IN THE

Supreme Court of Virginia

RECORD NO. 141480

GINA L. SCHAECHER
and
HAPPY TAILS DEVELOPMENT, LLC,

Appellants,

v.

ROBINA RICH BOUFFAULT,

Appellee.

BRIEF OF APPELLEE

Julia B. Judkins (VSB No. 22597)
Maureen E. Cummins (VSB No. 85680)
BANCROFT, MCGAVIN, HORVATH & JUDKINS, P.C.
3920 University Drive
Fairfax, Virginia 22030-0022
(703) 385-1000 (telephone)
(703) 385-1555 (facsimile)
jjudkins@bmhjlaw.com

Counsel for Appellee

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

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I. COUNTER-STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This matter comes before this Honorable Court on the appeal of Gina L. Schaecher ("Schaecher") and Happy Tails Development, LLC ("HTDLLC") of a demurrer, which was sustained on all counts. The Appellants claim that the Appellee, Robina Bouffault ("Bouffault") is liable for defamation and intentional interference with a contract due to email correspondence between Ms. Bouffault and members of the Clarke County Planning Commission regarding a special use permit application. The circuit court was correct in sustaining the demurrer and dismissing Appellant's case for failure to allege prima facie claims of defamation or intentional interference with a contract. The statements relied upon by Appellants are not actionable, are subject to immunity, and do not otherwise support a claim for defamation. Further, the statements are protected under the First Amendment and the *Noerr-Pennington* Doctrine. Likewise, the allegations in the Amended Complaint do not set forth sufficient facts to support a claim of intentional interference of a contract upon which relief can be granted.

On December 2, 2013, Appellants filed a lawsuit against Ms. Bouffault alleging two counts of defamation on behalf of each Appellant, and one count of tortious interference of contract on behalf of HTDLLC. (JA 1-21). On

December 23, 2013, Ms. Bouffault filed a Motion Craving Oyer and a Demurrer (JA 22-27). Ms. Bouffault then filed a Memorandum in Support of Demurrer on April 15, 2014. (JA 28- 47). Appellants filed an Opposition to Demurrer with accompanying exhibits on April 30, 2014. (JA 49-89). Following a hearing on the demurrer on May 7, 2014, the circuit court sustained the demurrer on all counts, and granted Appellants leave to file an Amended Complaint. (JA 99-100).

An Amended Complaint, which included ten exhibits identified as A through J, was then filed on May 29, 2014. (JA 101-189). Ms. Bouffault demurred to the Amended Complaint, and noticed the matter for a hearing. (JA 190-195). Appellants filed an Opposition to Demurrer which included an opposition to Ms. Bouffault's previously-filed objections to discovery and motions related to discovery. (JA 196-246). On July 9, 2014, Ms. Bouffault filed a Memorandum in Support of Demurrer to the Amended Complaint. (JA 247-256). A hearing was then held on July 16, 2014, and following argument, the court sustained the demurrer on all counts, finding that the statements relied upon by Appellants were not defamatory, that the statements were committed incident to the performance of a legislative function, and that HTDLLC failed to set forth a claim for tortious interference of a contract. (JA

257-340). The order reflecting the circuit court's rulings was entered following the hearing, on July 16, 2014. (JA 341).

The Honorable Judge Wetsel did not err in his rulings because as a matter of law, Appellants failed to state viable causes of action for defamation and tortious interference of a contract. Additionally, the statements are not actionable because as a member of the Clarke County Planning Commission, Ms. Bouffault is entitled to immunity and qualified privilege; and as a citizen, Ms. Bouffault is protected by the *Noerr-Pennington* Doctrine. For these reasons, for the reasons set forth below, and in addition to the arguments articulated in the Opposition Brief to Petition for Appeal, the appellee, Ms. Bouffault, respectfully requests that this Court *affirm* the judgment of the circuit court in sustaining the demurrer to all counts and dismissal of the Amended Complaint with prejudice.

II. COUNTER-STATEMENT OF FACTS

In 2013, HTDLLC, a company managed by Ms. Schaecher, entered into a contract to purchase certain land in Clarke County for the purpose of creating a canine rehabilitation facility with a farming operation. (JA 101-02). A portion of the property was intended to board more than five canine animals, and as such, required a special use permit pursuant to Clarke

County Zoning Ordinances. (JA 102). Ms. Bouffault, a nearby property owner, sent email communications, identified as Exhibits B through I of the Amended Complaint, discussing the special use permit application as well as matters related to the application, and her opposition to the special use permit. (JA 102-10; 124-89). It is a matter of public record that the individuals with whom Ms. Bouffault communicated by email were also individuals who were involved in the Clarke County government and consideration of the application for a special use permit. (JA 273:2-22, 274:1-9, 281:18-22, 300:2-10, 20-22, 301:1-9, 313:5-9). Apart from the email communications, a local newspaper, the Winchester Star, reported statements that Ms. Bouffault made regarding HTDLLC's special use permit application, which included Ms. Bouffault's understanding that conservation easements related to the property "usually allow only agricultural enterprises", "a dog kennel is not an agricultural enterprise," and "40 dogs barking would probably constitute noise pollution." (JA 104-05).

Based on these communications, relied upon by each Appellant individually in support of their claims of defamation (JA 103-17), Appellants claim that they incurred additional costs and expenses associated with the special use permit application process and had to negotiate amendments to

the sales contract. (JA 119-20). Further, HTDLLC claims that through these communications, Ms. Bouffault intentionally interfered with the land sale contract. (JA 118-120). The documents attached and identified as Exhibit J to the Amended Complaint evidence an existing and continuing contractual relationship between HTDLLC and the sellers, which was terminable for any reason whatsoever by the purchaser, and which was not in breach at any time pertinent to these proceedings. (JA 148-89).

III. STANDARD OF REVIEW

A demurrer tests the legal sufficiency of a pleading to determine whether it states a cause of action upon which relief can be granted. Va. Code § 8.01-273(A); *Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 131 (2003). On appeal, this Court reviews the circuit court's judgment on demurrer *de novo*. *Webb v. Virginian-Pilot Media Companies, LLC,* 287 Va. 84, 88 (2014). To survive demurrer, "[a complaint must] allege sufficient facts to constitute a foundation in law for the judgment sought, and not merely conclusions of law. . . a pleading must be made with sufficient definiteness to enable the court to find existence of a legal basis for judgment." *Hubbard v. Dresser, Inc.*, 271 Va. 117, 122-23 (2006) (internal citations omitted). Pursuant to Va. Sup. Ct. R. 1:4(i), "the mention in a pleading of an

accompanying exhibit, shall itself without more, make such exhibit a part of the pleading." Merely parroting the elements of a particular tort do not constitute well pleaded facts, only legal conclusions. *Pulte Home Corp. v. Parex, Inc.*, 265 Va. 518, 523-24 (2003). A demurrer should be sustained where the complaint contains mere conclusory statements unsupported by facts. *Dean v. Dearing*, 263 Va. 485, 490 (2002).

V. ARGUMENT AND AUTHORITIES

A. The Statements Alleged are Not Actionable Because They Are Not Defamatory and Are Expressions of Opinion.

The circuit court did not err in sustaining Ms. Bouffault's demurrer because the statements alleged in the Amended Complaint are not actionable, and therefore Appellants failed to plead a claim for defamation. A prima facie claim for defamation requires (1) publication of, (2) an actionable statement with, (3) requisite intent. *Jordan v. Kollman*, 269 Va. 569, 575 (2005). To be actionable, a statement must be "both false and defamatory." *Id.* A statement is defamatory if it "tend[s]...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...defamatory words are those that 'make the plaintiff appear odious, infamous, or ridiculous.'" *Chapin v.*

Knight-Ridder Inc., 993 F.2d 1087, 1092 (4th Cir. 1993)(internal citations omitted).

In ruling on a demurrer, the circuit court must determine as a matter of law whether each allegedly defamatory statement is reasonably capable of the defamatory meaning ascribed to it. *Webb*, 287 Va. at 89. "An allegedly defamatory statement must be considered as a whole...thus the factual portions of an allegedly defamatory statement may not be evaluated for truth or falsity in isolation, but must be considered in view of any accompanying opinions and other stated facts." *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 47 (2009); *Adams v. Lawson*, 58 Va. 250, 255-56 (1867); *Moss v. Harwood*, 102 Va. 386, 391 (1904). Further, allegedly defamatory statements must be "taken in their plain and natural meaning" and while "every fair inference that may be drawn from the pleadings be resolved in the plaintiff's favor," neither the court nor counsel may extend the meaning of allegedly defamatory language "beyond its ordinary and common acceptation." *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 8 (1954).

Additionally, the trial court must "determine as a matter of law whether the allegedly defamatory statements contain provably false factual statements or are merely statements of opinion." *Hyland v. Raytheon Tech. Servs. Co.*,

277 Va. at 47. If the trial judge determines that a statement is merely an opinion, it is not actionable. This is because both the United States Constitution and the Virginia Constitution protect "pure expression of opinion, not amounting to 'fighting words' however ill-founded, without inhibition by actions for libel and slander'... 'however pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.'" *American Communications Network, Inc. v. Williams*, 264 Va. 336, 340 (2002)(internal citations omitted).

For these reasons, the circuit court was not creating a new subjective standard of the law in Virginia as argued by Appellants (Appellant Br. 6-7), but rather was undertaking the duty of the trial court to determine, based on the plain meaning of the statements and the law of the Commonwealth, if the statements were defamatory as a matter of law. *See, e.g., Webb,* 287 Va. at 90 ("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"). As part of its analysis, the circuit court was articulating an example to show what is required for defamation, and was inquiring as to the "sting" of the alleged statement in order to determine whether the statements were

defamatory or merely offensive. *See, e.g., Cutaia v. Radius Eng'g Int'l, Inc.*, 2012 U.S. Dist. LEXIS 19736 *9-*10 (W.D. Va. Feb. 16, 2012)("'merely offensive or unpleasant statements are not defamatory.' '**This means that to be actionable as defamation, a statement must contain a defamatory sting**'")(emphasis added)(internal citations omitted).

On demurrer, the circuit court examined each statement, as well as Exhibits B-I, and determined that none of the statements in Appellants' Amended Complaint were actionable. (JA 266-325). The court properly considered the attached exhibits pursuant to Va. Sup. Ct. R. 1:4(i) in order to review the statements in context rather than rely on the conclusory arguments set forth in the Amended Complaint. When viewed in context, none of the following statements are actionable and as a result, none of them support a claim for defamation:

1. The circuit court did not commit reversible error by sustaining the demurrer with respect to statements made by Ms. Bouffault on September 3, 2013, about whether a conservation easement prohibited the proposed kennel use on the property; that conservation easements usually allow only agricultural enterprises; and a dog kennel is not an agricultural enterprise. (JA104-05; 124-25) (Appellant Br.12-13). These statements, taken in their

plain meaning, do not make the Appellants appear "odious, infamous or ridiculous" nor do they purport to damage Appellant's reputation. Further, without engaging in an impermissible extension of the plain meaning of the statements, there is no inference or imputation of a violation of law such to constitute a defamatory statement; rather these are expressions of opinion based on Ms. Bouffault's understanding of the conservation easement. Expressions of opinion are not actionable. *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. at 47 (expressions of opinion...are constitutionally protected and are not actionable as defamation). Relative statements that depend on a speaker's viewpoint are expressions of opinion. *Cashion v. Smith*, 286 Va. 327, 336 (2013). Questioning whether or not the proposed kennel use would violate a conservation easement is not an actionable statement for defamation.

2. The demurrer was properly sustained with regard to statements made on or about September 4, 2013 to the Winchester Star, a local newspaper. The statements "conservation easements usually allow only agricultural enterprises;" "a dog kennel is not an agricultural enterprise;" and "40 dogs barking would probably constitute noise pollution" are not false or defamatory, as Appellants allege. (JA 104-105) (Appellant Br. 13-14). These

statements do not tend to damage the reputation of the Appellants, but rather show an expression of opinion with regard to the matters presented in the special use permit application. Further, and contrary to Appellants' argument in their Opening Brief, these statements cannot be proven true or false because they are not unequivocal statements; rather it is apparent that the speaker is uncertain of the applicability of a conservation easement or potential noise pollution by use of the terms "usually" and "probably." Statements of opinion are those which cannot be objectively characterized as true or false. *Jordan v. Kollman*, 269 Va. 569 (2005). The statements are from the speaker's viewpoint, do not point to a firm statement of fact, and express an uncertainty regarding the applicability of a conservation easement and the potential for noise pollution. For these reasons, these statements cannot be grounds for defamation, and the circuit court did not err when sustaining the demurrer.

3. The circuit court properly held that when viewing statements made on September 6, 2013, in the context of the entire discussion and not in isolation, the statement "it would appear that Ms. Schaecher was not totally truthful" is not actionable, either as defamation or defamation per se. (JA 324:8-10, 325:1-3).

In Virginia, statements which impute an unfitness to perform duties of employment or prejudice a person in his or her profession or trade are actionable as defamation per se. *Fleming v. Moore*, 221 Va. 884, 889 (1981), *citing Shupe v. Rose's Stores*, 213 Va. 374, 376 (1972). The statements claimed here were not made against Ms. Schaecher in the context of her trade or profession as an attorney, but rather in the context of her application for a special use permit for the proposed dog kennel. (JA 126-27). Nor could these statements be construed to infer an unfitness as an attorney at law or prejudice Ms. Schaecher in the legal profession. Therefore, this statement is not actionable per se.

Additionally, these statements are not defamatory. Implying someone is a liar is not actionable except under certain circumstances, not present here. As stated by this Court in *Moseley v. Moss*, 47 Va. 534, 538 (1850):

> "words spoken that are merely vituperative, or insulting, or imputing only disorderly or immoral conduct or ignoble habits, propensities or inclinations, or the want of delicacy, refinement or good breeding are not regarded by the common law as sufficiently substantial to be treated as injuries calling for redress in damages. Thus **it is not actionable to call a man a** villain, cheat, rascal, **liar**, coward or ruffian; to accuse him of swearing falsely, unless in a judicial proceeding; to charge him with a base or fraudulent act, or with having been guilty of adultery, seduction or debauchery; or a women with vulgarity, obscenity or incontinence; where such defamation bears only on the feelings or general standing or reputation of the party implicated, and the misconduct

imputed has not been made punishable by statute." (emphasis added).

Further, these statements occurred between Ms. Bouffault and other Clarke County Planning Commission members, and evidences Ms. Bouffault's opinion based on her understanding of Ms. Schaecher's representations of the proposed dog kennel project. The use of the phrase "it would appear" indicates that this statement is the opinion of Ms. Bouffault as she attempts to ascertain the intended use of the property with regard to the special use permit application. These statements are made from Ms. Bouffault's viewpoint and are not actionable.

4. The circuit court correctly found that statements made on September 6, 2013 regarding whether the proposed dwelling size met the requirements of a private restrictive covenant are not actionable because they are not defamatory. (JA 113, 129-30, 291:3-22; 292:1-22, 293:1-9). Comments interpreting the dwelling requirements of a private restrictive covenant are opinion, as they are based on the speaker's viewpoint and interpretation of the covenant. Furthermore, these comments do not make the Appellants appear odious, ridiculous, or otherwise damage their reputation. They do not impute a violation of law, as argued by Appellants (Appellant Br. 14-15), because private restrictive covenants are treated like contracts, not

laws. "[W]hen reviewing the covenant, the court is mindful that 'the function of the court is to construe the contract made by the parties, not to make a contract for them." *Dysart v. Sunnyside Dev., LLC*, 73 Va. Cir. 210, 212 (Va. Cir. Ct. 2007), *citing Doswell Ltd. Ptnr. v. Virginia Elec. & Power Co.*, 251 Va. 215, 222 (1996). Opinions on whether the proposed dwelling size would breach the covenant are not actionable.

5. Statements made on September 7, 2013 regarding the proposed plan for the kennel building and its compliance with county ordinances on detached dwellings are not actionable because they are statements of interpretation and opinion based on the viewpoint of the speaker, Ms. Bouffault, and as such, the circuit court did not err in sustaining the demurrer as to these statements. (JA113-14, 131-33, 293: 11-22; 294-295). Further, the statements are not defamatory; they do not impugn Appellants' reputation or make them appear odious, ridiculous, or incompetent. When read in full, the statements refer to the special use permit application and whether it complies, based on Ms. Bouffault's interpretation and understanding, with local ordinances. Whether Ms. Bouffault's opinion as to compliance with local ordinances is correct or incorrect is irrelevant because the comments are not defamatory.

6. With regard to statements contained in an email sent on September 11, 2013, in which Ms. Bouffault discusses whether the proposed kennel complies with a residential ordinance, the circuit court was correct in ruling that those statements were not actionable because they are not defamatory. (JA 134-36, 296-302:1-10). The statements are merely interpretations of county residential ordinances, in the context of representations made about the proposed purpose of the kennel. Whether Ms. Bouffault analyzed the wrong ordinance does not make the statement defamatory; rather it further illustrates that Ms. Bouffault's opinion, even if mistaken, was from her viewpoint based on her understanding of the proposed kennel plans and applicable ordinance.

7. The circuit court did not commit reversible error by holding that statements regarding Ms. Schaecher's sister were not actionable. (JA 302:11-22, 303-309:1-19). None of the statements alleged or identified in Exhibit G as defamatory relate to either Appellant, nor are they about either or both Appellants. The law in Virginia requires that "a libel plaintiff must show that the alleged libel was **published 'of or concerning' him**." *Dean v. Dearing*, 263 Va. 485, 488 (2002), *citing Gazette, Inc. v. Harris*, 229 Va. 1, 27 (1985)

("[b]ut if the publication on its face does not show that it applies to the plaintiff, the publication is not actionable").

Appellants argue that the "small group" theory exception applies to this case. (Appellant Br. 17). This exception states that, "if the defamatory language is directed towards 'a comparably 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.'" *Dean,* 263 Va. at 488. Appellants contend that statements made regarding Ms. Schaecher's sister's ability to pay her mortgage on a separate and irrelevant piece of property are defamatory and the defamation is imputed to members of the small group, i.e. the remainder of the family who are associated with the kennel project. (Appellant Br. 18). The facts, as alleged, do not support this exception.

In *Ewell v. Boutwell*, this Court said, "if words used in respect to the small or restricted group expressly but impersonally and indefinitely refer to one or more of the several members thereof, one of the members, in order to maintain his action, must establish the application of the language to himself." 138 Va. 402, 411 (1924). There is nothing in the statement, as alleged, to show that Ms. Bouffault intended to injure the reputation of Ms.

Schaecher or HTDLLC, or her family as a whole, or to make either of them appear odious, infamous, or ridiculous. The statements were limited to Ms. Schaecher's sister, and are therefore not actionable.

8. Allegations that statements made in an email dated October 3, 2013 are likewise not actionable and the demurrer was properly sustained. (JA 310:14-22, 311-317:1). Similar to other statements regarding private restrictive covenants, these statements were from the impressions and viewpoint of the speaker, Ms. Bouffault, and are therefore not actionable. Additionally, they do not contain a defamatory sting, do not impugn the reputation of the Appellants, or make the Appellants appear odious, ridiculous, or incompetent. Finally, as addressed *supra*, private restrictive covenants are treated like contracts in Virginia, so these statements do not and cannot create an inference of a violation of law; the only inference which may arise is a breach of contract, which is not defamatory.

9. The circuit court properly found that statements made in an email dated October 4, 2013 were not actionable. (JA 317:2-22, 318-326:1-20). When reading the statement that Ms. Schaecher "has effectively stated that you, Jesse, are not stating the facts correctly (i.e., you are lying). . ." and "I firmly believe that Gina is lying and manipulating the facts to her benefit..." in

the context of the entire Amended Complaint and all Exhibits, the statements are not actionable because they are opinion and not defamatory (calling someone a liar is not actionable, *See Moss*, cited *supra*.). *See also Lauderback v. American Broadcasting Cos.*, 741 F.2d 193, 196 (8th Cir. 1984)(newscaster's statements about insurance agents as "crooks" and "liars" inactionable for defamation because statements were opinions).

Appellants contend that these statements could not be mere opinions and instead are actionable *per se*, but the facts, as alleged, do not support that position. To be actionable *per se*, as discussed *supra*, the statements must relate to Ms. Schaecher's trade or profession or discuss her unfitness as an attorney. When read in context, Ms. Bouffault was referring to the special use permit application, not to Ms. Schaecher's legal profession. The mere fact that Ms. Schaecher is an attorney does not make any statement made about her, under any circumstance, actionable. Therefore, the following cases relied upon by Appellants do not apply to the facts, as alleged, in this matter: *Pouslton v. Rock*, 251 Va. 254, 260 (1996)(reversing a trial court for granting a remittitur of a jury verdict where statements that plaintiff had stolen inventory from his employer had damaged his personal and business reputation, therefore the statements were defamation per se, and as such,

compensatory damages may be awarded even in the absence of showing actual injury or damage and punitive damages may be awarded even in the absence of compensatory damages); *Freedlander v. Edens Broadcasting, Inc.*, 734 F.Supp. 221 (E.D. Va. 1990)(granting a motion to dismiss and finding that a song broadcasted over the radio, even though it painted plaintiff in an unfavorable light, was not defamatory per se because the words did not impute nor induce that the plaintiff committed a crime of moral turpitude, nor did it contain false statements of fact to make the statements actionable); and *Perk v. Vector Resources Group, Ltd.*, 253 Va. 310 (1997)(finding that statements alleging that an attorney, who had undertaken collections work for a corporate client, had not reported certain payments he had received to this client, were not defamatory per se even though the attorney argued the statements injured his reputation for honesty and integrity).

Specifically, *Tronfeld v. National Mutual Insurance Company,* relied upon by Appellants, does not support the facts of this case. That case involved statements made against an attorney in his professional capacity: that he "just takes people's money" and that "clients of Jay Tronfeld would receive more money [for their claims] if they had not hired Jay..." 272 Va. 709, 711 (2006). Here, none of the statements either directly mention Ms.

Schaecher's profession as an attorney or impute or infer an unfitness in the practice of law.

Further, this case differs from other cases cited by Appellants for the proposition that certain opinions are actionable for defamation. (Appellant Br. 20-21). In each of the cases cited by the Appellants, the courts found the opinions actionable because they were statements of opinion containing facts which could be proven false, and were related to the plaintiffs' trades or professions. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 662 n.3 (1989)(finding that a statement of opinion implying that an attorney, vying to be a judicial candidate, was "unethical" and "capable of extortion" *in the context of his career as an attorney* could be actionable because it could be proven true or false); *Cretella v. Kuzminski*, 2008 U.S. Dist. LEXIS 42152 (finding that statements of opinion regarding reporting an attorney to the Maryland Bar Association for attempted extortion, unethical behavior in the practice of law, and causing his law firm embarrassment were actionable); *WJLA-TV v. Levin*, 264 Va. 140, 154-57 (2002)(holding that statements regarding sexual assault of female patients published by a television station, even though they were the opinions of the women, were actionable against the television station because they were published as fact,

accusing the doctor of a crime, and damaging the doctor's reputation *as a physician*). Here, the statements regarding Ms. Bouffault's opinions as to Ms. Schaecher's representations on her special use permit application are in no way related to her professional career as an attorney. Further, these statements are not facts which can be proven false; on the other hand, they come from the subjective viewpoint of the speaker based on her opinion and understanding of representations made referring to the special use permit application. The circuit court correctly held that none of these statements were actionable because they were mere expressions of opinion, and none were defamation per se. (JA 323:22, 324:1-10, 325: 1-3, 13-14).

The statements alleged in the Amended Complaint, including the attached Exhibits, when viewed in context, are not actionable because they are either not defamatory, are opinions, or a combination of both. The circuit court properly considered all of the statements and determined that they were not actionable pursuant to the law of the Commonwealth, and correctly sustained the demurrer and dismissed Appellants' claims.

B. The Circuit Court Did Not Commit Error in Sustaining the Demurrer Because of Appellee's Entitlement to Immunity, the Existence of a Qualified Privilege and Protection Under the *Noerr-Pennington* Doctrine.

The circuit court properly determined that in addition to none of the statements being "actionable" to satisfy the elements of defamation, the statements made by Ms. Bouffault are subject to immunity. Although not reached by the circuit court, Ms. Bouffault is also entitled to qualified privilege, and the protection under the *Noerr-Pennington* Doctrine. As a member of the Clarke County Planning Commission, Ms. Bouffault was exercising a legislative function by providing recommendations to other commission members with regard to Appellants' special use permit. Her comments and opinions were made pursuant to the authority granted by the Board of Supervisors of Clarke County to the Planning Commission to review and investigate special use permits. Va. Code. §§ 15.2-2200, 2210, *et seq.*; Zoning Ordinance, §§ 1-C, 5-B. Va. Code §§ 15.2-2200, 2210. Further, Ms. Bouffault is entitled to qualified privilege as she was exercising her duties as a member of the Clarke County Planning Commission and sending messages to individuals who had a lawful duty or interest in them. Finally, as a citizen, Ms. Bouffault is protected under the *Noerr-Pennington* Doctrine, which affords constitutional protection of speech made when petitioning governing bodies.

IGEN Int'l, Inc. v. Roche Diagnostics GmbH, 335 F.3d 303, 310 (4th Cir. 2003).

i. Appellee is Entitled to Legislative Immunity and Qualified Privilege.

The circuit court did not err in finding that Ms. Bouffault was not liable for defamation for statements made in the scope of her authority as a member of the Clarke County Planning Commission and exercise of a delegated legislative function. *See Blankenship v. City of Richmond*, 188 Va. 97, 103 (1948)("[w]here a member of the legislative branch of the government offends in these particulars in performance of a purely legislative duty, he is answerable to the electors from whom he derived his official position and not to the courts which have no power to inquire into the motives which prompted his action on a purely legislative matter"). As such, she is immune from liability. Further, she is additionally entitled to a qualified privilege.

Legislative immunity is available when municipal legislators are "acting within the sphere of legitimate legislative activity." *Bd. of Supervisors v. Davenport & Co, LLC*, 285 Va. 580, 589 (2013). Legislative activity includes, "delivering an opinion, uttering a speech, or haranguing in debate; proposing legislation; voting on legislation; making, publishing, presenting, and using legislative reports; authorizing investigations and issuing subpoenas; and

holding hearings and introducing material at Committee hearings." *Davenport*, 285 Va. at 589. This Court has previously found that consideration of a special use permit is a legislative function. *Ames v. Painter*, 239 Va. 343, 349 (1990). *See also Helmick v. Town of Warrenton*, 254 Va. 225, 229 (1997) (legislative functions that relate to the use of land and that have been delegated by local governing bodies to subordinate bodies, officers, or employees remain legislative functions).

Clarke County delegated to the Planning Commission legislative duties and functions by lawful ordinances. These duties included advising the Board of Supervisors and making recommendations on special use permit applications consistent with the general welfare and the orderly development of the community, as well as the duty to investigate and report to the Board of Supervisors regarding special use permit applications. Va. Code. §§ 15.2-2200, 2210, *et seq.*; Zoning Ordinance, §§ 1-C, 5-B. Va. Code §§ 15.2-2200, 2210. As the United States Supreme Court stated "the power to investigate is inherent to the power to make laws because 'a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'" *Eastland v.*

United States Servicemen's Fund, 421 U.S. 491, 505 (1975)(*citing McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)).

Ms. Bouffault, as a member of the Clarke County Planning Commission, is tasked with the investigation, gathering of information, evaluation, and preparation of a report to the Board of Supervisors regarding such items as special use permit applications. As such, her email correspondence with other members of the Planning Commission, namely Commission Chairman George Ohstrom; Director of Planning, Brandon Stidham; members Anne Caldwell, Thomas McFillen, William Steinmetz, Scott Kreider, Douglas Kruhm, Jon Turkel, Cliff Nelson, and Clay Brumback; Supervisor John Staelin; and the Zoning Administrator, Jesse Russell (JA 124-147), was within the scope of the authority and function delegated to her by the Board of Supervisors. The content of the emails contain Ms. Bouffault's opinions with regard to the investigation into the special use permit application. When viewing all of the exhibits, Ms. Bouffault's statements to the other Planning Commission members directly relate to the investigation and evaluation of the special use permit application, which entitles her to legislative immunity.

Appellants' reliance on *Sinclair v. New Cingular Wireless PCS, LLC, et al.*, can be distinguished from the case at bar. In that case, this Court

held that a planning commission did not have the authority to grant or deny a waiver to a zoning variance. 283 Va. 567 (2012). This Court analyzed the purpose of planning commissions, and found that because a "variance 'allows a property owner to do what is otherwise not allowed under the [zoning] ordinance'" that the decision to "grant or deny a critical slope waiver application cannot be delegated to planning commissions" because it is a legislative decision, which is a power not expressly delegated by statute to planning commissions. *Id.* at 577, 581-82. Here, there has been no impermissible grant of statutory decision-making power to the Clarke County Planning Commission to grant or deny special use applications. The statements made by Ms. Bouffault do not indicate or infer that she is engaged in making a "legislative decision." Indeed, none of the exhibits evidence any type of decision-making power or action contemplated by Ms. Bouffault with regard to the special use permit application. Rather, the statements show she is appropriately discussing the special use permit application in the context of her role as an investigator, evaluator, and recommender to the Board of Supervisors, which is within the scope of her legislative function as a member of the Planning Commission.

Further, because all of the communications which form the bases of Appellants' claims relate to a subject matter about which the individuals communicating had a lawful duty or interest as evidenced by the content of the exhibits, (JA 124-147), Ms. Bouffault is entitled to a qualified privilege as a matter of law. A qualified privilege "attaches to communications between persons on a subject in which the persons have an interest or duty. . . [and is defeated] if the plaintiff proves that the defamatory statement was made maliciously." *Larimore v. Blaylock*, 259 Va. 568, 571 (2000). Whether a statement was subject to a qualified privilege is a question of law to be determined by the court. *See Cashion v. Smith*, 286 Va. 327, 338 (2013).

The allegations in this case show that the statements made by Ms. Bouffault regarding the special use permit application were all made to a small group of individuals who had a lawful duty or interest to hear them. These emails were made in the context of the investigative functions of the Planning Commission, and include information learned at public hearings held for the specific purpose of addressing the permit application. There are no factual allegations to support that these statements were made maliciously (such as personal spite or ill will, knowledge that the statements were false or with a reckless disregard for the truth, or statements which include "strong or violent

language disproportionate to the occasion." *Cashion*, 286 Va. at 338-39). Without properly pleading malice, Appellants cannot defeat Ms. Bouffault's entitlement to qualified privilege.

For these reasons, because Ms. Bouffault was exercising her role as a member of the Planning Commission when she was evaluating and making recommendations to the other members, who had a legal duty and interest to receive that information, Ms. Bouffault is entitled to legislative immunity and qualified privilege.

ii. Appellants Have Not Plead Sufficient Facts to Support a Waiver of Sovereign Immunity for Intentional Torts.

Contrary to Appellant's arguments (Appellant Br. 26-28), there are insufficient facts to support that Ms. Bouffault engaged in any intentional tortious act which would defeat her entitlement to sovereign immunity. Appellants rely on *Fox v. Deese*, 234 Va. 412 (1987) to support the principle that sovereign immunity is waived when a government employee engages in an intentional tort. (Appellant Br. 22-26). Their reliance on that case is misplaced, however, since the facts and context of that case are significantly different than the allegations and claims of this immediate matter. In *Fox*, a concert promoter sued Richmond city officials for breach of contract, malicious and reckless disregard for his rights, and conspiracy to interfere

with his contractual rights with the city. *Id.* Based on his understanding of the oral agreement, the plaintiff took certain actions to prepare for the concert. *Id.* at 417. The city officials, however, had knowingly deceived him and intentionally made false representations during the negotiation of the contract. *Id.* at 417-18. The circuit court sustained the demurrer as to certain city officials on the ground of sovereign immunity. *Id.* at 423. This Court reversed the trial court, holding that the allegations sufficiently alleged that the defendants committed intentional torts and were acting outside the scope of their employment, and thus could not benefit from sovereign immunity. *Id.* at 424.

In the case at bar, Appellants' conclusory allegations against Ms. Bouffault fail to claim that Ms. Bouffault committed any intentional tort against them. First, as discussed *supra*, Appellants' claims fall short of satisfying the legal standard for defamation, and therefore the claims of defamation do not form the intentional tort to dissolve immunity. Second, Appellants make conclusory remarks such as Ms. Bouffault acted in "her own self-interest" or "made false, misleading, and defamatory statements." (Appellant Br. 24-25). When viewed in conjunction with the Exhibits, however, the statements themselves do not infer an intent to mislead or to act in one's own "self-

interest." (JA 124-147). On the contrary, the statements appear to be within the context of an investigation and evaluation process Ms. Bouffault was charged with participating in by virtue of her position on the Clarke County Planning Commission. Va. Code § 15.2-2223. Ms. Bouffault was engaging in her duties as a member of the Planning Commission, which includes evaluating special use permits (*see* Zoning Ordinance § 5-B-2-c) when the allegedly defamatory statements were made. These actions fall squarely within her delegated functions associated with government action, which involve the exercise of judgment and discretion in investigating and evaluating the merits of the special use permit application, thus entitling her to sovereign immunity. *City of Virginia Beach v. Carmichael Dev. Co.*, 259 Va. 493, 499-500 (2000); *Messina v. Burden*, 228 Va. 307, 308 (1984). For all these reasons, the circuit court was correct in sustaining the demurrer and dismissing Appellants' claims.

iii. Appellee is Shielded from Liability Based on the *Noerr-Pennington* Doctrine.

The *Noerr-Pennington* Doctrine "is concerned with efforts to affect the decisions of legislative, judicial, and executive bodies in the field of public policy matters." *Titan Am. v. Riverton Inv. Corp.*, 264 Va. 292, 301 (2002). The doctrine is pertinent to "actions seeking to enforce or challenge

governmental decisions through the use of the courts and, thus, falls [within the First Amendment protections surrounding petitions to the government]." *Id.* at 302. In Virginia, the *Noerr-Pennington* Doctrine applies to cases involving tortious interference with business expectancy. *Id.* at 302.

This doctrine grants First Amendment protections to people who petition the government. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965). *See also, Pendleton Constr. Corp. v. Rockbridge County,* 652 F. Supp. 312, 319-322 (W.D. Va.1987) (business competitor's repeated lobbying efforts to county board to effectuate denial of plaintiff's requests for certain permits and efforts to influence third parties against engaging in business with the plaintiff fell within protection of the *Noerr-Pennington* doctrine and were not actionable); *Video International Production, Inc. v. Warner-Amex Cable Communications, Inc.,* 858 F.2d 1075 (5th Cir. 1988), *cert. denied* 491 U.S. 906 (1989)(anti-trust and business tort claims brought by a cable television provider against city and competitor alleging that city action taken at the urging of the competitor favored the competitor to the detriment of the plaintiff's ability to conduct business, barred by the *Noerr-Pennington* doctrine.) It serves to insulate statements made by individuals to the government in order to influence the government in its legislative or executive

actions, unless such petitions were made with the underlying intent to indirectly interfere with business relationships of a competitor. *Titan Am.,* 264 Va. at 301.

Here, when viewing the statements in context and in plain meaning, the underlying communications between Bouffault and members of the Planning Commission were made with regard to the application of a special use permit, and Ms. Bouffault's serious and legitimate reservations about the intended use of the property, to include a kennel boarding more than five canines. She expressed her opinions and concerns to other Planning Commission members and lobbied others to vote no or recommend against the issuance of the special use permit. Significantly, the record is clear that Ms. Bouffault was not in a competitive relationship with Appellants. These statements were produced within the scope of Ms. Bouffault's position to investigate and report on land use, development, and special use permits, particularly with regard to covenants, zoning ordinances, and county land-use guidelines.

Ms. Bouffault, as a citizen of Clarke County, had the constitutional right to take action "to affect the decisions of legislative. . . .bodies in the field of public policy matters." *Titan Am.,* 264 Va. at 301. Efforts by her, as a citizen, to exercise those rights, are protected and not actionable, including written or

verbal statements or attempts to influence others in the recommendation to the Board; all are protected under the *Noerr-Pennington* Doctrine.

C. Appellant's Pleading Fails to State a Prima Facie Claim for Tortious Interference of Contract and Ms. Bouffault is Entitled to Protection of the *Noerr-Pennington* Doctrine.

The circuit court was correct in sustaining the demurrer to Count III of the Amended Complaint for failing to set forth a prima facie claim of tortious interference with a contract. To properly allege such a claim, a plaintiff must establish (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Chaves v. Johnson*, 230 Va. 112, 120 (1985). Further, if the contract is terminable at-will, which is the case in this instant matter, a plaintiff must allege "not only an *intentional* interference that caused termination of the at-will contract, but also that the defendant employed '*improper* methods.'" *Duggin v. Adams*, 234 Va. 221, 227 (1987).

In the Amended Complaint, HTDLLC has not alleged sufficient facts to establish an intentional interference which induced or caused a breach of

contract or termination of the relationship or expectancy, through improper methods, against Ms. Bouffault. First, the allegations in Count III of the Amended Complaint, as well as the contract documents marked in Exhibit J, indicate that the contract was never breached or terminated as a result of any actions by Ms. Bouffault. HTDLLC appears to acknowledge the flaw in their pleading by providing this Court with case law from various courts throughout the country in their Opening Brief to support the proposition that even if the defendant did not cause an actual breach, a plaintiff may still recover for intentional interference if the defendant improperly interfered with the performance of the contract, resulting in increased costs to the plaintiff. (Appellant Br. 36-45). However, the law of the Commonwealth of Virginia, states that to establish a prima facie case of intentional interference, the intentional interference must be the cause of a *breach* or a *termination* of the contractual relationship. *Duggin*, 234 Va. at 226.

Of the Virginia cases cited, HTDLLC relies on the *Duggin* case to support its contention that alleging interference with performance of the contract is sufficient to state an actionable claim. (Appellant Br. 39-42). That argument is not supported by the holding of the *Duggin* case. In that case, the third-party interferor was Adams, the attorney of the seller, Williams, who

was in a contract to sell land to Duggin, the buyer, who had entered into an agreement to assign the contract to a corporate developer, Centennial Development Corporation, and receive an assignment fee. *Duggin,* 234 Va. at 224-26. As alleged, throughout the course of the contract negotiations, Adams, in his role as attorney for the seller, received confidential information from the buyer, Duggin, regarding the value of the land which was the subject of the contract. Adams then used this information and his influence to intentionally interfere with the land sale contract. *Id.*

On the day Centennial Development Corporation was prepared to settle with Williams, Adams "willfully, wantonly, wrongfully, and maliciously induced Williams to sign a contract, which Adams had prepared, giving Adams the right to purchase the subject property and requiring Williams to cancel her contract with Duggin." *Id.* at 224. This Court found, that as alleged, Duggin had plead sufficient facts for intentional interference with a contract to withstand demurrer, namely, that a valid contractual relationship existed, that the interferor was aware of the relationship or business expectancy, that the interferor intentionally induced breach or termination of the relationship or expectancy by improper means, which resulted in damage to the party whose relationship or expectancy had been disrupted. *Id.* at 226, 230.

The facts plead in this matter are significantly different from *Duggin,* particularly when viewing the relationship of the parties, as well as the fact that a breach or termination of contract did not occur as a result of the actions of the third-party interferor. First, the parties in *Duggin* were in a competitive relationship where the interferor was vying for contractual rights and benefits. Here, there are no allegations that Ms. Bouffault was in competition for the land sale contract between HTDLLC and the sellers, or that she had any interaction at all with the sellers or HTDLLC. Second, in the *Duggin* matter, the interferor actually caused a breach of contract between the buyer and the seller. Here, HTDLLC fails to allege that an actual breach or termination occurred as a result of Ms. Bouffault's actions; rather, it appears that the contract was entered into after all of the statements, which were made to other individuals who were not parties to the contract, had occurred. Whether HTDLLC, as the buyer, could no longer perform based on the costs of the contract is not an element of intentional interference in Virginia.

Under Virginia law, a tortious interference claim lies against a third party who intentionally interferes and induces or causes the breach or termination of the contractual relationship of two other parties. It does not lie in the situation contemplated by HTDLLC, who argues it could not afford to continue

performance and "had to terminate" the contract prior to settlement. (Appellant Br. 45). This Court reversed the circuit court in *Duggin* because the elements of the tort were properly plead; here HTDLLC's claim for intentional interference lacks several elements to constitute a well-pleaded claim.

Further as alleged, the sales contract was terminable at-will (JA 149-189), and this Court has recognized "an individual's interest in a contract terminable at will is essentially only an expectancy of future economic gain, and he has no legal assurance that he will realize the expected gain. Thus, the cause of action for interference with contractual rights provides no protection from the mere intentional interference with a contract terminable at will." *Duggin*, 234 Va. at 226. For this reason, this Court imposed the additional element of "improper methods" for a plaintiff to prove along with "intentional interference." *Id.* at 227. As addressed *supra*, HTDLLC's claims against Ms. Bouffault do not establish an *intentional* interference as well as the use of *improper* methods to interfere with HTDLLC's at-will contract. The predicate statements relied upon to establish "improper methods" are not actionable, are subject to a qualified privilege, or subject to the *Noerr-Pennington* Doctrine, discussed *supra*.

Further, HTDLLC's claims of engaging third parties to threaten or harass persons who supported HTDLLC's proposed use for the property (JA 119-120) is not supported by the exhibits attached to the Amended Complaint (JA 122-189). There are no facts which identify who the alleged third-parties are, what threats were allegedly made, or what type of harassment was allegedly caused against HTDLLC. Blanket and conclusory statements without factual support cannot withstand demurrer.

The facts as alleged do not support that the sellers were ever aware or improperly influenced by the communications between Ms. Bouffault and members of the Planning Commission. *See Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 558 (2011)(describing the need for some interaction between the defendant and the third-party who breaches their contract with the plaintiff in a claim for tortious interference). The fact that the sellers entered into the Sales Contract on March 27, 2014, which is several months *after* the allegedly defamatory statements were made, contradicts HTDLLC's claims that Ms. Bouffault intended an interference which caused a breach or termination of the contract (JA 118-189). Further, no facts support a competitive relationship between Ms. Bouffault or either of the contracting parties. *See 17th St. Assocs., LLP v. Markel Int'l Ins. Co.*, 373

F. Supp. 2d 584, 600 (E.D. Va. 2005)("Virginia case law applying the tort of intentional interference with a business expectancy contains a fifth, unstated element to the prima facie case: a competitive relationship between the party interfered with and the interferor"). Based on the entire record, the facts as alleged are insufficient as a matter of law to state a cause of action against Ms. Bouffault for tortious interference of contract and the circuit court properly sustained the demurrer and dismissed this claim.

V. CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For all the foregoing reasons, Ms. Bouffault respectfully requests that this Court find no reversible error in the circuit court's judgment to sustain the demurrer and dismiss this matter with prejudice, and that this Court affirm the judgment.

ROBINA RICH BOUFFAULT

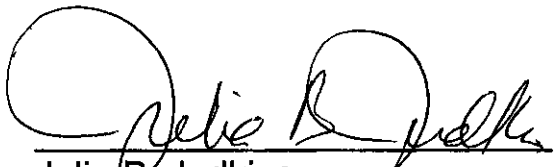
By Counsel

Julia B. Judkins, VSB No. 22597
Maureen E. Cummins, VSB No. 85680
BANCROFT, MCGAVIN, HORVATH & JUDKINS, P.C.
3920 University Drive
Fairfax, VA 22030
(703) 385-1000 (telephone)
(703) 385-1555 (facsimile)
jjudkins@bmhjlaw.com
Counsel for Appellee Robina Rich Bouffault

VI. CERTIFICATE

I hereby certify, pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia, that to the best of my knowledge and belief, this brief is in compliance with the rules. Additionally, I certify pursuant to Rule 5:26(e) of the Rules of the Supreme Court of Virginia, that on February 10, 2015, one electronic copy (via email) was filed with the Clerk of the Supreme Court of Virginia, and fifteen (15) copies of the brief were filed, via hand-delivery, with the Clerk of the Supreme Court of Virginia, and three (3) copies of the same were mailed to:

Gina L. Schaecher, Esquire (VSB 70281)
KASIMER, PIERCE & SCHAECHER, P.C.
1900 Gallows Road, Suite 210
Tysons Corner, Virginia 22182
Counsel for Appellants



Julia B. Judkins