IN THE

Supreme Court of Virginia

RECORD NO. 141480

GINA L. SCHAECHER
and
HAPPY TAILS DEVELOPMENT, LLC,

Appellants,

v.

ROBINA RICH BOUFFAULT,

Appellee.

REPLY BRIEF OF APPELLANTS

Gina L. Schaecher (VSB No. 70281)
KASIMER, PIERCE & SCHAECHER, P.C.
1900 Gallows Road, Suite 210
Tysons Corner, Virginia 22182
(703) 893-3914 – Telephone
(571) 405-6757 – Facsimile
gschaecher@kasimerlaw.com

Counsel for Appellants

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY TO BOUFFAULT'S ARGUMENTS 1

I. BOUFFAULT'S STATEMENTS ARE DEFAMATORY DUE TO THE CONTEXT IN WHICH THEY WERE MADE. 1

A. Bouffault used her personal email to make defamatory statements to subvert the review process. 2

B. Bouffault's statements regarding violations of ordinances, restrictive covenants and easement agreements are false, defamatory and actionable. 3

C. Bouffault's statements calling Ms. Schaecher a liar are actionable 5

II. BOUFFAULT IS NOT A MEMBER OF A LEGISLATIVE BODY NOR WAS SHE ENGAGED IN A LEGISLATIVE PROCESS 7

III. BOUFFAULT CANNOT RAISE ISSUES ON APPEAL THAT THE TRIAL COURT DID NOT DECIDE. 8

IV. HTDLLC HAS PLEAD SUFFICIENT FACTS TO STATE A CLAIM FOR TORTIOUS INTERFERENCE. 9

A. Bouffault's interference with HTDLLC's performance of the Sales Contract is the actionable conduct. 10

B. HTDLLC has clearly asserted facts to support a competitive relationship between it and Bouffault. 12

C. HTDLLC has alleged sufficient facts and not merely conclusory statements. 13

D. The Sellers were aware of Bouffault's tortious conduct. 14

CONCLUSION 15

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

CASES

Allaun v. First & Merchs. Nat'l Bank of Richmond, 190 Va. 104, 56 S.E.2d 83 (1949) 9

CaterCorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 431 S.E.2d 277 (1993) 14

Chapel v. Com., 197 Va. 406, 89 S.E.2d 337 (1955) 8

Chapin v. Knight Ridder Inc., 993 F.2d 1087 (4th Cir. 1993) 1

County of Fairfax v. Fleet Indus. Park LP, 242 Va. 426, 410 S.E.2d 669 (1991) 7

Fein v. Payandeh, 284 Va. 599, 734 S.E.2d 655 (2012) 14

Gray v. WALS-TV, 384 So. 2d 1062 (Ala. 1980), *overruled on other grounds by Nelson v. Lapeyrouse Grain Corp.*, 534 So.2d 1085 (Ala. 1988) 3

Imperial Dev. Inc. v. Seaboard Sur. Co., 518 N.W.2d 623 (Minn. 1994) 4

Kellermann v. McDonough, 278 Va. 478, 684 S.E.2d 786 (2009) 9

Laird v. City of Danville, 225 Va. 256, 302 S.E.2d 21 (1983) 7

Mumpower v. Housing Authority, 176 Va. 426, 11 S.E.2d 732 (1940) 7

Security Ben. Association v. Daily News Pub. Co., 299 F. 445 (8th Cir. 1924) 4

Thrasher v. Thrasher, 210 Va. 624, 172 S.E.2d 771 (1970) 9

REPLY TO BOUFFAULT'S ARGUMENTS

I. BOUFFAULT'S STATEMENTS ARE DEFAMATORY DUE TO THE CONTEXT IN WHICH THEY WERE MADE.

Bouffault's arguments that her false and defamatory statements are not actionable ignore the fact that Ms. Schaecher and HTDLLC were before the community seeking approval for their Project. It is the factual context in which Bouffault's statements were made that demonstrate their clear defamatory nature. A statement is defamatory if it tends to harm the reputation of another as to lower him in the estimate of the community or to deter third persons from associating or dealing with him. *Chapin v. Knight Ridder Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993). Bouffault made her false statements about Ms. Schaecher and HTDLLC to harm their reputation in the Clarke County community and to paint them as persons without regard for conservation easements, local ordinances, or the truth so as to defeat approval of their Project. Bouffault's false and malicious statements that Ms. Schaecher, HTDLLC and their Project were in violation of the conservation easement, the local ordinances, and that Ms. Schaecher was not truthful were repeated by members of the community at the public hearings for the Project. Bouffault's intent was to poison the well against Ms. Schaecher, HTDLLC and their Project in order to prevent a rescue animal facility from being built near Ms. Bouffault's Property.

For instance, Ms. Bouffault calling Ms. Schaecher a liar is defamatory because Ms. Schaecher, her business, HTDLLC and their Project were being scrutinized and evaluated by the public in seeking a special use permit ("SUP") to build the animal rehabilitation Project. Bouffault, by telling members of the community that Ms. Schaecher is a liar, is saying that Ms. Schaecher cannot be trusted to tell the truth about her Project.

A. Bouffault used her personal email to make defamatory statements to subvert the review process.

Part of the context in which Bouffault's false and defamatory statements were made, that the Court must consider, is that Bouffault did not make these false and defamatory statements in public meetings or in any meetings of the planning commission during which Ms. Schaecher would have had an opportunity to respond and refute such false and defamatory statements. Instead, Bouffault used her private email account to send messages containing false and defamatory statements about Ms. Schaecher, HTDLLC and their Project, outside of the review process, in order to subvert the public process and advance Bouffault's personal agenda to ruin the reputation of Ms. Schaecher, her business HTDLLC and their Project. It is this context that demonstrates the defamatory nature of Bouffault's false statements.

B. Bouffault's statements regarding violations of ordinances, restrictive covenants and easement agreements are false, defamatory and actionable.

Remarkably, Bouffault argues to this Court that a breach of a private agreement, be it either private restrictive covenants or a conservation easement agreement in this case, is not a legal violation and cannot support a claim of defamation. (Bouffault Brief at 14). However, courts directly considering whether an alleged breach of a private agreement or violations of law can support a claim for libel or slander have found defamation. Many such courts have held such statements regarding an alleged breach of contract to be *per se* defamation as the defamatory character is so obviously and materially harmful to the plaintiff that injury to his or her reputation may be presumed. Thus, many courts have ruled that the facts supported or established a finding that there was libel or slander *per se* by statements defaming a person or organization by saying that they did not, or would not, fulfill their private agreements, since such statements would tend to subject the plaintiff to public ridicule and would injure or attack their integrity or their reputations, both individually and their businesses. *See Gray v. WALS-TV,* 384 So.2d 1062 (Ala. 1980), *overruled on other grounds by Nelson v. Lapeyrouse Grain Corp.*, 534 So.2d 1085 (Ala. 1988) (Plaintiffs were alleged to have breached their contract to

provide brochures although having received full payment; court found that statements imputed that plaintiffs corruptly obtained their contract, took the funds and failed to produce the brochures and would subject plaintiffs to ridicule and injure their reputations and that of their businesses.); *Security Ben. Ass'n v. Daily News Pub. Co.,* 299 F. 445 (8th Cir. 1924) (Article attacking the credit, integrity and business methods of the organization was libelous *per se*); *Imperial Dev. Inc. v. Seaboard Sur. Co.*, 518 NW.2d 623 (Minn. 1994) (Court reasoned that allegations that a company regularly breached its contracts clearly disparaged that company's business reputation and such statement was defamatory *per se*).

In the instant case, Ms. Schaecher and HTDLLC were seeking the necessary approvals for their proposed rescue animal facility Project. Clearly, in this context, it was harmful to Ms. Schaecher's reputation, that of her business HTDLLC and that of the Project when Bouffault asserted that Ms. Schaecher, HTDLLC and their Project violated restrictive covenants, a conservation easement and local ordinances. There can be no other purpose for Bouffault to have made such statements. Bouffault's intent was to prevent the Project by damaging the reputation of Ms. Schaecher, HTDLLC and their Project within the community and prevent public approval of the Project.

C. Bouffault's statements calling Ms. Schaecher a liar are actionable.

As Bouffault has admitted, calling a person a liar is actionable under certain circumstances. (Bouffault Brief at p. 12). However, Bouffault continues to contend that calling Ms. Schaecher a liar, untruthful, or stating that she has misrepresented the truth, was not defamatory because it did not harm her reputation as an attorney, a point that Ms. Schaecher does not concede and vehemently contests. However, Bouffault's argument misses the obvious point which is that calling Ms. Schaecher a liar damages her reputation and that of her business within the Clarke County community while she and HTDLLC are seeking the public approval of the proposed rescue kennel Project. Bouffault's statements are intended to damage Ms. Schaecher's reputation to prevent the public approval of her Project. It is hard to image a more damaging statement than to call a SUP applicant a liar, thus suggesting that the community and the regulators cannot trust what the applicant has represented with respect to the proposed Project. Again, it is the context in which Bouffault has made her false and defamatory statements that render them so damaging. It is the fact that Bouffault's false statements that Ms. Schaecher has been dishonest with respect to her representations regarding the proposed Project or Ms. Schaecher's operation of an illegal kennel operation were

made while Ms. Schaecher and HTDLLC are seeking approval of the SUP and the public approval of their Project that render Bouffault's false and disparaging statements so ruinous and defamatory. It is clear that Bouffault's statements calling Ms. Schaecher a liar, saying that she is lying or in any way implying that she was less than truthful or dishonest would harm her reputation and that of her business because Ms. Schaecher and HTDLLC were seeking the public approval for their Project. Bouffault's false and disparaging statements during this time of public scrutiny of the proposed rescue kennel Project make the statements particularly harmful. For a proposed Project, the community and those reviewing the SUP application must be able to rely upon the representations of the applicant. If the applicant is labeled as dishonest or a liar, the community in which the Project is proposed will doubt the applicant's representations and be less inclined to support the Project. Bouffault's statements calling Ms. Schaecher dishonest or untrustworthy impute dishonesty with respect to Ms. Schaecher's and HTDLLC's proposed Project. It is difficult to imagine a set of circumstances under which such statements could not be viewed as defamatory. Bouffault's contentions to the contrary are meritless.

II. BOUFFAULT IS NOT A MEMBER OF A LEGISLATIVE BODY NOR WAS SHE ENGAGED IN A LEGISLATIVE PROCESS.

Contrary to Bouffault's unsubstantiated contentions, she is not a member of a legislative body nor was she engaged in the legislative process when she sent email messages from her private email account containing false and defamatory statements about Ms. Schaecher, her business HTDLLC and their Project. (Bouffault Brief at 23). Bouffault is an appointed member of the Planning Commission. She is not an elected official or a member of the local legislative body, the Board of Supervisors. Bouffault was not engaged in any legitimate legislative process when she sent email messages from her private email account which contained false and defamatory statements about Ms. Schaecher, HTDLLC and their Project. There was no law making activity even remotely associated with Bouffault's conduct.

Legislative authority cannot be delegated to an individual or to a non-legislative body despite Bouffault's unsupported contentions to the contrary. *See County of Fairfax v. Fleet Indus. Park LP*, 242 Va. 426, 432-33, 410 S.E.2d 669, 673 (1991). This Court has uniformly held that the power to exercise legislative authority may not be removed from the control of the local legislative representatives of the people. *Id., citing Mumpower v. Housing Authority*, 176 Va. 426, 454, 11 S.E.2d 732, 743 (1940); Laird v.

City of Danville, 225 Va. 256, 261, 302 S.E.2d 21, 24 (1983); *Chapel v. Com.,* 197 Va. 406, 413-14, 89 S.E.2d 337, 342 (1955).

Legislative immunity clearly is not available to Bouffault, nor is it applicable to shield her intentionally tortious conduct in the instant case.

III. BOUFFAULT CANNOT RAISE ISSUES ON APPEAL THAT THE TRIAL COURT DID NOT DECIDE.

The trial court did not consider, decide or rule upon the affirmative defenses that Bouffault attempts to improperly raise before this Court. Specifically, Bouffault's arguments regarding sovereign immunity, qualified privilege and the *Noerr Pennington* doctrine were not considered, decided or ruled upon by the trial court. Such were not at issue, nor properly raised on a demurrer.[1] In addition, Bouffault did not raise the trial court's failure to consider or decide these issues or otherwise assert these issues on cross-appeal. Therefore, these affirmative defenses that were not considered, or decided by, the trial court are not appealable and not properly before this Court. Ms. Schaecher and HTDLLC specifically object to Bouffault arguing them before this Court and submit that such cannot be considered by this Court.

---

[1] A demurrer challenges only the sufficiency of the allegations of plaintiff's claim, not affirmative defenses improperly raised by a defendant. (JA57-60; 201-2). These defenses and affirmative defenses were not properly before the trial court on a demurrer, and the trial court did not consider, decide or rule upon them.

An issue not raised or ruled on by a trial court will not be noticed on appeal. *Kellermann v. McDonough*, 278 Va. 478, 503, 684 S.E.2d 786, 800 (2009), citing *Thrasher v. Thrasher*, 210 Va. 624, 628-29, 172 S.E.2d 771, 774 (1970). A question not raised in the trial court and upon which the record contains no evidence will not be considered on appeal. *Allaun v. First & Merchs. Nat'l Bank of Richmond*, 190 Va. 104, 113, 56 S.E.2d 83, 88 (1949). The trial court did not consider, decide or rule upon Bouffault's affirmative defenses of privilege or other immunity. Bouffault did not cross appeal to assert error as to the trial court's failure to consider these defenses. Therefore, these affirmative defenses are not before this Court and cannot be decided for the first time on appeal. There is no evidence before this Court to support these affirmative defenses and Bouffault's arguments as to such are a violation of this Court's rules and Virginia law.

IV. HTDLLC HAS PLEAD SUFFICIENT FACTS TO STATE A CLAIM FOR TORTIOUS INTERFERENCE.

Bouffault continues to ignore the fact that the intentional interference at issue in this case is Bouffault's interference with HTDLLC's ability to perform as Purchaser, and not interference with the Sellers. Although the Sellers in this case would have their own cause of tortious interference, this is not the case before this Court. HTDLLC has asserted that Bouffault's defamatory statements and threatening, harassing, and intimidation

through third parties, so delayed and increased HTDLLC's cost of performance that its continued performance was no longer financially feasible, and as a result, it had to terminate the Sales Contract.

A. Bouffault's interference with HTDLLC's performance of the Sales Contract is the actionable conduct.

Bouffault argues to this Court that a claim for interference can only be raised when the defendant's interference impacts a third party's performance of a contract as opposed to the plaintiff's performance of its contract. However, Virginia law does not make this distinction, nor has this Court held that interference with the plaintiff's performance is not actionable. It is Bouffault's tortious interference with HTDLLC's performance that is at issue in the instant case, and not, contrary to Bouffault's confusing contentions, Bouffault's interference with the Sellers.

As plead, HTDLLC had to terminate the Sales Contract because it could not afford to continue to defend against, and refute Bouffault's defamatory statements and harassment. As plead in the Complaint and as demonstrated by the attached Sales Contract, HTDLLC had to continue to pay additional engineers, consultants, scientists, appraisers and purchase services from specialized experts to refute and address Bouffault's defamatory statements and harassment in order to obtain the necessary approvals for the Project. (JA 118-120). As demonstrated by HTDLLC's

Sales Contract, HTDLLC had negotiated a study period in order to secure the necessary approvals for the Project. (JA 171). Bouffault's false and defamatory statements delayed the process of obtaining the necessary approvals and rendered the process far more expensive. (JA 119-120). HTDLLC had to negotiate extensions to the study period in the Sales Contract in order to buy the additional time necessary to retain the experts and professionals to provide the expert opinions required to refute Bouffault's false and defamatory statements. HTDLLC also had to retain the services necessary to track the source of threatening phone calls and notes being left at the homes of persons who supported the HTDLLC Project and to contact the appropriate authorities to ensure the safety of the persons associated with, and those who had publicly supported, the Project.

When HTDLLC could not timely secure all the necessary approvals within the original study period, as amended, the Sales Contract was terminated. (JA 149). HTDLLC had to pay the Sellers an additional nonrefundable amount and make monthly installment payments in order to revive and reinstate the Sales Contract to secure more time to seek the necessary approvals and to continue to refute and address Bouffault's false and defamatory statements and her harassing conduct. (JA 160). As

Bouffault's interference continued, HTDLLC could not afford to continue to fight the effects of Bouffault's false and defamatory statements and harassing conduct. HTDLLC had to terminate the Sales Contract. (JA 120). Bouffault's intentional interference so increased HTDLLC's cost of performance in securing the necessary approvals for the Project, that its performance was no longer economically feasible. This fact is further demonstrated by the continued delay of approval of the Project despite the Planning Department's repeated recommendation of approval. (JA 87-89).

HTDLLC could not secure the funding for its Project without the necessary approvals for the rescue kennel, and HTDLLC could not timely secure the necessary approvals due to Bouffault's tortious interference. (JA 85). HTDLLC's performance became economically unfeasible and it had to terminate the Sales Contract. (JA 119-120). It was Bouffault's continued false, defamatory statements and her harassment of persons supporting the Project that delayed the approval process and rendered HTDLLC's performance increasingly more expensive and ultimately cost prohibitive. (JA 118-120).

B. HTDLLC has clearly asserted facts to support a competitive relationship between it and Bouffault.

Although Bouffault attempts to distinguish and discredit HTDLLC's claim by contending that HTDLLC has not established a competitive

relationship, despite the fact that such is not relevant to a claim of intentional interference with a contract, the facts alleged in the Complaint clearly demonstrate that Bouffault was competing against HTDDLLC to prevent its animal facility from being built. Again, Bouffault incorrectly focuses on the relationship between Bouffault and the Sellers when the claim in the instant case concerns the competitive relationship between HTDLLC, as the purchaser, and Bouffault as an opposing land owner. Bouffault did not want the rescue kennel built near her property, so she engaged in in a campaign to ruin the reputation of Ms. Schaecher, HTDLLC and tarnish the image of their Project to prevent the construction of the facility. There can be no doubt that Bouffault had a personal agenda and acted upon it to prevent the animal rescue Project.

C. HTDLLC has alleged sufficient facts and not merely conclusory statements.

At the pleading stage, HTDLLC need only allege sufficient facts to assert the elements of a claim of intentional interference. One of the elements of the claim is the intentional interference inducing the termination of the relationship. HTDLLC has plead in specific detail Bouffault's tortious conduct which constitutes the interference. (JA 118-120). So long as the claim contains sufficient allegations of material fact so as to inform the defendant of the nature and character of the claim, it will withstand

demurrer. *CaterCorp, Inc. v. Catering Concepts, Inc.,* 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993). Even a flawed complaint will withstand demurrer if it is drafted in such a way that the defendant is on notice of the true nature of the claim and the allegations may be supplemented in discovery. *Fein v. Payandeh,* 284 Va. 599, 608, 734 S.E.2d 655, 660 (2012). In the instant case, there can be no doubt that the Complaint contains sufficient facts to inform Bouffault of the nature and the character of the claims against her.

D. The Sellers were aware of Bouffault's tortious conduct.

In direct contradiction of the facts as alleged, Bouffault continues to contend that the Sellers of the Property were not aware of or improperly influenced by Bouffault's tortious conduct. In making such an unsupportable statement, Bouffault continues to ignore the fact that the Sellers, as the owners of the Property, were required to remain part of the SUP review process and participated in the efforts to refute and address Bouffault's tortious conduct. (JA 171). As Bouffault is well aware, the landowner, beside the SUP Applicant if a contract purchaser, must sign the SUP Application, and the Sellers continued to participate in the SUP review process, as clearly reflected by the public record in this case, and as required by the Sales Contract. (JA 171). As an example, it was the Sellers that secured the letter from the easement holder confirming that

HTDLLC's proposed use of the Property was consistent with the terms of the easement after Bouffault made her false and defamatory statements to the Winchester Star that the Project violated the conservation easement. (JA 123). Moreover, Bouffault's conduct was made public when she copied or communicated with individuals within the Clarke County government. Bouffault's tortious conduct was well know to the Sellers as Bouffault's defamatory statements were revealed in a response to a FOIA request and her conduct was reported in the local newspaper. (JA 104-5; 204-6).

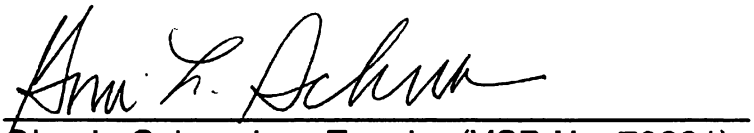
CONCLUSION

Ms. Schaecher and HTDLLC respectfully request that this Court reverse the circuit court's decision that dismissed their claims, remand the case to the circuit court for further proceedings in accordance with this Court's Opinion, and for any and all other relief that this Court deems just and appropriate.

Respectfully submitted,

GINA L. SCHAECHER and
HAPPY TAILS DEVELOPMENT, LLC,
Appellants,
By Counsel

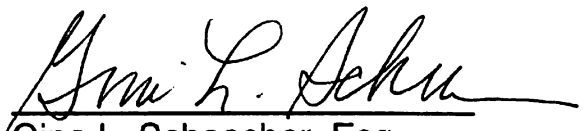
KASIMER, PIERCE & SCHAECHER, P.C.



Gina L. Schaecher, Esquire (VSB No. 70281)
KASIMER, PIERCE & SCHAECHER, P.C.
1900 Gallows Road, Suite 210
Tysons Corner, Virginia 22182
(703) 893-3914 - Telephone
(703) 405-6757 - Facsimile
gschaecher@kasimerlaw.com
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Reply Brief of Appellant, and one electronic copy (via email or CD) have been filed with the Clerk of the Supreme Court of Virginia and three (3) copies, and one electronic copy, have been mailed postage prepaid and/or hand delivered to counsel for Appellee, Julia B. Judkins, Esquire, Bancroft, McGavin, Horvath & Judkins, P.C., 3920 University Drive, Fairfax, Virginia 22030 on this 24th day of February, 2015.



Gina L. Schaecher, Esq.