subpoena is addressed are likely to have responsive information.

Code § 8.01-407.1(A). The statute also has a notice provision in section A, subsection three. The notice provision provides:

> Except where the anonymous communicator has consented to disclosure in advance, within five business days after receipt of a subpoena and supporting materials calling for disclosure of identifying information concerning an anonymous communicator, the individual or entity to whom the subpoena is addressed shall (i) send an electronic mail notification to the anonymous communicator reporting that the subpoena has been received if an e-mail address is available and (ii) dispatch one copy thereof, by registered mail or commercial delivery service, return receipt requested, to the anonymous communicator at his last known address, if any is on file with the person to whom the subpoena is addressed.

Code § 8.01-407.1(A)(3).

After receiving notice, the anonymous communicator, or any interested party, may file a written objection, motion to quash, or motion for protective order "at least seven business days prior to the date on which disclosure is sought under the subpoena." Code § 8.01-407.1(A)(4). Finally, "the party to whom the subpoena is addressed shall not comply with the subpoena earlier

than three business days before the date on which disclosure is due, to allow the anonymous communicator the opportunity to object." Code § 8.01-407.1(A)(6).

In summation, a plaintiff seeking to uncover the identity of an anonymous Internet speaker in the Commonwealth must show a circuit court that (1) he has given notice of the subpoena to the anonymous communicator via the Internet service provider; (2)(a) communications made by the anonymous communicator are or may be tortious or illegal *or* (b) the plaintiff "has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit is filed," Code § 8.01-407.1(A)(1)(a); (3) other "reasonable efforts to identify the anonymous communicator have proven fruitless," Code § 8.01-407.1(A)(1)(b); (4) the identity of the anonymous communicator is important, is centrally needed to advance the claim, is related to the claim or defense, or is directly relevant to the claim or defense; (5) no motion challenging the viability of the lawsuit is pending; and (6) the entity to whom the subpoena is addressed likely has responsive information. Code § 8.01-407.1(A)(1)(a)-(e) and (3).

Thus, the plaintiff must first show the circuit court that he has given notice of the subpoena to the Internet service provider, who in turn provided notice to the anonymous communicator. Notice provides the anonymous communicator with the chance to defend himself and maintain his anonymity.

The second prong consists of two, distinct subparts. Under the first subpart, the plaintiff must show that the communications are or may be tortious. If there is direct evidence demonstrating that the communications are tortious, and the plaintiff provides that evidence to the circuit court, then there is no need to analyze the second subpart of this prong. The second subpart, which is explicitly separated from the first subpart by the conjunction *or*, requires the plaintiff to show that he has "legitimate, good faith basis" for his belief that the conduct is

tortious. Thus, the plaintiff can either show that the communications are or may be tortious or show that he has a "legitimate, good faith basis" for his belief that the communications are tortious.

The third prong requires the plaintiff to show that other "reasonable efforts to identify the anonymous communicator have proven fruitless." Code § 8.01-407.1(A)(1)(b). This is merely a requirement that the plaintiff exhaust all other means of identifying the anonymous communicator. Indeed, by exhausting all other means of identifying the anonymous communicator, the plaintiff can show a real need for the identity of the person before the veil of anonymity is pierced.

The fourth prong provides the circuit court with some leeway to apply a balancing test to the request for a subpoena. The plaintiff must show that the identity of the anonymous communicator is important, is centrally needed to advance the claim, is related to the claim or defense, or is directly relevant to the claim or defense. In order to make this determination, a circuit court must necessarily balance the interests of the anonymous communicator against the interests of the plaintiff in discovering the identity of the anonymous communicator.

The fifth prong speaks for itself. It is designed to assure the circuit court that there is no dispositive motion pending before the court before it rules on the subpoena.

Similarly, the sixth prong speaks for itself. It merely requires a showing that the entity to whom the subpoena is addressed has responsive information.

Code § 8.01-407.1 provides the test for uncovering the identity of an anonymous Internet communicator in Virginia. We are "reluctant to declare legislative acts unconstitutional, and will do so only when the infirmity is clear, palpable, and practically free from doubt." Mahan v. NCPAC, 227 Va. 330, 335, 315 S.E.2d 829, 832 (1984) (citing Blue Cross v. Commonwealth,

221 Va. 349, 358, 269 S.E.2d 827, 832 (1980); Green v. Cnty. Bd., 193 Va. 284, 287, 68 S.E.2d 516, 518 (1952)). This is because

> [t]here is a strong presumption in favor of the constitutionality of statutes. Indeed, "[t]here is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of Legislature." Any reasonable doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality, and "[o]nly where it is plainly in violation of the Constitution may the court so decide." The General Assembly may enact any law or take any action "unless it is prohibited by the state or federal constitution in express terms or by necessary implication."

FFW Enters. v. Fairfax Cnty., 280 Va. 583, 590, 701 S.E.2d 795, 799-800 (2010) (citations omitted).

We decline to declare Code § 8.01-407.1 unconstitutional. We cannot identify a clear, palpable, and free from doubt infirmity. Therefore, we hold that Code § 8.01-407.1 provides the path of analysis that a circuit court must follow when determining whether to enforce a subpoena *duces tecum* seeking the identity of an anonymous communicator.

ii. Dendrite, Cahill, and their Progeny

Nevertheless, Yelp argues that we should apply the standards enunciated in Dendrite, Cahill, and their progeny when determining whether a subpoena to identify an anonymous defendant should be enforced. We find Yelp's argument unpersuasive.

In Dendrite, an intermediate appellate court in New Jersey held that a plaintiff seeking to uncover the identity of an anonymous defendant must meet a five-part test: the plaintiff must (1) give notice to the anonymous defendant; (2) identify the exact statements that purportedly constitute actionable speech; (3) establish a prima facie cause of action against the defendant based on the complaint and all information provided to the court; (4) "produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant"; (5) "balance the defendant's

First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed." Dendrite, 775 A.2d at 760-61.

In Cahill, the Supreme Court of Delaware adopted a test that requires the plaintiff to both make reasonable efforts to notify the defendant and "support his defamation claim with facts sufficient to defeat a summary judgment motion." Cahill, 884 A.2d at 460. In so holding, the Cahill court declined to adopt the balancing prong of the Dendrite test.

Although the case law has coalesced around the basic framework of the Dendrite and Cahill standards, they are not the only courts to articulate a standard for identifying anonymous Internet speakers. One commentator notes that

> [a]s of 2010, more than twenty courts have either promulgated unmasking standards or outlined specific criteria that parties seeking to identify anonymous internet speakers must satisfy before compelling discovery. These unmasking standards have been promulgated primarily at the state and federal district court levels and have been formulated on a jurisdiction-by-jurisdiction basis, resulting in what has been described as an "entire spectrum" or, less charitably, a "morass" of unmasking standards.

Matthew Mazzotta, Note: Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers, 51 B.C. L. Rev. 833, 846 (2010).

There is no need for us to adopt persuasive authority from other states. In drafting Code § 8.01-407.1, the General Assembly considered persuasive authority from other states and made the policy decision to include or exclude factors that other states use in their unmasking standards. The General Assembly's unmasking standard was ultimately promulgated in Code § 8.01-407.1. This is the standard that we will apply.

2. Hadeed, Yelp, and the Doe Defendants

Here, it is clear that the circuit court complied with the requirements of Code § 8.01-407.1 in determining whether to enforce the subpoena *duces tecum* seeking the identity of

the Doe defendants. Accordingly, we hold that the circuit court did not abuse its discretion in enforcing the subpoena *duces tecum*.

Turning to the first prong of Code § 8.01-407.1(A)(1)(a), it is evident that Hadeed provided the requisite notice to Yelp. Indeed, Yelp concedes that Hadeed provided the requisite notice. Accordingly, after making an independent review of the whole record, we hold that the circuit court did not abuse its discretion in ruling that Hadeed met the first prong of Code § 8.01-407.1(A)(1)(a).

Turning to the second prong, it is without dispute that the Doe defendants have a constitutional right to speak anonymously over the Internet. However, that right must be balanced against Hadeed's right to protect its reputation. The circuit court, in determining whether to enforce the subpoena *duces tecum* under Code § 8.01-407.1, stated:

> Among other things, [Code § 8.01-407.1] requires that one show that the statements "may be tortious" and that the "identity of the anonymous communicator is important, is centrally needed to advance the claim, relates to a core claim or defense, or is directly and materially relevant to that claim or defense." This Court finds that Hadeed's subpoena *duces tecum* complies with the requisite standard enumerated in Code § 8.01-407.1 and that the statements are tortious if not made by customers of Hadeed Carpet Cleaning and the identity of the communicators is essential to maintain a suit for defamation.

Thus, the circuit court held that Hadeed met the statutory standard for requiring Yelp to disclose the identity of the Doe defendants.

In order to meet the second prong of Code § 8.01-407.1(A)(1)(a), Hadeed could either show that the communications are or may be tortious or show that it has a legitimate, good faith basis for its belief that the communications are tortious. Here, it is clear, as the circuit court held, that if the Doe defendants were not customers of Hadeed, then their Yelp reviews *are* defamatory. Assuming without deciding that the Doe defendants are not customers of Hadeed, the first subpart of this prong is met because the Doe defendants published a tortious, defamatory

statement with the requisite intent. See Tharpe, 285 Va. at 481, 737 S.E.2d at 892. Moreover, Hadeed met the second subpart of this prong because it showed that it had a legitimate, good faith basis for its belief that the reviews are defamatory. It established that it had no record of having provided services to the posters. Specifically, Yelp alleged the following in its subpoena *duces tecum*:

> 8. After conducting an independent investigation in an attempt to match the negative reviews contained in Exhibit 5 with customers on the Hadeed customer database, Hadeed determined that it simply had no record that the negative reviewers were ever actually Hadeed customers.
>
> 9. Consequently, Hadeed believes that the reviews contained in Exhibit 5 are not the opinions of its customers, but were made by Defendants falsely representing themselves as customers of Hadeed.
>
> 10. The negative reviews in Exhibit 5 are false and defamatory. For example, user "Bob G." from Oakton allegedly relates how he was in a desperate need of emergency carpet cleaning and was ripped off. User "Chris H." from Washington reported that his precious rugs were shrunk. User "J8." from Falls Church reports that he was charged for work never performed. User "YB." from Fairfax reports that unauthorized work was performed and his rug was stained. One user, "Aris P." from Haddonfield, N.J. reports that the price was double the quote and that Hadeed was once bankrupt. Many of the negative reviews report that the price was double what was charged [sic]. After combing it customer records, Hadeed was at a loss to find record of these allegations. Regarding Aris P., in particular, Hadeed conducts no business in New Jersey.
>
> 11. Not only was Hadeed unable to find any evidence that the negative reviewers were ever Hadeed customers, but many of the negative reviewers use the same theme. For example, negative reviewers Bob G., YB, and Aris P. use the theme that Hadeed doubled the price. Negative reviewers Bob G., Chris H., MP., Mike M., and Aris P. criticize Hadeed's advertising.

Generally, a Yelp review is entitled to First Amendment protection because it is a person's opinion about a business that they patronized. See Tharpe, 285 Va. at 481, 737 S.E.2d at 893. But this general protection relies upon an underlying assumption of fact: that the

reviewer was a customer of the specific company and he posted his review based on his personal experience with the business. If this underlying assumption of fact proves false, in that the reviewer was never a customer of the business, then the review is not an opinion; instead, the review is based on a false statement of fact—that the reviewer is writing his review based on personal experience. And "'there is no constitutional value in false statements of fact.'" Id. (quoting Gertz, 418 U.S. at 340).

Here, Hadeed attached sufficient evidence[7] to its subpoena *duces tecum* indicating that it made a thorough review of its customer database to determine whether all of the Yelp reviews were written by actual customers. After making such a review, Hadeed discovered that it could not match the seven Doe defendants' reviews with actual customers in its database. Thus, the evidence presented by Hadeed was sufficient to show that the reviews are or may be defamatory, if not written by actual customers of Hadeed. Moreover, Hadeed sought the subpoena *duces tecum* under the legitimate, good faith belief that the Doe defendants were not former customers, and, therefore, their reviews were defamatory.

After making an independent review of the whole record, we hold that the circuit court did not abuse its discretion in ruling that the communications made by the Doe defendants "are tortious if not made by customers of Hadeed." In so holding, the circuit court correctly applied the second prong of Code § 8.01-407.1(A)(1)(a).

Turning to the third prong, we find that Hadeed took reasonable efforts to identify the anonymous communicators and those efforts proved fruitless. Hadeed represented to the circuit court that it compared all of the Yelp reviews with its customer database. Out of all of the Yelp reviews, Hadeed identified seven reviewers whose information could not be found in their

[7] Hadeed attached evidence that it made an independent investigation of its customer database in an attempt to match all of the Yelp reviews with its customers. Further, Hadeed attached screenshots of the specific reviews that it alleged were defamatory.

customer database. The circuit court, in reaching its holding, considered this evidence and ruled that Hadeed complied with the requirements of Code § 8.01-407.1(A)(1)(b). Moreover, Hadeed first contacted Yelp to obtain the identity of the Doe defendants. Yelp refused to comply. Thus, Hadeed was then forced to resort to a subpoena *duces tecum* to obtain the identity of the Doe defendants. After making an independent review of the whole record, we hold that the circuit court did not abuse its discretion in ruling that Hadeed took reasonable efforts to identify the Doe defendants before requesting the subpoena *duces tecum*.

Turning to the fourth prong, we find that the identity of the Doe defendants is important, is centrally needed to advance the claim, is related to the claim or defense, or is directly relevant to the claim or defense. Without the identity of the Doe defendants, Hadeed cannot move forward with its defamation lawsuit. There is no other option. The identity of the Doe defendants is not only important, it is necessary. The circuit court considered this in making its decision. After making an independent review of the whole record, we hold that the circuit court did not abuse its discretion in ruling that the identity of the Doe defendants is important and centrally needed to advance the defamation claim.

Turning to the fifth and sixth prongs, we find that there was no dispositive motion pending before the circuit court at the time it made its decision, and we find that Yelp has responsive information. These prongs were not disputed at the circuit court. The record does not indicate that there was a dispositive motion pending before the circuit court before it made its decision on the subpoena *duces tecum*. Further, Yelp concedes that it keeps responsive information on all of the users of its website. Therefore, after making an independent review of the whole record, we hold that the circuit court did not abuse its discretion in making its decision in regard to the fifth and sixth prongs of Code § 8.01-407.1(A)(1).

We have made an independent examination of the whole record, and we cannot say that the circuit court abused its discretion. The judgment of the circuit court "'does not constitute a forbidden intrusion on the field of free expression.'" Bose Corp., 466 U.S. at 499 (quoting Sullivan, 376 U.S. at 285). Accordingly, we affirm the circuit court's decision.

B. Subpoena *Duces Tecum* and Jurisdiction

Yelp next argues that the trial court erred by asserting subpoena jurisdiction over Yelp, which is a non-party, foreign corporation. We disagree.

"'We review the trial court's refusal to quash the issuance of a subpoena *duces tecum* . . . under an abuse of discretion standard.'" America Online, Inc. v. Nam Tai Elec., Inc., 264 Va. at 590-91, 571 S.E.2d at 132 (quoting America Online, Inc. v. Anonymous Pub. Traded Co., 261 Va. at 359, 542 S.E.2d at 382). However, we review questions of law *de novo*. This involves a question of law because it requires us to interpret the relevant service of process statutes.

Yelp is a non-party, foreign corporation that is headquartered in San Francisco, California. But Yelp is registered to do business in the Commonwealth and has a registered agent in the Commonwealth. Yelp argues that the circuit court lacked jurisdiction to subpoena documents from Yelp. Within this, Yelp argues that the mere presence of a registered agent is not enough to confer jurisdiction. In so arguing, Yelp skirts around the rules of the Supreme Court and the service of process statutes found in the Virginia Code.

A subpoena *duces tecum* is a rule-based discovery tool. The procedure for issuing a subpoena *duces tecum* to a non-party is found in Rule 4:9A. The Rule is titled, "Production from Non-Parties of Documents, Electronically Stored Information, and Things and Entry on Land for Inspection and Other Purposes; Production at Trial." The Rule creates two methods by which a subpoena *duces tecum* may be issued: by the clerk of court or by an attorney. Rule 4:9A(1) and (2).

The procedure for the issuance of a subpoena *duces tecum* by the clerk of court is found in Rule 4:9A(1):

> Upon written request therefor filed with the clerk of the court in which the action or suit is pending by counsel of record for any party or by a party having no counsel in any pending case, with a certificate that a copy thereof has been served pursuant to Rule 1:12 upon counsel of record and to parties having no counsel, *the clerk shall issue to a person not a party therein a subpoena duces tecum subject to this Rule.*

(Emphasis added).

The procedure for the issuance of a subpoena *duces tecum* by an attorney is found in Rule 4:9A(2). Under this rule, an attorney-at-law may personally issue the subpoena *duces tecum*, but a copy of it must be sent to all parties, and it must be filed with the clerk's office in which the case is pending. Rule 4:9A(a). Further, the person to whom the subpoena *duces tecum* is directed may file a written objection. Rule 4:9A(b). If an objection is made, then the party issuing the subpoena may seek a court order compelling disclosure. Id.

Rule 4:9A, however, does not state *how* a subpoena *duces tecum* is to be served on a non-party, foreign corporation. Instead, Code § 8.01-301 sets forth the method for serving process on a foreign corporation.

Code § 8.01-301 provides that service may be effected "[b]y personal service . . . on the registered agent of a foreign corporation which is authorized to do business in the Commonwealth . . . ." Code § 8.01-301(1). Code § 13.1-766[8] works in conjunction with Code § 8.01-301 in that it explicitly defines the purpose of a foreign corporation's "registered agent." Code § 13.1-766 provides, in relevant part: "The registered agent of a foreign corporation authorized to transact business in this Commonwealth shall be an agent of such corporation upon whom any *process,*

[8] Code § 13.1-766 applies to corporations that issue stock. Code § 13.1-928 applies to corporations that do not issue stock. The rules for service are functionally similar for stock corporations and non-stock corporations. Yelp is a corporation that issues stock; therefore, we analyze only Code § 13.1-766.

notice, order or demand required or permitted by law to be served upon the corporation may be served." (Emphasis added).[9]

Code § 8.01-301(1) and Code § 13.1-766 explicitly allow for service on a registered agent of a foreign corporation that is authorized to do business in the Commonwealth. Service includes "any process, notice, order or demand required or permitted by law." Code § 13.1-766. A subpoena *duces tecum* falls within the definition of "process," as used in Code § 13.1-766. See Bellis v. Commonwealth, 241 Va. 257, 262, 402 S.E.2d 211, 214 (1991) ("'Process,' includes a subpoena directed to a witness.").

Yelp's registered agent in Virginia was served with a subpoena *duces tecum* by Hadeed. This constituted service of process under Code § 13.1-766. Accordingly, we agree with the circuit court's holding that "service of a subpoena *duces tecum* on Yelp's registered agent in Virginia provides jurisdiction for th[e] Court to adjudicate the motion to compel." Therefore, we affirm the circuit court's decision.

III. CONCLUSION

For the foregoing reasons, we affirm the circuit court's decision.

Affirmed.

[9] In the same chapter of the Virginia Code, there is a provision that defines the sole duty of the registered agent: "The sole duty of the registered agent is to forward to the corporation at its last known address any process, notice or demand that is served on the registered agent." Code § 13.1-763(B).

Haley, S.J., concurring, in part, and dissenting, in part.

I concur with the majority: (1) that the trial court had subpoena jurisdiction over Yelp, and (2) that Code § 8.01-407.1 provides a procedural and substantive path of analysis for determining the propriety of issuing an unmasking subpoena *duces tecum* which constitutionally balances the First Amendment protection of an anonymous speaker and the right of redress for defamation.

Code § 8.01-407.1(A)(1)(a), (b), and (c) define the "supporting material" to be attached to the request for an unmasking subpoena *duces tecum*. This dissent maintains that the supporting material did not suffice to justify issuance of the subpoena.[10]

Subsection (A)(1)(a) requires that the communications "are or may be tortious." To be tortious the communications must be false. Tharpe v. Saunders, 285 Va. 476, 481, 737 S.E.2d 890, 892 (2013). Six of the seven communications claimed Hadeed overcharged and/or failed to honor a quoted price.[11] Nowhere in this cause has Hadeed claimed that any of the substantive statements are false. Rather, Hadeed maintains, these communicators *may* not have been customers, and, *if* they were not, the substantive statements may be tortious.

Subsection (A)(1)(b) requires that "reasonable efforts" for identification have been fruitless, and subsection (A)(1)(c) requires that identity is "needed to advance the claim."

In the trial court counsel for Hadeed stated: "I don't know whether that person is a customer or not, and we suspect not."

In material supporting issuance of the subpoena request, Hadeed writes:

> 8. After conducting an independent investigation in an attempt to match the negative reviews . . . with customers on the Hadeed

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[10] I concur with the majority that Hadeed complied with all other subsections of Code § 8.01-407.1.

[11] One of the commenters claimed Hadeed had "shrunk" his rugs.

> customer database, Hadeed determined that it simply had no record that the negative reviewers were ever actually Hadeed customers.
>
> * * * * * * *
>
> 26. In order to advance its defamation claim, Hadeed must ascertain whether or not Defendants were in fact customers.

In oral argument before this Court, Hadeed candidly admitted that it cannot say the John Doe defendants are *not* customers until it obtains their identities.

This, I suggest, is a self-serving argument - one that proceeds from a premise the argument is supposed to prove. If Hadeed were an individual, he would be attempting to "'lift himself by his own bootstraps.'" Turpin v. Branaman, 190 Va. 818, 827, 58 S.E.2d 63, 67 (1950).

Anonymous speech is protected by the Constitution of the United States and by Article 1, Section 12 of the Constitution of Virginia. A business subject to critical commentary, commentary here not even claimed to be false in substance, should not be permitted to force the disclosure of the identity of anonymous commentators simply by alleging that those commentators may not be customers because they cannot identify them in their database.

Under the facts in this case, the balance envisioned by Code § 8.01-407.1 should weigh for the protection afforded by our Constitutions. Accordingly, I would reverse the trial court's finding of civil contempt and quash the subpoena *duces tecum*.

365 U.S. 127
81 S.Ct. 523
5 L.Ed.2d 464

EASTERN RAILROAD PRESIDENTS CONFERENCE et al., Petitioners,
v.
NOERR MOTOR FREIGHT, INC., et al.

No. 50.
Argued Dec. 12, 1960.
Decided Feb. 20, 1961.
Rehearing Denied April 3, 1961.

See 365 U.S. 875, 81 S.Ct. 899.

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Mr. Philip Price, Philadelphia, Pa., for petitioners.

Mr. Harold E. Kohn, Philadelphia, Pa., for respondents.

Mr. Justice BLACK delivered the opinion of the Court.

American railroads have always largely depended upon income from the long-distance transportation of heavy freight for economic survival. During the early years of their existence, they had virtually no competition in this aspect of their business, but, as early as the 1920's, the growth of the trucking industry in this country began to bring about changes in this situation. For the truckers found, just as the railroads had learned earlier, that a very profitable part of the transportation business was the long hauling of heavy freight. As the trucking industry became more and more powerful, the competition between it and the railroads for this business became increasingly intense until, during the period following the conclusion of World War II, at least the railroads, if not both of the competing groups, came to view the struggle

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as one of economic life or death for their method of transportation. The present litigation is an outgrowth of one part of that struggle.

The case was commenced by a complaint filed in the United States District Court in Pennsylvania on behalf of 41 Pennsylvania truck operators and their trade association, the Pennsylvania Motor Truck Association. This complaint, which named as defendants 24 Eastern railroads, an association of the presidents of those railroads known as the Eastern Railroad Presidents Conference, and a public relations firm, Carl Byoir & Associates, Inc., charged that the defendants had conspired to restrain trade in and monopolize the long-distance freight business in violation of §§ 1[1] and 2[2] of the Sherman Act. The gist of the conspiracy alleged was that the railroads had engaged Byoir to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers. The campaign so conducted was described in the complaint as 'vicious, corrupt, and fraudulent,' first, in that the sole motivation behind it was the desire on the part of the railroads to injure the truckers and eventually to destroy them as competitors in the long-distance freight business, and, secondly, in that the defendants utilized the

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so-called third-party technique, that is, the publicity matter circulated in the campaign was made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared and produced by Byoir and paid for by the railroads.[3] The complaint then went on to supplement these more or less general allegations with specific charges as to particular instances in which the railroads had attempted to influence legislation by means of their publicity campaign. One of several such charges was that the defendants had succeeded in persuading the Governor of Pennsylvania to veto a measure known as the 'Fair Truck Bill,'[4] which would have permitted truckers to carry heavier loads over Pennsylvania roads.

The prayer of the complaint was for treble damages under § 4 of the Clayton Act[5] and an injunction restraining the defendants from further acts in pursuance of the conspiracy. Insofar as the prayer for damages was concerned a stipulation was entered that the only damages suffered by the individual truck operators was the loss of business that resulted from the veto of the 'Fair Truck Bill' by the Governor of Pennsylvania, and accordingly the claim for damages was limited to an amount based upon the loss of profits as a result of this veto plus the expenses incurred by the truckers' trade association

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for the purpose of combatting the railroads' publicity campaign. The prayer for injunctive relief was much broader, however, asking that the defendants be restrained from disseminating any disparaging information about the truckers without disclosing railroad participation, from attempting to exert any pressure upon the legislature or Governor of Pennsylvania through the medium of front organizations, from paying any private or public organizations to propagate the arguments of the railroads against the truckers or their business, and from doing 'any other act or thing to further * * * the objects and purposes' of the conspiracy.

In their answer to this complaint, the railroads admitted that they had conducted a publicity campaign designed to influence the passage of state laws relating to truck weight limits and tax rates on heavy trucks, and to encourage a more rigid enforcement of state laws penalizing trucks for overweight loads and other traffic violations, but they denied that their campaign was motivated either by a desire to destroy the trucking business as a competitor or to interfere with the relationships between the truckers and their customers. Rather, they insisted, the campaign was conducted in furtherance of their rights 'to inform the public and the legislatures of the several states of the truth with regard to the enormous damage done to the roads by the operators of heavy and especially of overweight trucks, with regard to their repeated and deliberate violations of the law limiting the weight and speed of big trucks, with regard to their failure to pay their fair share of the cost of constructing, maintaining and repairing the roads, and with regard to the driving hazards they create * * *.' Such a campaign, the defendants maintained, did not constitute a violation of the Sherman Act, presumably because that Act could not properly be interpreted to apply either to restraints of trade or monopolizations that result from the passage or enforcement of laws

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or to efforts of individuals to bring about the passage or enforcement of laws.[6]

Subsequently, defendants broadened the scope of the litigation by filing a counterclaim in which they charged that the truckers had themselves violated §§ 1 and 2 of the Sherman Act by conspiring to destroy the railroads' competition in the long-distance freight business and to monopolize that business for heavy trucks. The means of the conspiracy alleged in the counterclaim were much the same as those

with which the truckers had charged the railroads in the original complaint, including allegations of the conduct of a malicious publicity campaign designed to destroy the railroads' business by law, to create an atmosphere hostile to the railroads among the general public, and to interfere with relationships existing between the railroads and their customers. The prayer for relief of the counterclaim, like that of the truckers' original complaint, was for treble damages and an injunction restraining continuance of the allegedly unlawful practices. In their reply to this counterclaim, the truckers denied each of the allegations that charged a violation of the Sherman Act and, in addition, interposed a number of affirmative defenses, none of which are relevant here.

In this posture, the case went to trial. After hearings, the trial court entered a judgment, based upon extensive findings of fact and conclusions of law, that the railroads'

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publicity campaign had violated the Sherman Act while that of the truckers had not.[7] In reaching this conclusion, the trial court expressly disclaimed any purpose to condemn as illegal mere efforts on the part of the railroads to influence the passage of new legislation or the enforcement of existing law. Instead, it rested its judgment upon findings, first, that the railroads' publicity campaign, insofar as it was actually directed at lawmaking and law enforcement authorities, was malicious and fraudulent—malicious in that its only purpose was to destroy the truckers as competitors, and fraudulent in that it was predicated upon the deceiving of those authorities through the use of the third-party technique;[8] and, secondly, that the railroads' campaign also had as an important, if not overriding, purpose the destruction of the truckers' goodwill, among both the general public and the truckers' existing customers, and thus injured the truckers in ways unrelated to the passage or enforcement of law. In line with its theory that restraints of trade and monopolizations resulting from valid laws are not actionable under the Sherman Act, however, the trial court awarded only nominal damages to the individual truckers, holding that no damages were recoverable for loss of business due to the veto of the Pennsylvania 'Fair Truck Bill.' The judgment did, however, award substantial damages to the

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truckers' trade association as well as the broad injunction asked for in the complaint.[9]

The conclusion that the truckers' publicity campaign had not violated the Sherman Act was reached despite findings that the truckers also had engaged in a publicity campaign designed to influence legislation, as charged in the counterclaim, and despite findings that the truckers had utilized the third-party technique in this campaign. Resting largely upon the fact that the efforts of the truckers were directed, at least for the most part,[10] at trying to get legislation passed that was beneficial to them rather than harmful to the railroads, the trial court found that the truckers' campaign was purely defensive in purpose and concluded that the truckers' campaign differed from that of the railroads in that the truckers were not trying to destroy a competitor. Accordingly, it held that the truckers' campaign, though technically in restraint of trade, was well within the rule of reason which

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governs the interpretation of §§ 1 and 2 of the Sherman Act and consequently dismissed the counterclaim.

The railroads appealed from this judgment, both as to the conclusion that they had violated the Sherman Act as charged in the original complaint and as to the conclusion that the truckers had not violated the Act as charged

in the counterclaim. The Court of Appeals for the Third Circuit, one judge dissenting in part, upheld the judgment of the District Court in every respect, stating that the findings amply support the judgment and that there was sufficient evidence to support all of the findings.[11] This was followed by a petition for certiorari filed on behalf of the railroads and Byoir limited to the question of the correctness of the judgment insofar as it held that they had violated the Sherman Act. Because the case presents a new and unusual application of the Sherman Act and involves severe restrictions upon the rights of these railroads and others to seek the passage or defeat of legislation when deemed desirable, we granted that petition.[12]

We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized, at least since the landmark decision of this Court in Standard Oil Co., of New Jersey v. United States,[13] that the Sherman Act forbids only those trade restraints and monopolizations

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that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.'[14] Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out.[15] These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.

We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of 'combination(s) * * * in restraint of trade,' they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.[16] This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the question of the applicability of the

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Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. And we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.

In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the

people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.[17] Secondly, and of at least equal significance,

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such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. We are thus called upon to consider whether the courts below were correct in holding that, notwithstanding this principle, the Act was violated here because of the presence in the railroads' publicity campaign of additional factors sufficient to take the case out of the area in which the principle is controlling.

The first such factor relied upon was the fact, established by the finding of the District Court, that the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business. But we do not see how this fact, even if adequately supported in the record,[18] could transform conduct otherwise lawful

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into a violation of the Sherman Act. All of the considerations that have led us to the conclusion that the Act does not apply to mere group solicitation of governmental action are equally applicable in spite of the addition of this factor. The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. This Court has expressly recognized this fact in its opinion in United States v. Rock Royal Co-op., where it was said: 'If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act * * *.'[19] Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We reject such a construction of the Act and hold that, at least insofar

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as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had.

The second factor relied upon by the courts below to justify the application of the Sherman Act to the railroads' publicity campaign was the use in the campaign of the so-called third-party technique. The theory under which this factor was related to the proscriptions of the Sherman Act, though not entirely clear from any of the opinions below, was apparently that it

involved unethical business conduct on the part of the railroads. As pointed out above, the third-party technique, which was aptly characterized by the District Court as involving 'deception of the public, manufacture of bogus sources of reference, (and) distortion of public sources of information,' depends upon giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups. We can certainly agree with the courts below that this technique, though in widespread use among practitioners of the art of public relations,[20] is one which falls far short of the ethical standards generally approved in this country. It does not follow, however, that the use of the technique in a publicity campaign designed to influence governmental action constitutes a violation of the Sherman Act. Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category

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of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation.[21] All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

Moreover, we think the courts below themselves recognized this fact to some extent for their disposition of the case is inconsistent with the position that the use of the third-party technique alone could constitute a violation of the Sherman Act. This much is apparent from the fact that the railroads' counterclaim against the truckers was not allowed. Since it is undisputed that the truckers were as guilty as the railroads of the use of the technique,[22] this factor could not have been in any sense controlling of the holding against the railroads. Rather,

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it appears to have been relied upon primarily as an indication of the vicious nature of the campaign against the truckers. But whatever its purpose, we have come to the conclusion that the reliance of the lower courts upon this factor was misplaced and that the railroads' use of the third-party technique was, so far as the Sherman Act is concerned, legally irrelevant.

In addition to the foregoing factors, both of which relate to the intent and methods of the railroads in seeking governmental action, the courts below rested their holding that the Sherman Act had been violated upon a finding that the purpose of the railroads was 'more than merely an attempt to obtain legislation. It was the purpose and intent * * * to hurt the truckers in every way possible even though they secured no legislation.' (Emphasis in original.) Specifically, the District Court found that the purpose of the railroads was to destroy the goodwill of the truckers, among the public generally and among the truckers' customers particularly, in the hope that by doing so the over-all competitive position of the truckers would be weakened, and that the railroads were successful in these efforts to the extent that such injury was actually inflicted. The apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable the principles announced above. But this effect is only apparent and cannot stand under close scrutiny. There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, all of the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement

of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate the

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laws and create traffic hazards, and urge that truckers should be forced to pay a fair share of the costs of rebuilding the roads, that they should be compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry. In the light of this, the findings of the District Court that the railroads' campaign was intended to and did in fact injure the truckers in their relationships with the public and with their customers can mean no more than that the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen.[23] Thus, the issue presented by the lower courts' conclusion of a violation of the Sherman Act on the basis of this injury is no different than the issue presented by the factors already discussed. It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to out-

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lawing all such campaigns. We have already discussed the reasons which have led us to the conclusion that this has not been done by anything in the Sherman Act.

There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the truckers' complaint is fully credited, as it was by the courts below, that effort was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case.

In rejecting each of the grounds relied upon by the courts below to justify application of the Sherman Act to the campaign of the railroads, we have rejected the very grounds upon which those courts relied to distinguish the campaign conducted by the truckers. In doing so, we have restored what appears to be the true nature of the case—a 'no-holds-barred fight'[24] between two industries both of which are seeking control of a profitable source of income.[25] Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, and in many instances even the probability, that one group or the other will get hurt by the arguments that are made.

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In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned. That Act was not

violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement. Since the railroads have acquiesced in the dismissal of their counterclaim by not challenging the Court of Appeals' affirmance of that order in their petition for certiorari, we are here concerned only with those parts of the judgments below holding the railroads and Byoir liable for violations of the Sherman Act. And it follows from what we have said that those parts of the judgments below are wrong. They must be and are reversed.

Reversed.

1. 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *' 15 U.S.C. § 1, 15 U.S.C.A. § 1.

2. 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *' 15 U.S.C. § 2, 15 U.S.C.A. § 2.

3. For a discussion of the mechanics of this technique and the purposes generally underlying its use by public relations firms, see Ross, The Image Merchants, at 118, 226—227 and 266—267.

4. The 'Fair Truck Bill' referred to was introduced in the Pennsylvania Legislature in May 1951, as Senate bill 615.

5. 'Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.' 15 U.S.C. § 15, 15 U.S.C.A. § 15.

6. The answer to the truckers' complaint also interposed a number of other defenses, including the contention that the activities complained of were constitutionally protected under the First Amendment and the contention that the truckers were barred from prosecuting this suit by reason of the fact that they had themselves engaged in conduct identical to that about which they were complaining with regard to the railroads and were thus in pari delicto. Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses.

7. The opinion of the District Court on the merits of the controversy is reported at 155 F.Supp. 768. An additional opinion dealing with the question of relief is reported at 166 F.Supp. 163. For reports of earlier opinions dealing with preliminary motions, see D.C., 113 F.Supp. 737; D.C., 14 F.R.D. 189, and D.C., 19 F.R.D. 146.

8. The District Court did not expressly find that any particular part of the railroads' publicity campaign was false in its content. Rather, it found that the technique of the railroads was 'to take a dramatic fragment of truth and by emphasis and repetition distort it into falsehood.' 155 F.Supp. at page 814.

9. If anything, the injunction was even broader than had been requested in the complaint for it effectively enjoined the defendants from any publicity activities against the truckers whether or not the third-party technique was used. See 166 F.Supp. at pages 172—173.

10. The trial court did recognize that on at least one occasion the truckers attempted to encourage legislation that would have been directly harmful to the railroads rather than beneficial to themselves. Thus, the court found: 'About the middle of the decade (the 1940's) PMTA had a tax manual prepared charging that the railroads of Pennsylvania themselves did not pay their fair share of taxes as compared with other states and made a wide distribution of it to legislators, banks, security investment houses, etc.' The trial court found, however, that this action of the truckers also lay within the rule of reason because 'the truckers had been the target of a strong campaign directed to the public with the purpose of convincing the public that trucks did not pay their fair share of taxes,' thus making it necessary for the truckers to 'be permitted to likewise show the public that their competitors, the railroads, were actually guilty of the fault charged against the truckers.' 155 F.Supp. at page 803.

11. 273 F.2d 218. Chief Judge Biggs dissented from the opinion of the majority of the Court of Appeals insofar as it upheld the District Court's conclusion that the railroads and Byoir had violated the Sherman Act. For similar reasons, he concurred in that part of the majority opinion which upheld the conclusion that the truckers had not violated the Act.

12. 362 U.S. 947, 80 S.Ct. 862, 4 L.Ed.2d 866.

13. 221 U.S. 1, at pages 51—62, 31 S.Ct. 502, at pages 512 516, 55 L.Ed. 619.

14. Id., 221 U.S. at page 57, 31 S.Ct. at page 514.

15. United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315.

16. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 491—493, 60 S.Ct. 982, 990—992, 84 L.Ed. 1311.

17. In Parker v. Brown, supra, this Court was unanimous in the conclusion that the language and legislative history of the Sherman Act would not warrant the invalidation of a state regulatory program as an unlawful restraint upon trade. In so holding, we rejected the contention that the program's validity under the Sherman Act was affected by the nature of the political support necessary for its implemenation—a contention not unlike that rejected here. The reasoning underlying that conclusion was stated succinctly by Mr. Chief Justice Stone: 'Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application.' 317 U.S., at page 352, 63 S.Ct. at page 314.

18. A study of the record reveals that the only evidence or subsidiary findings upon which this conclusory finding could be based is the undisputed fact that the railroads did seek laws by arguments and propaganda that could have had the effect of damaging the competitive position of the truckers. There is thus an absence of evidence of intent independent of the efforts that were made to influence legislation and law enforcement. We nonetheless accept the finding of the District Court on this issue for, in our view, the disposition of this case must be the same regardless of that fact.

19. 307 U.S. 533, 560, 59 S.Ct. 993, 1006.

20. The extent to which the third-party technique is utilized in the public relations field is demonstrated by the fact, found by the District Court, that each of the several public relations firms interviewed by the railroads before they finally decided to hire the Byoir organization to conduct their publicity campaign included the use of this technique in its outline of proposed activities submitted for consideration by the railroads. See 155 F.Supp. at page 778.

21. See, e.g., United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989. Cf. United States v. Rumely, 345 U.S. 41, 73 S.Ct. 543, 97 L.Ed. 770.

22. The District Court expressly recognized this fact in its opinion: 'The record discloses that both sides used, or wanted to use, fronts and/or the propaganda technique.' 155 F.Supp. at page 816. This conclusion was amply supported by specific findings. Thus, the court found: 'The record establishes that the truckers wrote to and made personal contacts with legislators in support of bills increasing the weight of trucks; that they had representatives of other industries write and make personal contacts with legislators in Harrisburg without disclosing trucker connections; and that they had such persons intentionally refrain from advising the legislators and the said officials that the letters and contacts had been solicited; that they solicited from legislators statements in support of their position and had news releases issued thereon.' 155 F.Supp. at page 803.

23. Here again, the petitioners have leveled a vigorous attack upon the trial court's findings. As a part of this attack, they urge that there is no basis in reason for the finding that some shippers quit doing business with the truckers as a result of the railroads' publicity campaign. Their contention is that since the theme of the campaign was that the truckers had an unfair competitive advantage and could consequently charge unfairly low prices, the campaign would have encouraged, rather than discouraged, shippers who availed themselves of the truckers' services. This argument has considerable appeal but, as before, we find it unnecessary to pass upon the validity of these findings for we think the conclusion must be the same whether they are allowed to stand or not.

24. We borrow this phrase from the dissenting opinion below of Chief Judge Biggs.

25. Since the commencement of this litigation, a new bill increasing truck-weight limits has passed the Pennsylvania Legislature and has become law by virtue of the Governor's approval. Thus, the fight goes on.

THE *NOERR-PENNINGTON* DOCTRINE

Chapter VI

What Do We Mean By "Generally Immune"? The Exceptions to the Immunity

A. The "Misrepresentation" or Corruption Exception

   1. The Distinction Between "Judicial" and "Legislative" Processes: Questions of "Deconstruction" and Political Versus Less Political Arenas

   2. The Contours of a Misrepresentation Exception

   3. The Strange Case of *Walker Process*: Is it a "Misrepresentation" Case?

B. The "Commercial" Exception: Must "Redress" Be in Some Sense "Political"?

C. Can and/or Should There Be an "FTC" Exception?

CHAPTER VI

WHAT DO WE MEAN BY "GENERALLY IMMUNE"? THE EXCEPTIONS TO THE IMMUNITY

Not all activities relating to "petitioning" the government—even among those activities genuinely aimed at seeking some government action—qualify for *Noerr-Pennington* protection. Instead, the Supreme Court in *Allied Tube & Conduit Corp. v. Indian Head*[1] cautioned that "the applicability of *Noerr* immunity varies with the context and nature of the activity" at issue.[2] *Noerr-Pennington* is not a seamless blanket of protection that covers all contact with the government. Courts, commentators, and the Federal Trade Commission (FTC) have identified holes or exceptions, or situations simply not reached by *Noerr-Pennington*, based on the "source, context, and nature"[3] of the particular circumstances in question. This chapter considers the exceptions and exclusions from *Noerr-Pennington* protection.

A. The "Misrepresentation" or Corruption Exception

One possible area for exceptions to antitrust immunity for efforts to influence the government can be found in those efforts that are tainted by deception, corruption, or other misconduct. The Supreme Court has made it clear that the First Amendment, itself, does not insulate one from claims for libel, slander, and other intentional falsehoods.[4] But, from its inception, the *Noerr* doctrine has never been circumscribed by a universal exception for misconduct.

When the Supreme Court first articulated antitrust immunity in *Noerr* for "petitioning" activity aimed at influencing the government, the specific conduct in question involved "unethical and deceptive

1. 486 U.S. 492 (1988).
2. *Id.* at 499.
3. *Id.*
4. *See, e.g.*, McDonald v. Smith, 472 U.S. 479, 482-85 (1985); Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

methods."[5] Even though the defendants in *Noerr* had "deliberately deceived the public and public officials," the Court later observed, "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned," at least in the situation at issue.[6] Following the pattern set in *Noerr*, the Court in *City of Columbia v. Omni Outdoor Advertising*[7] declined to recognize a conspiracy exception to *Noerr* immunity for collusion between private actors and representatives of the government whom they were seeking to influence.[8] In *Allied Tube*, the Court rejected an "improper means" test as an alternative basis for invoking the "sham" exception to *Noerr* immunity.[9] Finally, in *Professional Real Estate Investors v. Columbia Pictures Industries (PRE)*,[10] the Supreme Court expressly declined to decide "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations."[11]

The Supreme Court has made clear, however, that it does not uniformly and universally reject an exception to *Noerr* immunity for misrepresentations, corruption, or other misconduct. For example, not long after *Noerr*, the Court observed in *California Motor Transport v. Trucking Unlimited*,[12] that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."[13] As the Court later explained in *Allied Tube*, any exception—including an exception for misrepresentations or corruption—will depend upon the setting and the nature of the conduct and governmental processes in question:

> [T]he applicability of *Noerr* immunity varies with the context and nature of the activity. A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods . . . . But in less

5. Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492, 499-500 (1988) (citing E. R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 140-41 (1961)).
6. City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 383-84 (1991) (quoting *Noerr*, 365 U.S. at 145).
7. 499 U.S. 365 (1991).
8. *Id.* at 382-84.
9. *Allied Tube*, 486 U.S. at 507 n.10.
10. 508 U.S. 49 (1993).
11. *Id.* at 61 n.6.
12. 404 U.S. 508 (1972).
13. *Id.* at 513.

> political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.[14]

In fact, "[a]lthough Supreme Court law remains unsettled, the weight of lower court authority, spanning more than thirty years, has recognized that misrepresentations may preclude application of *Noerr-Pennington* in less political arenas than the legislative lobbying at issue in *Noerr* itself."[15]

1. The Distinction Between "Judicial" and "Legislative" Processes: Questions of "Deconstruction" and Political Versus Less Political Arenas

Often, the availability of the misrepresentation exception has been cast in terms of legislative settings (as in *Noerr*), where it does not apply, versus judicial settings, where it does apply.[16] As the Supreme Court's language in *Allied Tube* implies, however, a more useful approach might focus on where a particular governmental process falls on a spectrum between the "political" and "non-political," with the legislative and judicial functions occupying the two ends of that spectrum. As *Noerr* itself demonstrates, in a purely "political" setting, there will be no misrepresentation exception to the doctrine; in "less political arenas," such as in courts or in administrative proceedings that more closely resemble a judicial setting, a misrepresentation exception is more likely to be recognized.

The reasons for this distinction are many. They begin with the somewhat cynical but pragmatic recognition that "[m]isrepresentations

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14. *Allied Tube*, 486 U.S. 493 at 499-500 (internal citation omitted).
15. *In re* Union Oil Co., 138 F.T.C. 1, 25 (2004). [hereinafter *Unocal*]. *See generally* 1 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶¶ 203a-f (3d ed. 2006); C. Douglas Floyd, *Antitrust Liability for the Anticompetitive Effects of Governmental Action Induced by Fraud,* 69 ANTITRUST L.J. 403 (2001).
16. *See, e.g.,* Mercatus Group LLC v. Lake Forest Hospital, 528 F. Supp. 2d 797, 804-07 (N.D. Ill. 2007) (discussing application of sham exception to adjudicatory as distinguished from legislative process). See also ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1293-94 (6th ed. 2007) ("Misrepresentations designed to influence 'legislative functions' tend to qualify for *Noerr* immunity, while those designed to influence adjudicatory functions do not.").

are a fact of life in politics"[17] in that "rough and tumble" arena, legislative bodies are fully capable of dealing with those matters and sorting out such "contending political forces."[18] Of at least equal significance is the reluctance of courts in antitrust cases to delve into the causes or motivations behind legislative or "political" actions, a reluctance pointedly expressed by the Supreme Court in *Omni*: "This would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid."[19] As a practical matter, "in the legislative [or political] context, ... no one can say what combination of facts, arguments, politics, or other factors produced the legislation."[20] Perhaps more importantly from a policy perspective—and this appears to have been the primary concern of the Supreme Court in *Omni*— allowing plaintiffs or courts to "look behind the actions of state sovereigns" to pursue or review antitrust claims would undermine effective governmental decision making and raise serious questions of federalism.[21]

In the judicial context, by contrast, the reasons for government action should be transparent, often recited or self-evident from the record before the court. Moreover, while legislative bodies may perform their own investigations and inquiries, seeking such information as they deem appropriate from whatever sources they like, courts must base their determinations upon the limited information provided by the parties before them, and they must rely upon the veracity and candor of the litigants; misrepresentations, therefore, may rob such an adjudicatory or nonpolitical process of its legitimacy.[22]

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17. Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056, 1062 (9th Cir. 1998).
18. AREEDA & HOVENKAMP, *supra* note 15, ¶ 203e at 175.
19. *Omni*, 499 U.S. at 377.
20. I AREEDA & HOVENKAMP, *supra* note 15, ¶ 203f3 at 186.
21. *See Omni*, 499 U.S. at 379; *Unocal*, 138 F.T.C. at 21, 35.
22. *See* Liberty Lake Invs. v. Magnuson, 12 F.3d 155, 159 (9th Cir. 1993); Clipper Express v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240, 1261 (9th Cir. 1982) ("[I]nformation supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these [entities] and does not deserve immunity from the antitrust laws."). *See also* FEDERAL TRADE COMM'N, ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE: AN FTC STAFF REPORT at 23-24 (2006) [hereinafter FTC STAFF REPORT].

But what of executive and administrative processes that lie more in the middle of the spectrum, not obviously legislative or adjudicative, but instead a process that is a hybrid of both? Here again, the Supreme Court's admonition in *Allied Tube*—that the applicability of *Noerr* immunity "varies with the context and nature of the activity"—guides the way. In these circumstances, a court must evaluate both the conduct of the private actor and the nature of the governmental process and place each on the political/legislative end of the spectrum or the nonpolitical/judicial end of the spectrum. Only after this analysis can a court determine whether, and to what extent, *Noerr* immunity should apply:

> There certainly is no privilege for misrepresentations to administrative agencies that base their decisions on information provided by the parties. Moreover, there is no reason here to differentiate for these purposes between adjudication and rule making or between rules grounded exclusively in a hearing record and those grounded in less formal procedures.[23]

In sum, then, the applicability of *Noerr* immunity should in every instance be determined by the particular "context and nature of the activity" and governmental processes in question, and not simply by the legislative, administrative, or adjudicatory labels applied to those activities and processes.

2. *The Contours of a Misrepresentation Exception*

Even in those "less political arenas" in which a misrepresentation exception to *Noerr* immunity is recognized, there remains the question what the "nature" of the misrepresentation must be in order to trigger the exception. Certainly, not every erroneous statement even to a court will strip a party of his or her *Noerr* immunity. But, for example, must the statement be knowingly made and intentionally false? How significant to the government's action or decision must the statement be? Some

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23. I AREEDA & HOVENKAMP, *supra* note 15, ¶ 203e at 178; *Unocal*, 138 F.T.C. at 16-17 & nn.16-30 (collecting cases). *See also* Caldon, Inc. v. Advanced Measurement & Analysis Group, Inc., 515 F. Supp. 2d 565, 574 (W.D. Pa 2007) (denying motion to dismiss because Noerr-Pennington immunity does not apply where misrepresentations "not only made in regulatory submissions, but were made to private entities within the nuclear industry.").

courts have required that in order to negate *Noerr* immunity, misrepresentations must be intentional and infect "the very core" of the proceeding such as to deprive the proceeding of its legitimacy.[24]

The Federal Trade Commission (FTC), in both an enforcement proceeding and in a staff report examining the *Noerr-Pennington* doctrine, recently has undertaken a comprehensive analysis of the misrepresentation exception to *Noerr* immunity.[25] Having examined the approaches to the misrepresentation exception followed by courts across the country, the FTC concluded that, in order to trigger an exception to *Noerr* immunity, misrepresentations made in an appropriately "less political arena" must fulfill three criteria:

> [I]n order to lose *Noerr* protection, the misrepresentation or omission must be: (1) deliberate (something more than mere error is necessary); (2) subject to factual verification; and (3) central to the legitimacy of the affected governmental proceeding.[26]

Leading commentators have agreed essentially with this formulation,[27] and it therefore appears to be a useful yardstick by which

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24. *See, e.g., Liberty Lake Invs.*, 12 F.3d at 159; Cheminor Drugs v. Ethyl Corp., 168 F.3d 119, 122-24 (3d Cir. 1999). *But see* Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hosp., 185 F.3d 154, 161-64 (3d Cir. 1999) (citing *Omni* and holding that misrepresentations in the context of a campaign to block the issuance of a state certificate for a hospital were protected).

25. *See Unocal*, 138 F.T.C. at 14-37; FTC STAFF REPORT, *supra* note 22, at 22-28, 37-38.

26. FTC STAFF REPORT, *supra* note 22, at 27.

27. *See, e.g.,* I AREEDA & HOVENKAMP, *supra* note 15, ¶ 203f at 182. Professors Areeda and Hovenkamp reached largely the same conclusions as did the FTC, noting that "[t]he possible offense is confined to 'known' falsity for several reasons. There is no policy ground to impose antitrust punishments on those who make innocent errors in their dealings with governments." *Id.*, ¶ 203f1 at 183. Further, "[i]f false information is to be actionable in an antitrust suit, the falsity must be clear and apparent with respect to particular and sharply defined facts," *i.e.*, it must be readily subject to verification. *Id.*, ¶ 203f2 at 185. Finally, to negate *Noerr* immunity, "the falsity [must] make a significant difference to the government's decision or have a significant effect on competition[.] Even with knowing falsity established, there is no antitrust offense without a material connection between the falsity and some impairment of competition." *Id.*, ¶ 203f3 at 185-86.

to measure whether a particular misrepresentation will abrogate *Noerr* immunity in a given situation.

3. *The Strange Case of Walker Process: Is it a "Misrepresentation" Case?*

In one instance, the Supreme Court unequivocally has held a party to be subject to antitrust liability because of its misrepresentations to the government. In *Walker Process Equipment v. Food Machine & Chemical Corp.*,[28] a patent holder filed suit for infringement. The defendant counterclaimed, arguing not only that the patent was invalid, but also that the plaintiff illegally sought to monopolize commerce by fraudulently obtaining its patent and attempting to enforce that patent by threats and by litigation. The Court agreed with the counterclaimant, concluding that where a patent holder "obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office"—that is, by "intentional fraud"—and then proceeded to attempt to enforce that fraudulently obtained patent with knowledge of the fraud, this "would be sufficient to strip [the patent holder] of its exemption from the antitrust laws," and subject it to liability, if the other elements necessary for Sherman Act liability (such as requisite power in a relevant market) are present.[29]

Standing alone, *Walker Process* seems unremarkable, a logical step in protecting the public interest in the processes by which government-sanctioned "monopoly" of patents is effectuated.[30] What renders the decision curious is that, although the conduct in question—persuading the Patent and Trademark Office (PTO) to issue a patent and then enforcing that patent in the courts—seems clearly to fall within the realm of "petitioning" activity covered by *Noerr*, the Supreme Court never mentioned *Noerr* in its *Walker Process* opinion.[31] Obviously, therefore, the Court gave no guidance about whether, or on what basis, the rule

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28. 382 U.S. 172 (1965).
29. *Id.* at 177-79.
30. *See id.* at 177.
31. The Supreme Court's decision in *Noerr* had been issued about four years earlier. *See* E. R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 127 (1961). The Court's follow-up decision in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)—also not mentioned in *Walker Process*—had been issued only months before the *Walker Process* opinion.

announced in *Walker Process* should be construed as an exception to *Noerr* immunity. Further, the Court has declined the opportunity in later decisions to clarify the issue. In *PRE*, for example, the Court cited *Walker Process*, but reserved ruling on its specific interaction with *Noerr* principles.[32]

Consensus has long since coalesced in the lower courts, however, that *Walker Process* effectively embodies an exception to *Noerr* immunity, although questions linger about the scope of that exception (that is, whether it should extend to settings other than patents fraudulently obtained and enforced) and the nature of the conduct necessary to trigger that exception (whether one must demonstrate "intentional fraud" as in *Walker Process* itself, or whether some lesser form of misrepresentation or corruption will suffice).[33]

For example, the Federal Circuit in *Nobelpharma AB, Inc. v. Implant Innovations*,[34] declared that *Walker Process* is an exception to *Noerr* immunity that stands on equal ground with the "sham" exception explicated by the Supreme Court in *PRE*:

> *PRE* and *Walker Process* provide alternative legal grounds on which a patentee may be stripped of its immunity from the antitrust laws; both legal theories may be applied to the same conduct. Moreover, we need not find a way to merge these decisions. Each provides its own basis for depriving a patent owner of immunity from the antitrust laws; either or both may be applicable to a particular party's conduct in obtaining and enforcing a patent. The Supreme Court saw no need to merge these separate lines of cases and neither do we.[35]

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32. *PRE*, 508 U.S. at 61 n.6. *See also* FTC STAFF REPORT, *supra* note 22, at 23 n.92 ("To date, the Court has not . . . explained the relationship, if any, between its *Walker Process* holding and the *Noerr* doctrine.").

33. *See* III PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 706 at 251. *See also Unocal*, 138 F.T.C. at 15-17 (citing *Walker Process*, and finding that "[a]lthough Supreme Court law remains unsettled, the weight of lower court authority, spanning more than thirty years, has recognized that misrepresentations may preclude application of *Noerr-Pennington* in less political arenas than the legislative lobbying at issue in *Noerr* itself").

34. 141 F.3d 1059 (Fed. Cir. 1998).

35. *Id.* at 1071. *See also* Morton Grove Pharms., Inc. v. Par Pharms. Cos., 2006 WL 850873, at **4-13 (N.D. Ill. 2006) (applying *Walker Process* and *PRE* tests in denying motion to dismiss).

Further, some courts have begun to apply *Walker Process* and its principles outside the strict confines of intentional fraud upon the PTO.[36] Likewise, the FTC has sought to extend "the *Walker Process* exception" to *Noerr* immunity beyond the PTO and beyond the "intentional fraud" that was the cornerstone of the Supreme Court's original decision.[37] Consequently, although *Walker Process* may have been born in a context devoid of *Noerr* analysis, it has become very much a part of *Noerr* jurisprudence, at least in the lower courts, and promises to be a source of continuing controversy and development in the years to come.

B. The "Commercial" Exception: Must "Redress" Be in Some Sense "Political"?

What about situations in which the government or an agency functions like any private participant in the marketplace, such as when it purchases supplies or services? Should anticompetitive efforts to influence the government in those circumstances be considered protected "petitioning," insulated from antitrust liability by *Noerr* immunity? Or, stated another way, is there or should there be a "commercial" exception to *Noerr*, covering attempts to influence the government when it acts in a proprietary fashion?

Several Supreme Court decisions after *Noerr* suggested that, at least in some circumstances of this sort, *Noerr* would not apply. For example, in *California Motor Transport*, the Supreme Court noted that "bribery of a public purchasing agent" likely would not be protected by *Noerr*.[38] Later, in *Omni*, the Court discussed a "possible market participant exception," observing that "immunity does not necessarily obtain where

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36. *See, e.g., In re* Buspirone Patent Litig., 185 F. Supp. 2d 363, 373-75 (S.D.N.Y. 2002); III AREEDA & HOVENKAMP, *supra* note 33, ¶ 706 at 251 (collecting cases).

37. *See, e.g., In re* Union Oil Co. of Cal., F.T.C. Dkt. No. 9305, App. Br. of Counsel Supporting Complaint, at 22-41 (Jan. 14, 2004), *available at* http://www.ftc.gov/os/adjpro/d9305/040114ccappealbrief.pdf [hereinafter Br. of FTC *Unocal* Compl. Counsel] (arguing that there is "no principled reason why *Walker Process* should be limited solely to the patent context"); Timothy J. Muris, *Clarifying the State Action and* Noerr *Exemptions*, 27 HARV. J.L. & PUB. POL'Y 443, 455 (2004) (arguing for extension of the *Walker Process* exception to *Noerr-Pennington* immunity beyond the Patent and Trademark Office context to analogous non-political proceedings).

38. *Cal. Motor Transp.*, 404 U.S. at 513.

the State acts not in a regulatory capacity, but as a commercial participant in a given market."[39]

The Court later applied these principles to reach its holding in *FTC v. Superior Court Trial Lawyers Ass'n (SCTLA)*.[40] In *SCTLA*, a group of lawyers who traditionally accepted court appointments to represent indigent defendants banded together to refuse any further appointments until the District of Columbia raised their compensation for those services. The Court found this to be "a classic restraint of trade," and then—although the lawyers' conduct plainly was undertaken with the goal of influencing the government—the Supreme Court rejected the lawyers' plea of *Noerr* immunity.[41] Specifically, the Court invoked language from its prior opinion in *Allied Tube* to find that "[h]orizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government" are not immunized "on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms."[42]

Nevertheless, most commentators and many courts have stopped short of recognizing a monolithic "commercial exception" to *Noerr*, applicable whenever the government acts in any proprietary capacity.[43] Instead, these authorities have observed, even where the government acts in a commercial or proprietary role, the availability of *Noerr* immunity will depend upon the nature of the conduct in question—both by the private actor and by the governmental entity or representative—and upon all of the circumstances there at issue; *Noerr* applicability will vary with the degree to which the government, although pursuing a generally "commercial" endeavor, also engages in traditional governmental political or policy-making activity in connection with that endeavor. As the Fifth Circuit has explained:

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39. *Omni*, 499 U.S. at 374-75, 379.
40. 493 U.S. 411 (1990).
41. *Id.* at 422, 424-25.
42. *Id.* at 425. *See also* Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 789 (1962) (rejecting *Noerr* immunity related to "commercial activity" of foreign government entity).
43. *See* I AREEDA & HOVENKAMP, *supra* note 15, ¶ 209. Some courts have flatly rejected a "commercial exception" to *Noerr* immunity. *See, e.g.*, Greenwood Utils. Comm'n v. Miss. Power Co., 751 F.2d 1484, 1505 (5th Cir. 1985). Others have been more open to such an exception. *See, e.g.*, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, 424 F.2d 25, 33 (1st Cir. 1970).

> We reject any notion that there should be a commercial exception to *Noerr-Pennington*, because although such a distinction may be intuitively appealing it proves difficult, if not impossible, of application in a case . . . where the government engages in a policy decision and at the same time acts as a participant in the marketplace.[44]

For example, the government's decision to purchase a new type of military aircraft is in a large sense "commercial" or "proprietary," but it is also laden with the types of policy decisions that are customarily the role of government.[45] So, the applicability of *Noerr* to immunize efforts to influence governmental activity at each end of the spectrum—from purely proprietary on one end to purely political or policy making on the other—may be fairly easy to predict. As the governmental conduct moves toward the middle of the spectrum with a mixture of proprietary and political function, gauging the applicability of *Noerr* becomes more difficult.

Still, some principles appear to emerge: first, *Noerr* immunity will rarely be appropriate when the government is the object or victim of the alleged anticompetitive activity, as opposed to the situation (as in *Noerr* itself) where the private actor seeks to have the government affect some anticompetitive result.[46] For example, *Noerr* immunity was rejected in *SCTLA* for the trial lawyers' boycott of the District of Columbia in an effort to coerce higher payments from the government.[47] Second, as two leading commentators have observed, "*Noerr* immunity becomes increasingly appropriate as (a) the resulting government decision reflects a policy choice rather than capitulation to the economic pressure of the private firm; and (b) anticompetitive injury to others is caused by the government decision rather than the private restraint seeking to compel that decision."[48]

So, while *Noerr* immunity plainly is more suspect in circumstances where the government acts in a commercial role, the applicability and operation of the doctrine to each individual set of circumstances must be judged by the *Allied Tube* test; that is, it will depend upon "the source, context and nature of the anticompetitive restraint at issue."[49]

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44. *Greenwood Utils.*, 751 F.2d at 1505.
45. *See* I AREEDA & HOVENKAMP, *supra* note 15, ¶ 209a at 306.
46. *See id.*, ¶ 209 at 306-07.
47. *SCTLA*, 493 U.S. at 425.
48. I AREEDA & HOVENKAMP, *supra* note 15, ¶ 209a at 307.
49. *Allied Tube*, 486 U.S at 499 (1988).

C. Can and/or Should There Be an "FTC" Exception?

For some time, the FTC and its representatives have warned against unduly broad interpretation of exemptions to the antitrust laws.[50] Overly liberal application of the *Noerr* doctrine has been of particular concern to the FTC and commentators.[51] In addition to speaking in favor of an expanding "misrepresentation" exception to the *Noerr* doctrine, described above, and extension of the *Walker Process* exception to situations beyond the PTO, the FTC has argued for what amounts to an "FTC exception" to *Noerr* immunity—or, stated more accurately, it has contended that *Noerr* immunity simply does not extend to Section 5 of the FTC Act.[52]

In 2003, the FTC launched an enforcement action against Unocal under Section 5 of the Act, based in large measure upon allegations that Unocal had misled the California Air Resources Board and two private industry groups in connection with their adoption of regulations and standards relating to auto emissions and reformulated gasoline.[53] Unocal defended primarily by arguing that its conduct and representations to the governmental and private standard-setting bodies were protected by *Noerr* immunity.[54] FTC Complaint Counsel disputed Unocal's fulfillment of *Noerr*'s requirements, but went a step further.[55] Contending that *Noerr* immunity "is a narrow, statute-specific exception to Sherman Act liability," Complaint Counsel argued that the *Noerr* doctrine, with all its permutations as it had developed through the years, simply does not apply to the FTC's ability to proceed against "unfair competition" under Section 5 of the FTC Act.[56]

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50. *See, e.g.*, FTC STAFF REPORT, *supra* note 22, at 3-4.
51. See, e.g., John T. Delacourt, *Restoring Rationality to Petitioning Immunity*, 17 ANTITRUST 36 (2003); John T. Delacourt, *Protecting Competition by Narrowing* Noerr*: a Reply*, 18 ANTITRUST 77 (2003).
52. 15 U.S.C. § 45.
53. *In re* Union Oil Co. of Cal., FTC Dkt. No. 9305, Compl. (Mar. 4, 2003), *available at* http://www.ftc.gov/os/adjpro/d9305/030304unocaladmin-cmplt.pdf.
54. *See* Answering Br. of Union Oil Co. of Cal., at 10-50 (Feb. 27, 2004), *available at* http://www.ftc.gov/os/adjpro/d9305/040227unocals-answeringbrief.pdf.
55. Br. of FTC *Unocal* Compl. Counsel, *supra* note 37, *at* 13-39.
56. *Id.* at 42, 41-46.

Instead, Complaint Counsel argued, Section 5 enforcement actions regarding conduct such as that alleged against Unocal should be constrained only by the requirements of the First Amendment, which can be considerably narrower than *Noerr*, particularly where the conduct at issue involves allegations of misrepresentation or corruption.[57] Because the *Unocal* enforcement proceeding ended in a consent decree, neither the FTC itself nor any court reached a conclusion about the proposed FTC Act exemption.

The argument that *Noerr* immunity does not extend to actions brought under Section 5 of the FTC Act is grounded in the idea that the *Noerr* doctrine derives from a statute-specific analysis of the interaction between the Sherman Act and the First Amendment right to petition, and that such an analysis will, of necessity, vary when applied to another statute, such as the FTC Act.[58] Those favoring such an approach point, for example, to *BE & K Construction Co. v. NLRB,*[59] in which the Supreme Court gave a nod to *Noerr* jurisprudence but evaluated the conduct in question based upon the interaction between the First Amendment and "the NLRA rather than the Sherman Act."[60] Supporters of this argument describe what they contend to be the significant differences between the FTC Act and the Sherman Act, including the limitation of the former to enforcement actions by the FTC, that seek only forward-looking cease and desist orders, rather than treble damages remedies.[61] Finally, they note that neither the Supreme Court nor any lower court has expressly ruled upon the question whether *Noerr* immunity applies to enforcement proceedings under the FTC Act or whether, instead, such proceedings are constrained only by First Amendment bounds, much as the Supreme Court decided with respect to the National Labor Relations Act in *BE & K Construction Co.*

While it is true that no court has decided directly and definitively whether Section 5 enforcement actions by the FTC are subject to the *Noerr* doctrine, numerous courts and other authorities have long assumed that *Noerr* does apply to the FTC Act proceedings. In *SCTLA*, for example, the Supreme Court rejected the defendants' *Noerr* defense in an FTC Act enforcement proceeding; in so doing, the Court applied *Noerr*

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57. *Id.*
58. *Id.*
59. 536 U.S. 516 (2002).
60. *Id.* at 526, 524-33.
61. *See, e.g.*, Br. of FTC *Unocal* Compl. Counsel, *supra* note 37, at 43-46.

principles and precedents, rather than questioning whether that doctrine pertained at all or applying only First Amendment principles instead.[62] Similarly, the Supreme Court has observed (in *dicta*) both in *Omni* and *PRE* that the doctrine applies to "antitrust laws"[63] generally and to establish that those "who petition government are generally immune from antitrust liability"[64]—without limiting those concepts to the Sherman Act. In fact, there is broad consensus that *Noerr* immunity applies not only to "antitrust laws," but also to other federal statutes and even to state common law claims, such as tortious interference with contract.[65] So, even though the question has not been directly and authoritatively determined by the courts, proponents of an "FTC Act exception" to *Noerr* immunity find themselves swimming against a tide of indirect and inferential authority that presumes *Noerr* applicability not only to the FTC Act, but to numerous other claims as well.

Finally, the suggestion that *Noerr* does not apply to FTC Act enforcement actions presents something of a logical and practical problem. If *Noerr* immunity does not extend to FTC enforcement proceedings, then the same conduct would be immunized in a case brought by a private litigant, or even by the Department of Justice, but could nevertheless subject an antitrust defendant to liability in a proceeding brought by the FTC under the FTC Act. Such inconsistent treatment, predicated solely upon the identity of the complaining party or prosecuting agency and not upon anything within the control of the antitrust defendant, seems difficult to justify.

Nevertheless, those who argue against *Noerr*'s applicability to FTC Act proceedings claim legitimate support in the Supreme Court's approach to cases like *BE & K Construction*. The question will remain open until some court—and perhaps until the Supreme Court—directly addresses and disposes of the matter.

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62. *SCTLA*, 493 U.S. at 414, 424-25.
63. *Omni*, 499 U.S. at 380.
64. *PRE*, 508 U.S. at 56.
65. *See, e.g.*, Cheminor Drugs. v. Ethyl Corp., 168 F.3d 119, 128-29 (3d Cir. 1999) (collecting authorities applying *Noerr* to claims such as malicious prosecution, tortious interference, unfair competition, and the like). *But see* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885, 889 (10th Cir. 2000) (en banc) (ruling that *Noerr* immunity applies only to antitrust claims, while First Amendment principles govern non-antitrust settings).

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85 S.Ct. 1585
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UNITED MINE WORKERS OF AMERICA, Petitioner,
v.
James M. PENNINGTON et al.

No. 48.
Argued Jan. 27, 1965.
Decided June 7, 1965.

[Syllabus from pages 657-658 intentionally omitted]

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Harrison Combs, Washington, D.C., for petitioner.

John A. Rowntree, Knoxville, Tenn., for respondents.

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Organizations, as amicus curiae.

Mr. Justice WHITE delivered the opinion of the Court.

This action began as a suit by the trustees of the United Mine Workers of America Welfare and Retirement Fund against the respondents, individually and as owners of Phillips Brothers Coal Company, a partnership, seeking to recover some $55,000 in royalty payments alleged to be due and payable under the trust provisions of the National Bituminous Coal Wage Agreement of 1950, as amended, September 29, 1952, executed by Phillips and United Mine Workers of America on or about October 1, 1953, and reexecuted with amendments on or about September 8, 1955, and October 22, 1956. Phillips filed an answer and a cross claim against UMW, alleging in both that the trustees, the UMW and certain large coal operators had conspired to restrain and to monopolize interstate commerce in violation of §§ 1 and 2 of the Sherman Antitrust Act, as amended, 26 Stat. 209, 15 U.S.C. §§ 1, 2 (1958 ed.). Actual damages in the amount of $100,000 were claimed for the period beginning February 14, 1954, and ending December 31, 1958.[1]

The allegations of the cross claim were essentially as follows: Prior to the 1950 Wage Agreement between the operators and the union, severe controversy had existed in the industry, particularly over wages, the welfare fund and the union's efforts to control the working time of

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its members. Since 1950, however, relative peace has existed in the industry, all as the result of the 1950 Wage Agreement and its amendments and the additional understandings entered into between UMW and the large operators. Allegedly the parties considered overproduction to be the critical problem of the coal industry. The agreed solution was to be the elimination of the smaller companies, the larger companies thereby controlling the market. More specifically, the union abandoned its efforts to control the working time of the miners, agreed not to oppose the rapid mechanization of the mines which would substantially reduce mine employment, agreed to help finance such mechanization and agreed to impose the terms of the 1950 agreement on all operators without regard to their ability to pay. The benefit to the union was to be increased wages as productivity increased with mechanization, these increases to be demanded of the smaller companies whether

mechanized or not. Royalty payments into the welfare fund were to be increased also, and the union was to have effective control over the fund's use. The union and large companies agreed upon other steps to exclude the marketing, production, and sale of nonunion coal. Thus the companies agreed not to lease coal lands to nonunion operators, and in 1958 agreed not to sell or buy coal from such companies. The companies and the union jointly and successfully approached the Secretary of Labor to obtain establishment under the Walsh-Healey Act, as amended, 49 Stat. 2036, 41 U.S.C. § 35 et seq. (1958 ed), of a minimum wage for employees of contractors selling coal to the TVA, such minimum wage being much higher than in other industries and making it difficult for small companies to compete in the TVA term contract market. At a later time, at a meeting attended by both union and company representatives, the TVA was urged to curtail its spot market purchases, a substantial portion of which

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were exempt from the Walsh-Healey order. Thereafter four of the larger companies waged a destructive and collusive price-cutting campaign in the TVA spot market for coal, two of the companies, West Kentucky Coal Co. and its subsidiary Nashville Coal Co., being those in which the union had large investments and over which it was in position to exercise control.

The complaint survived motions to dismiss and after a five-week trial before a jury, a verdict was returned in favor of Phillips and against the trustees and the union, the damages against the union being fixed in the amount of $90,000, to be trebled under 15 U.S.C. § 15 (1958 ed.). The trial court set aside the verdict against the trustees but overruled the union's motion for judgment notwithstanding the verdict or in the alternative for a new trial. The Court of Appeals affirmed. 325 F.2d 804. It ruled that the union was not exempt from liability under the Sherman Act on the facts of this case, considered the instructions adequate and found the evidence generally sufficient to support the verdict. We granted certiorari. 377 U.S. 929, 84 S.Ct. 1333, 12 L.Ed.2d 294. We reverse and remand the case for proceedings consistent with this opinion.

I.

We first consider UMW's contention that the trial court erred in denying its motion for a directed verdict and for judgment notwithstanding the verdict, since a determination in UMW's favor on this issue would finally resolve the controversy. The question presented by this phase of the case is whether in the circumstances of this case the union is exempt from liability under the antitrust laws. We think the answer is clearly in the negative and that the union's motions were correctly denied.

The antitrust laws do not bar the existence and operation of labor unions as such. Moreover, § 20 of the Clayton Act, 38 Stat. 738, and § 4 of the Norris-LaGuardia

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Act, 47 Stat. 70, permit a union, acting alone, to engage in the conduct therein specified without violating the Sherman Act. United States v. Hutcheson, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788; United States v. International Hod Carriers Council, 313 U.S. 539, 61 S.Ct. 839, 85 L.Ed. 1508, affirming per curiam, 37 F.Supp. 191 (D.C.N.D.Ill.1941); United States v. American Federation of Musicians, 318 U.S. 741, 63 S.Ct. 665, 87 L.Ed. 1120, affirming per curiam, 47 F.Supp. 304 (D.C.N.D.Ill.1942).

But neither § 20 nor § 4 expressly deals with arrangements or agreements between unions and employers. Neither section tells us whether any or all such arrangements or agreements are barred or permitted by the antitrust laws. Thus Hutcheson itself stated:

'So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.' 312 U.S., at 232, 61 S.Ct. at 466. (Emphasis added.)

And in Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939, this Court made explicit what had been merely a qualifying expression in Hutcheson and held that 'when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included with the exemptions of the Clayton and Norris-LaGuardia Acts.' Id., 325 U.S. at 809, 65 S.Ct. at 1540. See also United Brotherhood of Carpenters v. United States, 330 U.S. 395, 398—400, 67 S.Ct. 775, 778, 91 L.Ed. 973; United States v. Employing Plasterers Assn., 347 U.S. 186, 190, 74 S.Ct. 452, 454, 98 L.Ed. 618. Subsequent cases have applied the Allen Bradley doctrine to such combinations without regard to whether they found expression in a collective bargaining agreement, United Brother-

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hood of Carpenters v. United States, supra; see Local 24 of International Brotherhood of Teamsters, etc., v. Oliver, 358 U.S. 283, 296, 79 S.Ct. 297, 304, 3 L.Ed.2d 312, and even though the mechanism for effectuating the purpose of the combination was an agreement on wages, see Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46 (C.A.8th Cir. 1958), or on hours of work, Philadelphia Record Co. v. Manufacturing Photo-Engravers Assn., 155 F.2d 799 (C.A.3d Cir. 1946).

If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not successfully defend this contract provision if it were challenged under the antitrust laws by the United States or by some party injured by the arrangement. Cf. Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939; United States v. Borden Co., 308 U.S. 188, 203—205, 60 S.Ct. 182, 190, 191, 84 L.Ed. 181; Lumber Prods. Assn. v. United States, 144 F.2d 546, 548 (C.A.9th Cir. 1944), aff'd on this issue sub nom. United Brotherhood of Carpenters v. United States, 330 U.S. 395, 398—400, 67 S.Ct. 775, 777, 778, 91 L.Ed. 973; Las Vegas Merchant Plumbers Assn. v. United States, 210 F.2d 732 (C.A.9th Cir. 1954), cert. denied, 348 U.S. 817, 75 S.Ct. 29, 99 L.Ed. 645; Local 175, IBEW v. United States, 219 F.2d 431 (C.A.6th Cir. 1955), cert. denied, 349 U.S. 917, 75 S.Ct. 606, 99 L.Ed. 1250. In such a case, the restraint on the product market is direct and immediate, is of the type characteristically deemed unreasonable under the Sherman Act and the union gets from the promise nothing more concrete than a hope for better wages to come.

Likewise, if as is alleged in this case, the union became a party to a collusive bidding arrangement designed to drive Phillips and others from the TVA spot market, we think any claim to exemption from antitrust liability would be frivolous at best. For this reason alone the motions of the unions were properly denied.

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A major part of Phillips' case, however, was that the union entered into a conspiracy with the large operators to impose the agreed-upon wage and royalty scales upon the smaller, nonunion operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and pre-empting the market for the large, unionized operators.

The UMW urges that since such an agreement concerned wage standards, it is exempt from the antitrust laws.

It is true that wages lie at the very heart of those subject about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit. National Labor Relations Board v. Truck Drivers Union, 353 U.S. 87, 94—96, 77 S.Ct. 643, 646—647, 1 L.Ed.2d 676. The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. Apex Hosiery Co. v. Leader, 310 U.S. 469, 503—504, 60 S.Ct. 982, 997, 84 L.Ed. 1311; see Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46 (C.A.8th Cir. 1958). We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers.

This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardl-

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ess of the subject or the form and content of the agreement. Unquestionably the Board's demarcation of the bounds of the duty to bargain has great relevance to any consideration of the sweep of labor's antitrust immunity, for we are concerned here with harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting 'the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation,' Fibreboard Paper Prods. Corp. v. National Labor Relations Board, 379 U.S. 203, 211, 85 S.Ct. 398, 403, 13 L.Ed.2d 233. But there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws. Local 24 of Intern. Broth. of Teamsters, etc. v. Oliver, 358 U.S. 283, 296, 79 S.Ct. 297, 304, 3 L.Ed.2d 312; United Brotherhood of Carpenters v. United States, 330 U.S. 395, 399—400, 67 S.Ct. 775, 778, 91 L.Ed. 973.

We have said that a union may make wage agreements with a multiemployer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior.[2] But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from

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the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.

We do not find anything in the national labor policy that conflicts with this conclusion. This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards. Apex Hosiery Co. v. Leader, 310

U.S. 469, 503, 60 S.Ct. 982, 997, 84 L.Ed. 1311. But there is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being strait-jacketed by some prior agreement with the favored employers.

So far as the employer is concerned it has long been the Board's view that an employer may not condition the signing of a collective bargaining agreement on the union's organization of a majority of the industry. American Range Lines, Inc., 13 N.L.R.B. 139, 147 (1939); Samuel Youlin, 22 N.L.R.B. 879, 885 (1940); Newton Chevrolet, Inc., 37 N.L.R.B. 334, 341 (1941); see National Labor Relations Board v. George P. Pilling & Son Co., 119 F.2d 32, 38 (C.A.3d Cir. 1941). In such cases the obvious interest of the employer is to ensure that acceptance of the union's wage demands will not adversely affect his competitive position. In American Range Lines, Inc., supra, the

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Board rejected that employer interest as a justification for the demand. '(A)n employer cannot lawfully deny his employees the right to bargain collectively through their designated representative in an appropriate unit because he envisions competitive disadvantages accruing from such bargaining.' 13 N.L.R.B., at 147. Such an employer condition, if upheld, would clearly reduce the extent of collective bargaining. Thus, in Newton Chevrolet, Inc., supra, where it was held a refusal to bargain for the employer to insist on a provision that the agreed contract terms would not become effective until five competitors had signed substantially similar contracts, the Board stated that '(t)here is nothing in the Act to justify the imposition of a duty upon an exclusive bargaining representative to secure an agreement from a majority of an employer's competitors as a condition precedent to the negotiation of an agreement with the employer. To permit individual employers to refuse to bargain collectively until some or all of their competitors had done so clearly would lead to frustration of the fundamental purpose of the Act to encourage the practice of collective bargaining.' 37 N.L.R.B., at 341. Permitting insistence on an agreement by the union to attempt to impose a similar contract on other employers would likewise seem to impose a restraining influence on the extent of collective bargaining, for the union could avoid an impasse only by surrendering its freedom to act in its own interest vis-a-vis other employers, something it will be unwilling to do in many instances. Once again, the employer's interest is a competitive interest rather than an interest in regulating its own labor relations, and the effect on the union of such an agreement would be to limit the free exercise of the employees' right to engage in concerted activities according to their own views of their self-interest. In sum, we cannot conclude that the national labor policy provides any support for such agreements.

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On the other hand, the policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit. One could hardly contend, for example, that one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers, or a system of computing wages that, because of differences im methods of production, would be more costly to one set of employers than to another. The anticompetitive potential of such a combination is obvious, but is little more severe than what is alleged to have been the purpose and effect of the conspiracy in this case to establish wages at

a level that marginal producers could not pay so that they would be driven from the industry. And if the conspiracy presently under attack were declared exempt it would hardly be possible to deny exemption to such avowedly discriminatory schemes.

From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy. See, e.g., Associated

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Press v. United States, 326 U.S. 1, 19, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013; Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457, 465, 61 S.Ct. 703, 706, 85 L.Ed. 949; Anderson v. Shipowners Assn., 272 U.S. 359, 364—365, 47 S.Ct. 125, 71 L.Ed. 298.

Thus the relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws.

II.

The UMW next contends that the trial court erroneously denied its motion for a new trial based on claimed errors in the admission of evidence.

In Eastern R. R. Presidents Conf. v. Noerr Motor Freight Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464, the Court rejected an attempt to base a Sherman Act conspiracy on evidence consisting entirely of activities of competitors seeking to influence public officials. The Sherman Act, it was held, was not intended to bar concerted action of this kind even though the resulting official action damaged other competitors at whom the campaign was aimed. Furthermore, the legality of the conduct 'was not at all affected by any anticompetitive purpose it may have had,' id., at 140, 81 S.Ct. at 531—even though the 'sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business,' Id., at 138, 81 S.Ct. at 530. Nothing could be clearer from the Court's opinion than that anticompetitive purpose did not illegalize the conduct there involved.

We agree with the UMW that both the Court of Appeals and the trial court failed to take proper account of the Noerr case. In approving the instructions of the trial court with regard to the approaches of the union and the operators to the Secretary of Labor and to the TVA officials, the Court of Appeals considered Noerr as applying only to conduct 'unaccompanied by a purpose or intent to further a conspiracy to violate a statute. It is

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the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal.' 325 F.2d, at 817. Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent of purpose. The Court of Appeals, however, would hold the conduct illegal depending upon proof of an illegal purpose.

The instructions of the trial court to the jury exhibit a similar infirmity. The jury was instructed that the approach to the Secretary of Labor was legal unless part of a conspiracy to drive small operators out of business and that the approach to the TVA was not a violation of the antitrust laws 'unless the parties so urged the TVA to modify its policies in buying coal for the purpose of driving the small operators out of business.' If, therefore, the jury determined the requisite anticompetitive purpose to be present, it was free to find an illegal conspiracy based solely on the Walsh-Healey and TVA episodes, or in any event to attribute illegality to these acts as part of a general plan to eliminate Phillips and other operators similarly situated. Neither finding, however, is permitted by Noerr for the reasons stated in that case. Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, given the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error.[3]

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There is another reason for remanding this case for further proceedings in the lower courts. It is clear under Noerr that Phillips could not collect any damages under the Sherman Act for any injury which it suffered from the action of the Secretary of Labor. The conduct of the union and the operators did not violate the Act, the action taken to set a minimum wage for government purchases of coal was the act of a public official who is not claimed to be a co-conspirator, and the jury should have been instructed, as UMW requested, to exclude any damages which Phillips may have suffered as a result of the Secretary's Walsh-Healey determinations.[4] See also American Banana Co. v. United Fruit Co., 213 U.S. 347, 358, 29 S.Ct. 511, 513, 53 L.Ed. 826; Angle v. Chicago, St. Paul, Minneapolis & Omaha R. Co., 151 U.S. 1, 16—21, 14 S.Ct. 240, 245, 247, 38 L.Ed. 55; Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co., 214 F.2d 413, 418 (C.A.5th Cir. 1954). The trial court, however, admitted evi-

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dence concerning the Walsh-Healey episodes for 'whatever bearing it may have on the overall picture' and told the jury in its final instructions to include in the verdict all damages resulting directly from any act which was found to be part of the conspiracy. The effect this may have had on the jury is reflected by the statement of the Court of Appeals that the jury could reasonably conclude 'that the wage determination for the coal industry under the Walsh-Healey Act and the dumping of West Kentucky coal on the TVA spot market materially and adversely affected the operations of Phillips in the important TVA market * * *,' 325 F.2d, at 815, and that '(t)his minimum wage determination prevented Phillips from bidding on the TVA term market * * *,' id., at 814.[5]

The judgment is reversed and the case remanded for further proceedings consistent with this opinion. It is so ordered.

Reversed and remanded.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK, and Mr. Justice CLARK agree, concurring.

As we read the opinion of the Court, it reaffirms the principles of Allen Bradley Co. v. Local Union, No. 3, IBEW, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939, and tells the trial judge:

First. On the new trial the jury should be instructed that if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a

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wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws.

Second. An industry-wide agreement containing those features is prima facie evidence of a violation.*

In Allen Bradley Co. v. Union, No. 3, IBEW, supra, the union was promoting closed shops in the New York City area. It got contractors to purchase equipment only from local manufacturers who had closed-shop agreements with the union; and it got manufacturers to confine their New York City sales to contractors employing the union's members. Agencies were set up to boycott recalcitrant local contractors and manufacturers and bar from the area equipment manufactured outside its boundaries. As we said:

'The combination among the three groups, union, contractors, and manufacturers, became highly successful from the standpoint of all of them. The business of New York City manufacturers had a phenomenal growth, thereby multiplying the jobs available for the Local's members. Wages went up, hours were shortened, and the New York electrical equip-

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ment prices soared, to the decided financial profit of local contractors and manufacturers.' 325 U.S., at 800, 65 S.Ct., at 1535.

I repeat what we said in Allen Bradley Co. v. Union No. 3, IBEW, supra, 325 U.S., at 811, 65 S.Ct., at 1540:

'The difficulty of drawing legislation primarily aimed at trusts and monopolies so that it could also be applied to labor organizations without impairing the collective bargaining and related rights of those organizations has been emphasized both by congressional and judicial attempts to draw lines between permissible and prohibited union activities. There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the (Sherman) Act.'

Congress can design an oligopoly for our society, if it chooses. But business alone cannot do so as long as the antitrust laws are enforced. Nor should business and labor working hand-in-hand be allowed to make that basic change in the design of our so-called free enterprise system. If the allegations in this case are to be believed, organized labor joined hands with organized business to drive marginal operators out of existence. According to those allegations the union used its control over West Kentucky Coal Co. and Nashville Coal Co. to dump coal at such low prices that respondents, who were small operators, had to abandon their business. According to those allegations there was a boycott by the union and the major companies against small companies who needed major companies' coal land on which to operate. Accord-

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ing to those allegations, high wage and welfare terms of employment were imposed on the small, marginal companies by the union and the major companies with the knowledge and intent that the small ones would be driven out of business.

The only architect of our economic system is Congress. We are right in adhering to its philosophy of the free enterprise system as expressed in the antitrust laws and as enforced

by Allen Bradley Co. v. Union, supra, until the Congress delegates to big business and big labor the power to remold our economy in the manner charged here.

1. The parties stipulated that the damages period would include the four-year limitation period, 15 U.S.C. § 15b (1958 ed.), preceding the filing of Phillips' cross claim and extend up to December 31, 1958, the date on which Phillips terminated its business.

2. Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency.

3. It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the 'established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny. Standard Oil Co. v. United States, 221 U.S. 1, 46, 47, 31 S.Ct. 502, 510, 55 L.Ed. 619. United States v. Reading Co., 253 U.S. 26, 43—44, 40 S.Ct. 425, 427, 428, 64 L.Ed. 760.' Federal Trade Comm'n v. Cement Institute, 333 U.S. 683, 705, 68 S.Ct. 793, 805, 92 L.Ed. 1010; see also Heike v. United States, 227 U.S. 131, 145, 33 S.Ct. 226, 229, 57 L.Ed. 450; American Medical Assn. v. United States, 76 U.S.App.D.C. 70, 87—89, 130 F.2d 233, 250—252 (1942), aff'd. 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434 (certiorari limited to other issues).

4. By contrast, in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777, we held that the acts of a wartime purchasing agent appointed by the Canadian Government could be proved as part of the conspiracy and as an element in computing damages. The purchasing agent, however, was not a public official but the wholly owned subsidiary of an American corporation alleged to be a principal actor in the conspiracy. The acts complained of had been performed at the direction of the purchasing agent's American parent and there was 'no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from (the plaintiff) be stopped.' 370 U.S. at 706, 82 S.Ct., at 1414. That case is wholly dissimilar to both Noerr and the present case.

5. This latter conclusion regarding the term market would seem doubly erroneous as Phillips had virtually conceded, in the course of offering evidence respecting bids of the alleged conspirators on the term market, that it was claiming no damages from its exclusion from the term market, a market it never had any immediate prospect of entering. The trial court ruled that the proffered testimony was inadmissible on the damages phase of the case.

* 'It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. United States v. Schenck, D.C., 253 F. 212, 213, affirmed 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; Levey v. United States, 9 Cir., 92 F.2d 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. Eastern States Retail Lumber Dealers' Association v. United States, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490; Lawlor v. Loewe, 235 U.S. 522, 534, 35 S.Ct. 170, 171, 59 L.Ed. 341; American Column & Lumber Co. v. United States, 257 U.S. 377, 42 S.Ct. 114, 66 L.Ed. 284; United States v. American Linseed Oil Co., 262 U.S. 371, 43 S.Ct. 607, 67 L.Ed. 1035.' Interstate Circuit v. United States, 306 U.S. 208, 227, 59 S.Ct. 467, 474, 83 L.Ed. 610.

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85 S.Ct. 1585
14 L.Ed.2d 626

UNITED MINE WORKERS OF AMERICA, Petitioner,
v.
James M. PENNINGTON et al.

No. 48.
Argued Jan. 27, 1965.
Decided June 7, 1965.

[Syllabus from pages 657-658 intentionally omitted]

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Harrison Combs, Washington, D.C., for petitioner.

John A. Rowntree, Knoxville, Tenn., for respondents.

Theodore J. St. Antoine, Washington, D.C., for American Federation of Labor and Congress of Industrial

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Organizations, as amicus curiae.

Mr. Justice WHITE delivered the opinion of the Court.

This action began as a suit by the trustees of the United Mine Workers of America Welfare and Retirement Fund against the respondents, individually and as owners of Phillips Brothers Coal Company, a partnership, seeking to recover some $55,000 in royalty payments alleged to be due and payable under the trust provisions of the National Bituminous Coal Wage Agreement of 1950, as amended, September 29, 1952, executed by Phillips and United Mine Workers of America on or about October 1, 1953, and reexecuted with amendments on or about September 8, 1955, and October 22, 1956. Phillips filed an answer and a cross claim against UMW, alleging in both that the trustees, the UMW and certain large coal operators had conspired to restrain and to monopolize interstate commerce in violation of §§ 1 and 2 of the Sherman Antitrust Act, as amended, 26 Stat. 209, 15 U.S.C. §§ 1, 2 (1958 ed.). Actual damages in the amount of $100,000 were claimed for the period beginning February 14, 1954, and ending December 31, 1958.[1]

The allegations of the cross claim were essentially as follows: Prior to the 1950 Wage Agreement between the operators and the union, severe controversy had existed in the industry, particularly over wages, the welfare fund and the union's efforts to control the working time of

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its members. Since 1950, however, relative peace has existed in the industry, all as the result of the 1950 Wage Agreement and its amendments and the additional understandings entered into between UMW and the large operators. Allegedly the parties considered overproduction to be the critical problem of the coal industry. The agreed solution was to be the elimination of the smaller companies, the larger companies thereby controlling the market. More specifically, the union abandoned its efforts to control the working time of the miners, agreed not to oppose the rapid mechanization of the mines which would substantially reduce mine employment, agreed to help finance such mechanization and agreed to impose the terms of the 1950 agreement on all operators without regard to their ability to pay. The benefit to the union was to be increased wages as productivity increased with mechanization, these increases to be demanded of the smaller companies whether

mechanized or not. Royalty payments into the welfare fund were to be increased also, and the union was to have effective control over the fund's use. The union and large companies agreed upon other steps to exclude the marketing, production, and sale of nonunion coal. Thus the companies agreed not to lease coal lands to nonunion operators, and in 1958 agreed not to sell or buy coal from such companies. The companies and the union jointly and successfully approached the Secretary of Labor to obtain establishment under the Walsh-Healey Act, as amended, 49 Stat. 2036, 41 U.S.C. § 35 et seq. (1958 ed), of a minimum wage for employees of contractors selling coal to the TVA, such minimum wage being much higher than in other industries and making it difficult for small companies to compete in the TVA term contract market. At a later time, at a meeting attended by both union and company representatives, the TVA was urged to curtail its spot market purchases, a substantial portion of which

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were exempt from the Walsh-Healey order. Thereafter four of the larger companies waged a destructive and collusive price-cutting campaign in the TVA spot market for coal, two of the companies, West Kentucky Coal Co. and its subsidiary Nashville Coal Co., being those in which the union had large investments and over which it was in position to exercise control.

The complaint survived motions to dismiss and after a five-week trial before a jury, a verdict was returned in favor of Phillips and against the trustees and the union, the damages against the union being fixed in the amount of $90,000, to be trebled under 15 U.S.C. § 15 (1958 ed.). The trial court set aside the verdict against the trustees but overruled the union's motion for judgment notwithstanding the verdict or in the alternative for a new trial. The Court of Appeals affirmed. 325 F.2d 804. It ruled that the union was not exempt from liability under the Sherman Act on the facts of this case, considered the instructions adequate and found the evidence generally sufficient to support the verdict. We granted certiorari. 377 U.S. 929, 84 S.Ct. 1333, 12 L.Ed.2d 294. We reverse and remand the case for proceedings consistent with this opinion.

I.

We first consider UMW's contention that the trial court erred in denying its motion for a directed verdict and for judgment notwithstanding the verdict, since a determination in UMW's favor on this issue would finally resolve the controversy. The question presented by this phase of the case is whether in the circumstances of this case the union is exempt from liability under the antitrust laws. We think the answer is clearly in the negative and that the union's motions were correctly denied.

The antitrust laws do not bar the existence and operation of labor unions as such. Moreover, § 20 of the Clayton Act, 38 Stat. 738, and § 4 of the Norris-LaGuardia

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Act, 47 Stat. 70, permit a union, acting alone, to engage in the conduct therein specified without violating the Sherman Act. United States v. Hutcheson, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788; United States v. International Hod Carriers Council, 313 U.S. 539, 61 S.Ct. 839, 85 L.Ed. 1508, affirming per curiam, 37 F.Supp. 191 (D.C.N.D.Ill.1941); United States v. American Federation of Musicians, 318 U.S. 741, 63 S.Ct. 665, 87 L.Ed. 1120, affirming per curiam, 47 F.Supp. 304 (D.C.N.D.Ill.1942).

But neither § 20 nor § 4 expressly deals with arrangements or agreements between unions and employers. Neither section tells us whether any or all such arrangements or agreements are barred or permitted by the antitrust laws. Thus Hutcheson itself stated:

'So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.' 312 U.S., at 232, 61 S.Ct. at 466. (Emphasis added.)

And in Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939, this Court made explicit what had been merely a qualifying expression in Hutcheson and held that 'when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included with the exemptions of the Clayton and Norris-LaGuardia Acts.' Id., 325 U.S. at 809, 65 S.Ct. at 1540. See also United Brotherhood of Carpenters v. United States, 330 U.S. 395, 398—400, 67 S.Ct. 775, 778, 91 L.Ed. 973; United States v. Employing Plasterers Assn., 347 U.S. 186, 190, 74 S.Ct. 452, 454, 98 L.Ed. 618. Subsequent cases have applied the Allen Bradley doctrine to such combinations without regard to whether they found expression in a collective bargaining agreement, United Brother-

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hood of Carpenters v. United States, supra; see Local 24 of International Brotherhood of Teamsters, etc., v. Oliver, 358 U.S. 283, 296, 79 S.Ct. 297, 304, 3 L.Ed.2d 312, and even though the mechanism for effectuating the purpose of the combination was an agreement on wages, see Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46 (C.A.8th Cir. 1958), or on hours of work, Philadelphia Record Co. v. Manufacturing Photo-Engravers Assn., 155 F.2d 799 (C.A.3d Cir. 1946).

If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not successfully defend this contract provision if it were challenged under the antitrust laws by the United States or by some party injured by the arrangement. Cf. Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939; United States v. Borden Co., 308 U.S. 188, 203—205, 60 S.Ct. 182, 190, 191, 84 L.Ed. 181; Lumber Prods. Assn. v. United States, 144 F.2d 546, 548 (C.A.9th Cir. 1944), aff'd on this issue sub nom. United Brotherhood of Carpenters v. United States, 330 U.S. 395, 398—400, 67 S.Ct. 775, 777, 778, 91 L.Ed. 973; Las Vegas Merchant Plumbers Assn. v. United States, 210 F.2d 732 (C.A.9th Cir. 1954), cert. denied, 348 U.S. 817, 75 S.Ct. 29, 99 L.Ed. 645; Local 175, IBEW v. United States, 219 F.2d 431 (C.A.6th Cir. 1955), cert. denied, 349 U.S. 917, 75 S.Ct. 606, 99 L.Ed. 1250. In such a case, the restraint on the product market is direct and immediate, is of the type characteristically deemed unreasonable under the Sherman Act and the union gets from the promise nothing more concrete than a hope for better wages to come.

Likewise, if as is alleged in this case, the union became a party to a collusive bidding arrangement designed to drive Phillips and others from the TVA spot market, we think any claim to exemption from antitrust liability would be frivolous at best. For this reason alone the motions of the unions were properly denied.

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A major part of Phillips' case, however, was that the union entered into a conspiracy with the large operators to impose the agreed-upon wage and royalty scales upon the smaller, nonunion operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and pre-empting the market for the large, unionized operators.

The UMW urges that since such an agreement concerned wage standards, it is exempt from the antitrust laws.

It is true that wages lie at the very heart of those subject about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit. National Labor Relations Board v. Truck Drivers Union, 353 U.S. 87, 94—96, 77 S.Ct. 643, 646—647, 1 L.Ed.2d 676. The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. Apex Hosiery Co. v. Leader, 310 U.S. 469, 503—504, 60 S.Ct. 982, 997, 84 L.Ed. 1311; see Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46 (C.A.8th Cir. 1958). We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers.

This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardl-

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ess of the subject or the form and content of the agreement. Unquestionably the Board's demarcation of the bounds of the duty to bargain has great relevance to any consideration of the sweep of labor's antitrust immunity, for we are concerned here with harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting 'the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation,' Fibreboard Paper Prods. Corp. v. National Labor Relations Board, 379 U.S. 203, 211, 85 S.Ct. 398, 403, 13 L.Ed.2d 233. But there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws. Local 24 of Intern. Broth. of Teamsters, etc. v. Oliver, 358 U.S. 283, 296, 79 S.Ct. 297, 304, 3 L.Ed.2d 312; United Brotherhood of Carpenters v. United States, 330 U.S. 395, 399—400, 67 S.Ct. 775, 778, 91 L.Ed. 973.

We have said that a union may make wage agreements with a multiemployer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior.[2] But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from

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the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.

We do not find anything in the national labor policy that conflicts with this conclusion. This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards. Apex Hosiery Co. v. Leader, 310

U.S. 469, 503, 60 S.Ct. 982, 997, 84 L.Ed. 1311. But there is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being strait-jacketed by some prior agreement with the favored employers.

So far as the employer is concerned it has long been the Board's view that an employer may not condition the signing of a collective bargaining agreement on the union's organization of a majority of the industry. American Range Lines, Inc., 13 N.L.R.B. 139, 147 (1939); Samuel Youlin, 22 N.L.R.B. 879, 885 (1940); Newton Chevrolet, Inc., 37 N.L.R.B. 334, 341 (1941); see National Labor Relations Board v. George P. Pilling & Son Co., 119 F.2d 32, 38 (C.A.3d Cir. 1941). In such cases the obvious interest of the employer is to ensure that acceptance of the union's wage demands will not adversely affect his competitive position. In American Range Lines, Inc., supra, the

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Board rejected that employer interest as a justification for the demand. '(A)n employer cannot lawfully deny his employees the right to bargain collectively through their designated representative in an appropriate unit because he envisions competitive disadvantages accruing from such bargaining.' 13 N.L.R.B., at 147. Such an employer condition, if upheld, would clearly reduce the extent of collective bargaining. Thus, in Newton Chevrolet, Inc., supra, where it was held a refusal to bargain for the employer to insist on a provision that the agreed contract terms would not become effective until five competitors had signed substantially similar contracts, the Board stated that '(t)here is nothing in the Act to justify the imposition of a duty upon an exclusive bargaining representative to secure an agreement from a majority of an employer's competitors as a condition precedent to the negotiation of an agreement with the employer. To permit individual employers to refuse to bargain collectively until some or all of their competitors had done so clearly would lead to frustration of the fundamental purpose of the Act to encourage the practice of collective bargaining.' 37 N.L.R.B., at 341. Permitting insistence on an agreement by the union to attempt to impose a similar contract on other employers would likewise seem to impose a restraining influence on the extent of collective bargaining, for the union could avoid an impasse only by surrendering its freedom to act in its own interest vis-a-vis other employers, something it will be unwilling to do in many instances. Once again, the employer's interest is a competitive interest rather than an interest in regulating its own labor relations, and the effect on the union of such an agreement would be to limit the free exercise of the employees' right to engage in concerted activities according to their own views of their self-interest. In sum, we cannot conclude that the national labor policy provides any support for such agreements.

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On the other hand, the policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit. One could hardly contend, for example, that one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers, or a system of computing wages that, because of differences im methods of production, would be more costly to one set of employers than to another. The anticompetitive potential of such a combination is obvious, but is little more severe than what is alleged to have been the purpose and effect of the conspiracy in this case to establish wages at

a level that marginal producers could not pay so that they would be driven from the industry. And if the conspiracy presently under attack were declared exempt it would hardly be possible to deny exemption to such avowedly discriminatory schemes.

From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy. See, e.g., Associated

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Press v. United States, 326 U.S. 1, 19, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013; Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457, 465, 61 S.Ct. 703, 706, 85 L.Ed. 949; Anderson v. Shipowners Assn., 272 U.S. 359, 364—365, 47 S.Ct. 125, 71 L.Ed. 298.

Thus the relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws.

II.

The UMW next contends that the trial court erroneously denied its motion for a new trial based on claimed errors in the admission of evidence.

In Eastern R. R. Presidents Conf. v. Noerr Motor Freight Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464, the Court rejected an attempt to base a Sherman Act conspiracy on evidence consisting entirely of activities of competitors seeking to influence public officials. The Sherman Act, it was held, was not intended to bar concerted action of this kind even though the resulting official action damaged other competitors at whom the campaign was aimed. Furthermore, the legality of the conduct 'was not at all affected by any anticompetitive purpose it may have had,' id., at 140, 81 S.Ct. at 531—even though the 'sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business,' Id., at 138, 81 S.Ct. at 530. Nothing could be clearer from the Court's opinion than that anticompetitive purpose did not illegalize the conduct there involved.

We agree with the UMW that both the Court of Appeals and the trial court failed to take proper account of the Noerr case. In approving the instructions of the trial court with regard to the approaches of the union and the operators to the Secretary of Labor and to the TVA officials, the Court of Appeals considered Noerr as applying only to conduct 'unaccompanied by a purpose or intent to further a conspiracy to violate a statute. It is

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the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal.' 325 F.2d, at 817. Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent of purpose. The Court of Appeals, however, would hold the conduct illegal depending upon proof of an illegal purpose.

The instructions of the trial court to the jury exhibit a similar infirmity. The jury was instructed that the approach to the Secretary of Labor was legal unless part of a conspiracy to drive small operators out of business and that the approach to the TVA was not a violation of the antitrust laws 'unless the parties so urged the TVA to modify its policies in buying coal for the purpose of driving the small operators out of business.' If, therefore, the jury determined the requisite anticompetitive purpose to be present, it was free to find an illegal conspiracy based solely on the Walsh-Healey and TVA episodes, or in any event to attribute illegality to these acts as part of a general plan to eliminate Phillips and other operators similarly situated. Neither finding, however, is permitted by Noerr for the reasons stated in that case. Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, given the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error.[3]

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There is another reason for remanding this case for further proceedings in the lower courts. It is clear under Noerr that Phillips could not collect any damages under the Sherman Act for any injury which it suffered from the action of the Secretary of Labor. The conduct of the union and the operators did not violate the Act, the action taken to set a minimum wage for government purchases of coal was the act of a public official who is not claimed to be a co-conspirator, and the jury should have been instructed, as UMW requested, to exclude any damages which Phillips may have suffered as a result of the Secretary's Walsh-Healey determinations.[4] See also American Banana Co. v. United Fruit Co., 213 U.S. 347, 358, 29 S.Ct. 511, 513, 53 L.Ed. 826; Angle v. Chicago, St. Paul, Minneapolis & Omaha R. Co., 151 U.S. 1, 16—21, 14 S.Ct. 240, 245, 247, 38 L.Ed. 55; Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co., 214 F.2d 413, 418 (C.A.5th Cir. 1954). The trial court, however, admitted evi-

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dence concerning the Walsh-Healey episodes for 'whatever bearing it may have on the overall picture' and told the jury in its final instructions to include in the verdict all damages resulting directly from any act which was found to be part of the conspiracy. The effect this may have had on the jury is reflected by the statement of the Court of Appeals that the jury could reasonably conclude 'that the wage determination for the coal industry under the Walsh-Healey Act and the dumping of West Kentucky coal on the TVA spot market materially and adversely affected the operations of Phillips in the important TVA market * * *,' 325 F.2d, at 815, and that '(t)his minimum wage determination prevented Phillips from bidding on the TVA term market * * *,' id., at 814.[5]

The judgment is reversed and the case remanded for further proceedings consistent with this opinion. It is so ordered.

Reversed and remanded.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK, and Mr. Justice CLARK agree, concurring.

As we read the opinion of the Court, it reaffirms the principles of Allen Bradley Co. v. Local Union, No. 3, IBEW, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939, and tells the trial judge:

First. On the new trial the jury should be instructed that if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a

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wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws.

Second. An industry-wide agreement containing those features is prima facie evidence of a violation.*

In Allen Bradley Co. v. Union, No. 3, IBEW, supra, the union was promoting closed shops in the New York City area. It got contractors to purchase equipment only from local manufacturers who had closed-shop agreements with the union; and it got manufacturers to confine their New York City sales to contractors employing the union's members. Agencies were set up to boycott recalcitrant local contractors and manufacturers and bar from the area equipment manufactured outside its boundaries. As we said:

'The combination among the three groups, union, contractors, and manufacturers, became highly successful from the standpoint of all of them. The business of New York City manufacturers had a phenomenal growth, thereby multiplying the jobs available for the Local's members. Wages went up, hours were shortened, and the New York electrical equip-

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ment prices soared, to the decided financial profit of local contractors and manufacturers.' 325 U.S., at 800, 65 S.Ct., at 1535.

I repeat what we said in Allen Bradley Co. v. Union No. 3, IBEW, supra, 325 U.S., at 811, 65 S.Ct., at 1540:

'The difficulty of drawing legislation primarily aimed at trusts and monopolies so that it could also be applied to labor organizations without impairing the collective bargaining and related rights of those organizations has been emphasized both by congressional and judicial attempts to draw lines between permissible and prohibited union activities. There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the (Sherman) Act.'

Congress can design an oligopoly for our society, if it chooses. But business alone cannot do so as long as the antitrust laws are enforced. Nor should business and labor working hand-in-hand be allowed to make that basic change in the design of our so-called free enterprise system. If the allegations in this case are to be believed, organized labor joined hands with organized business to drive marginal operators out of existence. According to those allegations the union used its control over West Kentucky Coal Co. and Nashville Coal Co. to dump coal at such low prices that respondents, who were small operators, had to abandon their business. According to those allegations there was a boycott by the union and the major companies against small companies who needed major companies' coal land on which to operate. Accord-

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ing to those allegations, high wage and welfare terms of employment were imposed on the small, marginal companies by the union and the major companies with the knowledge and intent that the small ones would be driven out of business.

The only architect of our economic system is Congress. We are right in adhering to its philosophy of the free enterprise system as expressed in the antitrust laws and as enforced

by Allen Bradley Co. v. Union, supra, until the Congress delegates to big business and big labor the power to remold our economy in the manner charged here.

1. The parties stipulated that the damages period would include the four-year limitation period, 15 U.S.C. § 15b (1958 ed.), preceding the filing of Phillips' cross claim and extend up to December 31, 1958, the date on which Phillips terminated its business.

2. Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency.

3. It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the 'established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny. Standard Oil Co. v. United States, 221 U.S. 1, 46, 47, 31 S.Ct. 502, 510, 55 L.Ed. 619. United States v. Reading Co., 253 U.S. 26, 43—44, 40 S.Ct. 425, 427, 428, 64 L.Ed. 760.' Federal Trade Comm'n v. Cement Institute, 333 U.S. 683, 705, 68 S.Ct. 793, 805, 92 L.Ed. 1010; see also Heike v. United States, 227 U.S. 131, 145, 33 S.Ct. 226, 229, 57 L.Ed. 450; American Medical Assn. v. United States, 76 U.S.App.D.C. 70, 87—89, 130 F.2d 233, 250—252 (1942), aff'd. 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434 (certiorari limited to other issues).

4. By contrast, in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777, we held that the acts of a wartime purchasing agent appointed by the Canadian Government could be proved as part of the conspiracy and as an element in computing damages. The purchasing agent, however, was not a public official but the wholly owned subsidiary of an American corporation alleged to be a principal actor in the conspiracy. The acts complained of had been performed at the direction of the purchasing agent's American parent and there was 'no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from (the plaintiff) be stopped.' 370 U.S. at 706, 82 S.Ct., at 1414. That case is wholly dissimilar to both Noerr and the present case.

5. This latter conclusion regarding the term market would seem doubly erroneous as Phillips had virtually conceded, in the course of offering evidence respecting bids of the alleged conspirators on the term market, that it was claiming no damages from its exclusion from the term market, a market it never had any immediate prospect of entering. The trial court ruled that the proffered testimony was inadmissible on the damages phase of the case.

* 'It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. United States v. Schenck, D.C., 253 F. 212, 213, affirmed 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; Levey v. United States, 9 Cir., 92 F.2d 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. Eastern States Retail Lumber Dealers' Association v. United States, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490; Lawlor v. Loewe, 235 U.S. 522, 534, 35 S.Ct. 170, 171, 59 L.Ed. 341; American Column & Lumber Co. v. United States, 257 U.S. 377, 42 S.Ct. 114, 66 L.Ed. 284; United States v. American Linseed Oil Co., 262 U.S. 371, 43 S.Ct. 607, 67 L.Ed. 1035.' Interstate Circuit v. United States, 306 U.S. 208, 227, 59 S.Ct. 467, 474, 83 L.Ed. 610.

VIRGINIA LAWYERS WEEKLY

Law firm slammed by client sues Yelp

By: Deborah Elkins June 6, 2014

A Northern Virginia law firm is suing the consumer review site Yelp and a former divorce client for defamation for unflattering comments posted by the client.

Other businesses in Virginia have taken Yelp to task – and its users to court – for carrying negative reviews. But a legal action filed by Thomas K. Plofchan Jr. and Westlake Legal Group against Yelp and poster Christopher Schumacher appears to be the first Virginia suit by a lawyer about a negative review on Yelp.

In 2012, a contractor sued for defamation for posts on Yelp and Angie's List implying his employees stole items from a customer's home. In Dietz Development LLC v. Perez, the Virginia Supreme Court vacated an order directing the customer to delete the post. The contractor and the customer dueled to a draw in January, with a jury finding each had defamed the other, but awarding no damages, according to a news report.

When a Virginia carpet cleaning business alleged defamation by anonymous posters on Yelp, the Virginia Court of Appeals said Yelp had to provide information on the "John Doe" posters named as defendants in the defamation action. The contest in Yelp Inc. v. Hadeed Carpet Cleaning over Yelp's ability to protect user identity is pending before the Supreme Court of Virginia.

Plofchan sued Yelp, as well as the Yelp user, filing his complaint in Loudoun County Circuit Court in 2012. He won a default judgment in October 2012 against both defendants for $200,000 in compensatory damages, and an injunction requiring Yelp to remove the post. Yelp is trying to set aside the judgment, claiming defective service of process. They have removed the suit to Alexandria federal court, where a motion to remand is pending.

In his complaint, Plofchan alleged that in 2009, Schumacher made critical comments about the law firm's handling of a divorce case.

Plofchan said another lawyer in his firm handled the case and Plofchan did no work on the matter. But he did participate in a telephone conference call through the Virginia State Bar's fee mediation program to resolve the firm's fee dispute with Schumacher, who had moved to Arizona. Plofchan said the mediation concluded with a determination that the client should pay a reduced fee, and Schumacher responded with the bad review.

Plofchan's complaint alleged he notified Yelp in writing on four occasions that Schumacher's complaints about the law firm were "false and defamatory," but the comments remained on the site.

The complaint said Schumacher's statement that "Plofchan lied, denied and presented a perfect filibuster ... true to huckster form," charged "professional incompetence" and constituted defamation per se.

He also took issue with Schumacher's comments that the law firm, formerly known as Plofchan & Associates, "has a history of messing up cases ... (search Google) ..." and their "SOP is to be reactive rather than proactive."

The bar in general came in for criticism from Schumacher, who allegedly posted that his father had told him not to waste his time filing a grievance with the Virginia State Bar, as "all attorneys and judges are coworkers ... they don't piss in their own pool."
Plofchan asked for $200,000 in compensatory damages and $200,000 in punitive damages.

Yelp complains in its court filings that it first received notice of the suit 18 months after entry of the default judgment. The review website says the default judgment is void because the trial court had no power to impose an unconstitutional prior restraint on speech on the website.

Yelp also argues it has immunity from liability for third-party statements under the Communications Decency Act, 47 U.S.C. § 230(c)(1), which protects interactive computer services.

Plofchan contends Yelp is different than some online review sites, because it's not just a publisher, it's participating in the process by evaluating and filtering content posted by others. Yelp classifies some reviews as "suspect," but still makes them available.

Washington, D.C. lawyer Micah J. Ratner, who represents Yelp, did not return a call for comment. Kristen Whisenand, a spokesperson for Yelp, said in an email there are several reasons why Yelp's automated software might not recommend certain reviews.

A review may be featured less prominently if Yelp thinks it might be posted by a less established user or the review suggests bias or it's simply "an unhelpful rant or rave," Whisenand said. Yelp also tries to ferret out fake reviews – business owners praising themselves or panning competitors.

These bulletin board companies are not public services, they are for-profit entities that are participating in the review process, according to Plofchan.

Lawyers, like contractors and carpet cleaners, are all service providers, according to Plofchan. "Our reputation is our stock in trade. Virginia law has a very clear demarcation of defamation per se," which covers damage to professional reputation.

"You have to be very clear about factual allegations," because "businesses need to be able to protect their reputations," he said.

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