IN THE

Supreme Court of Virginia

RECORD NO. 141480

GINA L. SCHAECHER
and
HAPPY TAILS DEVELOPMENT, LLC,

Appellants,

v.

ROBINA RICH BOUFFAULT,

Appellee.

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS 2

STATEMENT OF FACTS 4

AUTHORITIES AND ARGUMENTS 6

I. BOUFFAULT'S STATEMENTS ARE ACTIONABLE BECAUSE THEY ARE FALSE AND DEFAMATORY UNDER VIRGINIA LAW, AND THE CIRCUIT COURT'S DETERMINATION TO THE CONTRARY GRANTING THE DEMURRER IS ERRONEOUS. 6

II. BOUFFAULT'S STATEMENTS ARE ACTIONABLE AND NOT PROTECTED OPINION UNDER VIRGINIA LAW. 20

III. LEGISLATIVE IMMUNITY DOES NOT SHIELD A PERSON WHO IS NOT A MEMBER OF A LEGISLATIVE BODY NOR CONDUCTING LEGITIMATE LEGISLATIVE ACTIVITY FROM LIABILITY FOR INTENTIONAL TORTS. 22

A. Legislative immunity is an affirmative defense and Bouffault's unsupported contentions in a demurrer fail to satisfy Bouffault's burden of proof. 22

B. Bouffault's unsubstantiated contentions of immunity cannot shield Bouffault from liability for intentional torts. 26

C. Legislative immunity is not available to Bouffault because she is not a member of a legislative body engaged in law making activity. 28

IV. HTDLLC SUFFICIENTLY PLEADED A CLAIM FOR TORTIOUS INTERFERENCE, AND BOUFFAULT'S DEMURRER TO THIS CLAIM SHOULD HAVE BEEN DENIED..... 32

V. BOUFFAULT'S INTENTIONAL INTERFERENCE CAUSING INCREASED COST OF PERFORMANCE AND RENDERING THE CONTRACT COST PROHIBITIVE IS ACTIONABLE UNDER VIRGINIA LAW..... 36

CONCLUSION..... 45

CERTIFICATE OF SERVICE..... 47

TABLE OF AUTHORITIES

CASES

Bacon v. St. Paul Union Stockyards Co., 161 Minn. 522, 201 N.W. 326 (1924) 38

Benjamin v. University Internal Medical Foundation, , 254 Va. 400, 492 S.E.2d 651 (1997) 26

Board of Supervisors of Fluvanna County v. Davenport & Co., LLC, 285 Va. 580, 742 S.E.2d 59 (2013) 28

Carwile v. Richmond Newspaper, Inc., 196 Va. 1, 82 S.E.2d 588 (1954) 8, 9, 21

Chapin v. Greve, 787 F. Supp. 557 (E.D. Va. 1992) 8

Cherberg v. Peoples National Bank, 88 Wash. 2d 595, 564 P.2d 1137 (1978) 39

Coonis v. Rogers, 429 S.W.2d 709 (Mo. 1968) 38

Cretella v. Kuzminski, 2008 U.S. Dist. LEXIS 42152 *citing Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989) 20, 21

Cue v. Breland, 78 Miss. 864, 29 So. 850 (1901) 37

Dean v. Dearing, 263 Va. 485, 561 S.E.2d 686 (2002) 17

Dovel v. Betram, 184 Va. 19, 34 S.E.2d 369 (1945) 29

Duggin v. Adams, 234 Va. 221, 360 S.E.2d 832 (1987) ..... *passim*

Elder v. Holland, 208 Va. 15, 155 S.E.2d 369 (1967) 26

Fox v. Deese, 234 Va. 412, 362 S.E.2d 699 (1987) 23, 24, 26, 27

Freedlander v. Edens Broadcasting, Inc., 734 F. Supp. 221 (E.D. Va. 1990) 19

Fuste v. Riverside Healthcare Association, Inc., 265 Va. 127, 575 S.E.2d 858 (2003) 7, 11

Harber v. Ohio National Life Insurance Co., 512 F.2d 170 (8th Cir. 1975) 38

Hechler Chevrolet v. General Motors Corp., 230 Va. 396, 337 S.E.2d 744 (1985) 35

Heider v. Clemons, 241 Va. 143, 400 S.E.2d 190 (1991) 29

Isle of Wight County v. Alan Nogiec, 281 Va. 140, 704 S.E.2d 83 (2011) 31

James v. Jane, 221 Va. 43, 282 S.E.2d 864 (1980) 26, 27

Kyriazi v. Western Electric Co., 461 F. Supp. 894 (D.N.J. 1978) 38

L & H Investments, Ltd. V. Belvey Corp., 444 F. Supp. 1321 (W.D.N.C. 1978) 39

Law Research Service, 336 Fed. Supp. 510, 512 (E.D. Mo. 1971) 42

Lichter v. Fulcher, 22 Tenn. App. 670, 125 S.W.2d 501 (1938) 39

Maximus v. Lockheed, 254 Va. 408, 493 S.E.2d 375 (1987) 34

McNary v. Chamberlain, 34 Conn. 384, 91 Am. Dec. 732 (1867) 37

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) 12, 20

Morris v. Blume, 55 N.Y.S.2d 196 (1945) 37

Pacific Typesetting Co. v. International Typographical Union, 125 Wash. 273, 216 P. 358 (1923) 39

Perk v. Vector Resources Group, Ltd., 253 Va. 310, 485 S.E.2d 140 (1997) 19

Poulston v. Rock, 251 Va. 254, 467 S.E.2d 479 (1996) 19

Raytheon Tech. Services Co. v. Hyland, 273 Va. 292, 641 S.E.2d 84 20

Richardson v. La Rancherita La Jolla, Inc., 98 Ca. App.3d 73, 159 Cal. Rpter. 285 (1979) 38

Rinaldi v. Tana, 252 Md. 544, 250 A.2d 533 (1969) 38

Sanchez v. Medicorp Health System, 270 Va. 299, 618 S.E.2d 331 (2005) 7

Sidney Blumenthal & Co. v. United States, 30 F.2d 247 (2d Cir. 1928) 37

Sinclair v. New Cingular Wireless PCS, LLC, 283 Va. 567, 727 S.E.2d 40 (2012) 28

South Central Livestock Dealers, Inc. v. Security State Bank, 551 F.2d 1346 (5th Cir. 1977) 38

Sumwalt Ice & Coal Co. v. Knickerbocker Ice Co., 114 Md. 403, 80 A. 48 (1911) 38

Swengler v. Itt Corp. Electro-Optical Products Division, 993 F.2d 1063 (4th Cir. 1993) 20

Tharpe v. J. Harman Saunders, 285 Va. 476, 737 S.E.2d 890 (2013) 8

Tippett v. Hart, 497 S.W.2d 606 (Tex. Civ. App. 1973) 39

Tronfeld v. Nationwide Mutual Insurance Co., 272 Va. 709, 636 S.E.2d 447 (2006) 19

Webb v. Virginian-Pilot Media Companies, LLC, 287 Va. 84, 752 S.E.2d 808 (2014) 7

WJLA-TV v. Levin, 264 Va. 140, 564 S.E.2d 383 (2002) 21

White v. Massee, 202 Iowa 1304, 211 N.W. 839 (1927) 38

Yankee Network v. Gibbs, 295 Mass. 56, 3 N.E.2d 228 (1936) 38

STATUTES and OTHER AUTHORITIES

Va. Code § 2.2-3707 10

Va. Code § 15.2-1405 32

Annotation, 84 A.L.R. 43, 52, 26 A.L.R.2d 1227, 1240 § 3 42

Restatement of Law, Second, Torts, § 766A 36, 37

43 Am. Jur.2d Interference, § 55 43

45 Am. Jur.2d, Interference, § 41 42

Assignments of Error

1. The circuit court erred by granting the demurrer and finding that the statements asserted in the Amended Complaint were not defamatory and not actionable because the statements alleged are false, non-opinion representations that attack Appellants' reputation and impute conduct to Appellants which has injured Appellants in their business or profession. (Joint Appendix ("JA") 60-64, 200-201, 338, 342-344).

2. The circuit court erred by granting the demurrer and finding that the alleged defamatory statements asserted in the Amended Complaint were protected by legislative immunity because the affirmative defense cannot be raised by a demurrer without evidence to demonstrate the requisite elements of the defense, and Bouffault is not entitled to the benefit of the defense because she is not a member of a legislative body and she was not engaged in law making activity when she published the statements. (JA 51-57, 198-200, 338, 342-344).

3. The circuit court erred in granting the demurrer and finding that the allegations in the Amended Complaint do not set forth a claim for tortious interference because Appellant pleaded facts sufficient to state a *prima facie* case of tortious interference. (JA 64-68, 202-204, 338, 342-344).

Statement of the Nature of the Case and Material Proceedings

This case concerns whether a member of an appointed commission, which is without any legislative authority, and who is not engaged in any law making activity, can publish false and defamatory statements about a business owner and her business through email messages from the member's private email account, and intentionally interfere with a real estate contract, to promote the member's own self-interest, and yet be absolutely shielded from any liability for the commission member's intentional misconduct pursuant to legislative immunity.

Appellants, Plaintiffs below, Gina L. Schaecher and her business, Happy Tails Development, LLC ("HTDLLC"), were defamed by Appellee, Robina Rich Bouffault ("Bouffault") Defendant below, when Bouffault sent email messages to third parties through which Bouffault asserted that Ms. Schaecher was a liar, and that she and her business were violating the law by proposing to develop a rehabilitation facility for companion and farm animals on a Property located less than a mile away from Bouffault's property. Bouffault's false and defamatory publications, in addition to her efforts to harass and threaten supporters of Ms. Schaecher's project, damaged Ms. Schaecher's reputation and that of her business and tortiously interfered with HTDLLC's Contract to purchase the Property.

On December 2, 2013, Ms. Schaecher and HTDLLC filed their Complaint against Bouffault asserting defamation and tortious interference with a contract. (JA 1-21). On December 26, 2013, Bouffault filed a demurrer to the Complaint and subsequently a supporting brief on April 14, 2013. (JA 22-48). Ms. Schaecher and HTDLLC filed their opposition to the demurrer on April 30, 2014. (JA 49-89). The circuit court heard argument on the demurrer on May 7, 2014, and dismissed Ms. Schaecher's and HTDLLC's claims for defamation and tortious interference with contract, but granted leave to file an amended complaint. (JA 99-100).

Ms. Schaecher and HTDLLC filed their Amended Complaint (hereafter the "Complaint" on May 29, 2014. (JA 101-189). Bouffault demurrered to the Complaint. (JA 190-195). On July 9, 2014, Ms. Schaecher and HTDLLC filed their Opposition to Demurrer to First Amended Complaint & Opposition to Defendant's Objections to Discovery, Motion to Quash, Motion for Protective Order and Motion to Stay Discovery. (JA 196-246).

On July 16, 2014, the circuit court heard argument on Bouffault's demurrer (JA 257-340) and granted Bouffault's demurrer. (JA 341). The circuit court found that the statements were not defamatory and the statements and actions complained of were committed incident to the

performance of a legislative function and were protected by legislative immunity. (JA 341). In addition to the arguments stated in Ms. Schaecher's and HTDLLC's opposition brief, and the objections and arguments raised during the hearing, Ms. Schaecher and HTDLLC filed their objections to the court's Order on July 23, 2014, and timely filed their Notice of Appeal on August 12, 2014. (JA 342-346).

Statement of Facts

Ms. Schaecher is the owner of Happy Tails Development, LLC and is also an attorney admitted to practice before the Virginia Supreme Court, the District of Columbia Court of Appeals and the Nebraska Supreme Court. Ms. Schaecher is also the owner of 3 Dog Farm, LC ("3DF") which provides rehabilitation services to companion canines that are displaced and/or in need of permanent homes. Happy Tails Development, LLC ("HTDLLC") was the contract purchaser of real property identified as 91.35 acres located at the intersection of Route 723 (Old Winchester Road) and Bellevue Lane, Tax Map Number 20-2-9 Clarke County, Virginia (hereinafter the "Property"). (JA 101-102).

On or about June 6, 2013, HTDLLC, as contract purchaser, entered a contract with the Property owners (hereinafter the "Sellers") to purchase the Property (hereinafter the "Sales Contract"). HTDLLC entered the Sales

Contract to purchase the Property so that a portion of the Property would be used to provide rehabilitation services to companion and farm animals through 3DF. As part of the rehabilitation for companion animals, HTDLLC intended to board more than five canine animals. (JA 102-103).

The Property is located in an Agricultural-Open Space-Conservation District (AOC) as defined by Clarke County Zoning Ordinance 3-A-1. Pursuant to the Clarke County Zoning Ordinances, a boarding kennel of more than five canine animals is a special use permitted on a property located in the AOC District pursuant to a special use permit. On or about August 6, 2013, HTDLLC, as the contract purchaser of the Property, applied for a special use permit to allow a kennel use on the Property (hereinafter the "Special Use Permit"). (JA 102-103).

Bouffault, who is the owner of real property located less than one (1) mile from the Property, had knowledge of the HTDLLC's Sales Contract, as the HTDLLC's Special Use Permit Application is public record and Bouffault was notified as a neighboring land owner to the subject Property. (JA 103). At all relevant times, Bouffault acted in a manner to satisfy her own self-interest and to intentionally, willfully and recklessly cause harm to Ms. Schaecher and HTDLLC by defaming and harming their reputations and tortiously interfering with HTDLLC's Sales Contract to purchase the

Property. (JA 103). Bouffault published false and defamatory statements concerning Ms. Schaecher, HTDLLC and their intended use of the Property, to prevent Ms. Schaecher and HTDLLC from establishing a rescue kennel use on the Property. (JA 103). Bouffault acted individually through her personal email account to make false, misleading and defamatory statements to third parties concerning Ms. Schaecher and/or HTDLLC and their proposed use of the Property with the specific intent to defame, humiliate and/or damage the reputation of Ms. Schaecher, her business HTDLLC, and/or to tortiously interfere with HTDLLC's Sales Contract to purchase the Property and/or to prevent HTDLLC's intended kennel use of the Property. (JA 103).

AUTHORITIES & ARGUMENTS

I. BOUFFAULT'S STATEMENTS ARE ACTIONABLE BECAUSE THEY ARE FALSE AND DEFAMATORY UNDER VIRGINIA LAW, AND THE CIRCUIT COURT'S DETERMINATION TO THE CONTRARY GRANTING THE DEMURRER IS ERRONEOUS.

The defamatory statements asserted in the Complaint are actionable. The circuit court's determination to the contrary is flawed by the fact that the court did not apply the law to determine if the requisite elements of a defamation claim had been met. Instead the circuit court focused on some self-determined measure of defamation, repeatedly asking Ms. Schaecher

to demonstrate the "sting" of the alleged statement.[1] The circuit court's apparent subjective "sting" standard is not the law in Virginia. The alleged statements are false and defamatory under Virginia law. The circuit court's failure to apply the law, and instead applying some "sting" standard to find that the alleged statements are not defamatory and not actionable, and to grant the demurrer are reversible error.

A demurrer tests the legal sufficiency of a complaint and admits the truth of all material facts that are properly plead. *Sanchez v. Medicorp Health Sys.,* 270 Va. 299, 303, 618 S.E.2d 331 (2005). The facts admitted are those expressly alleged, those that are impliedly alleged, and those that may be fairly and justly inferred from the facts alleged. *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. *Fuste v. Riverside Healthcare Association, Inc.,* 265 Va. 127, 132, 575 S.E.2d 858, 861(2003). This Court reviews a circuit court's ruling on a demurrer *de novo. Webb v. Virginian-Pilot Media Companies, LLC,* 287 Va. 84, 88; 752 S.E.2d 808, 811 (2014).

In Virginia, the elements of defamation are "(1) publication of (2) an

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[1] See JA 279:7-9, JA 285:4-5, JA 287:6-8 ("[Y]ou have to, one, prove it has a sting if you're called a liar - - I mean that's the test, does it have a sting."); JA 288:19-20, JA 298:18-19, JA 300:19, JA 326:8-14.

actionable statement with (3) the requisite intent." *Tharpe v. J. Harman Saunders,* 285 Va. 476, 481-82, 737 S.E.2d 890, 892 (2013). To be actionable, the statement must be both false and defamatory. *Id.* Ms. Schaecher and HTDLLC have asserted that all the alleged defamatory statements are false, and for the purpose of a demurrer, the circuit court must have accepted the falsity as alleged. Consequently, the circuit court's inquiry should have been on whether the statements were defamatory under Virginia law.

To defame a person is to attack his or her good name, thereby injuring his or her reputation. *Chapin v. Greve,* 787 F. Supp. 557, 562 (E.D. Va. 1992). The established test under Virginia law for divining whether statements are defamatory is found in *Carwile v. Richmond Newspaper, Inc.*, 196 Va. 1, 82 S.E.2d 588, 591-92 (1954).

> Although varying circumstances often make it difficult to determine whether particular language is defamatory, it is a general rule that allegedly defamatory words are to be taken in their plain and natural meaning and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used. . . 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 draw from the pleadings must be resolved in the plaintiff's favor.***

Carwile, 196 Va. at 7, 82 S.E.2d at 591-92, *emphasis added*. Under Virginia law, every false and unauthorized imputation which impute to a business or professional person conduct which tends to injure her in her business or profession are actionable as defamation *per se*. *Carwile,* 196 Va. at 8, 82 S.E.2d at 592.

Each of the alleged defamatory statements in the Complaint impute to Ms. Schaecher and/or HTDLLC conduct that injures them in their business or profession. Ms. Schaecher is a business owner and an attorney with a law practice in Virginia. Bouffault's false statements that Ms. Schaecher is lying, is less than truthful, is violating private restrictive covenants, is violating local ordinances, has retained a manager who is not financially responsible and is losing her home, all these statements, directly attack Ms. Schaecher's credibility, integrity and reputation as a business owner and attorney and that of her business by calling her dishonest, a law breaker and fiscally irresponsible. (JA 103-117).

The false defamatory statements must be read in context. In the instant case, outside of any planning commission meeting or public hearing, Bouffault sent email messages from her personal email account which contained false and defamatory statements about Ms. Schaecher, calling her a liar and a law breaker, and telling third parties that Ms.

Schaecher's proposed project violates private restrictive covenants and local laws, despite the fact that the Planning Department determined that the project satisfied the requirements of the local ordinance. (JA 88-89).[2]

Persons seeking a special use permit should expect that the ***Board of Supervisors*** would consider the proposed project's compliance with the ***relevant criteria*** contained in the local ordinance. However, persons seeking a special use permit should not be subjected to completely unfounded personal attacks on their integrity, reputation, and the financial condition of their family members through private email messages from planning commission members outside of any legitimate administrative function. A planning commission member should not be allowed to make false, disparaging and defamatory statements to damage the reputation of a person in private email correspondence in a behind the scenes crusade to satisfy the member's own self-interest, not without taking responsibility for the statements. This is the exact conduct that Virginia's Freedom of Information Act seeks to prevent.[3]

In each of the email messages attached to the Complaint, Bouffault

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[2] "Staff recommends approval of the special use permit request based on the Applicant's proposal meeting the technical requirements of the Zoning Ordinance."

[3] "All meetings of public bodies shall be open . . . No meeting shall be conducted through telephonic, video, electronic or other communication means . . . " *Va. Code.* § 2.2-3707.

directly states or insinuates that Ms. Schaecher, her business HTDLLC, and/or the proposed resident manager for the business operation, are liars, in violation of some law, lack integrity, are financial irresponsible or are otherwise disreputable. (JA 103-117, JA 123-147). Bouffault's statements impute a want of integrity or an unfitness to conduct the operation that Ms. Schaecher and HTDLLC had proposed for the Property. Aside from being a business owner, Ms. Schaecher is also an attorney, so it should be apparent that Bouffault's statements that Ms. Schaecher is a liar or in violation of the law would be directly damaging to Ms. Schaecher's reputation in her professional practice as an attorney, a business owner and the proposed property developer.

Statements are actionable if they have a provably false factual connotation and thus are capable of being proven true or false. *Fuste, supra.* at 132, 575 S.E.2d 858, 861-62 (2003). Each of the defamatory statements alleged in the Complaint are capable of being proven true or false and are not statements of opinion.[4] The defamatory statements were

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[4] "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the fact upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statements may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause

published to third parties and in the local newspaper with the intent to defame and humiliate Ms. Schaecher and her business, HTDLLC. Each of the statements alleged as defamatory clearly satisfy Ms. Schaecher's and HTDLLC's burden of pleading:

1. On September 3, 2013, Bouffault published statements to third parties asserting that Ms. Schaecher's proposed use for the Property violated the conditions of a conservation easement on the Property. (JA 104, 123-125). Bouffault made such statements knowing that they were false, and the falsity of the statements was demonstrated by a letter from the easement holder confirming the conformance of Ms. Schaecher's proposed use with the conditions of the easement. The easement holder's approval was already part of the Special Use Permit Application prior to the easement holder's letter. It was Bouffault's false accusations that necessitated a letter from the easement holder. These statements are defamatory because Bouffault affirmatively asserts that Ms. Schaecher and her project are in violation of the conservation easement conditions, and therefore violating the law. *Id.* Bouffault is stating that Ms. Schaecher and HTDLLC are violating the law by virtue of their proposed use of the Property. There could be no better means of causing community members

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as much damage to reputation as the statement, 'Jones is a liar.'" *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 21 (1990).

to disdain Ms. Schaecher, HTDLLC, and their proposed use of the Property than to tell the community that the proposed Project violates a conservation easement, thus violating the law and threatening the environment.

In order to demonstrate that Bouffault's statements in this regard were false, Ms. Schaecher and HTDLLC had to require the Property Sellers to obtain a written statement from the easement holder confirming that the proposed use of the Property did not violate the conditions of the easement. (JA 123). The written statement was necessitated directly as a result of Bouffault's defamatory statements. Previous to Bouffault's contentions, the easement holder had verbally confirmed its approval of the proposed use, which was already part of the public record when Bouffault made her defamatory statements. Bouffault's statements were false statements of fact that she knew would, and that she intended to, harm the reputation of Ms. Schaecher and her business.

2. Bouffault's statements to the Winchester Star on or about September 4, 2013 are false and defamatory. (JA 104-105). Bouffault's statements again insinuate that Ms. Schaecher's proposed use for the Property violated the conservation easement and constituted noise pollution. The statements are not opinion because they contain representations that can be proven true of false. The easement holder had

already approved the proposed use of the Property so the statement in this regard is clearly false.[5] Clarke County has a sound ordinance with a stated decibel level. Whether the proposed kennel use would violate the sound ordinance and constitute noise pollution is a statement of fact that can be proven or disproven. The statements are defamatory because they insinuate that Ms. Schaecher and her proposed project are in violation of the law, and that Ms. Schaecher is acting in a manner that disregards the law.

3. On September 6, 2013, Bouffault stated that Ms. Schaecher was not truthful, and insinuated that Ms. Schaecher was operating an illegal kennel. (JA 105, 127). These statements can easily be proven true or false and are actionable *per se*. These statements are defamatory because they impute that Ms. Schaecher is engaging in an illegal business operation and is a liar. *Id.*

4. On September 6, 2013, Bouffault asserted that the proposed kennel was in violation of a private restrictive covenant to which Bouffault is neither a party nor a beneficiary, and urged the involvement of the county

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[5] Exhibit A to the Complaint, is a letter from the Virginia Outdoor Foundation ("VOF"), the holder of the conservation easement, which clearly states that the VOF reviewed the potential buyer's request to have a kennel back in March 2013. On September 3, 2013, Bouffault is still asserting that the kennel use is in violation of the VOF easement; even though the VOF approved the use back in March 2013. (JA 123).

attorney in the enforcement of a private restrictive covenant. (JA 106, 130). These statements again can be proven true or false, and are defamatory because they impute alleged illegal conduct by Ms. Schaecher. The county cannot enforce private restrictive covenants. Bouffault's only purpose in asserting an alleged violation of the restrictive covenants is to attack Ms. Schaecher's reputation and that of her business by insinuating that Ms. Schaecher has no regard for the law.

5. On September 7, 2013, Bouffault asserted again that Ms. Schaecher and HTDLLC would be breaking the law with the proposed structure for the Property and that Ms. Schaecher's family would not be residing on the Property, insinuating that Ms. Schaecher previously lied in the Special Use Permit Application. (JA 106-107, 132-133). Ms. Schaecher has asserted that these statements are false because Ms. Schaecher has consistently represented that her sister and her father would be residing on the Property. Such a statement of fact can be proven true or false. The statements are defamatory because Bouffault is insinuating that Ms. Schaecher previously lied on her Application. Bouffault misrepresents what Ms. Schaecher said and uses the false statement to suggest that Ms. Schaecher was not truthful in the Special Use Permit Application. Clearly

calling Ms. Schaecher a liar harms her reputation and her credibility within the community.

6. On September 11, 2013, Bouffault sent another email message in which she again contended that Ms. Schaecher and HTDLLC were breaking the law by violating a ***residential ordinance*** when the Property is not located in a residential district, and such ordinance was not part of the criteria to be considered for review of the Special Use Permit Application. (JA 107, 135). Bouffault's continued assertion of an inapplicable ordinance to support her representation that Ms. Schaecher is violating the law can serve no other purpose than to damage Ms. Schaecher's reputation and credibility. Again, the defamatory statement is made in a private email message so that Ms. Schaecher and HTDLLC are not in a position to refute the baseless contention.

7. On September 29, 2013, Bouffault made defamatory statements regarding the financial stability of Ms. Schaecher's proposed resident manager for the proposed kennel facility. (JA 108, 141). Ms. Schaecher had identified her sister Mary as the proposed resident manager for the Project. Bouffault's statements regarding Ms. Schaecher's sister's alleged inability to pay her mortgage and facing foreclosure, aside from being false, are defamatory as they harm the reputation of one of the

persons within the small group of persons associated with the Project. Clearly it was Bouffault's intention to tarnish the reputation of the Project by attacking the character of the proposed kennel's resident manager.

The exception to the general rule that a plaintiff must establish that the alleged defamatory statements published were of, or concerning plaintiff, is 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. 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 or concerning" element of common law defamation. *Dean v. Dearing,* 263 Va. 485, 561 S.E.2d 686 (2002). Ms. Schaecher's sister was identified as a family member who will serve as the resident manager. Bouffault's defamatory statements as to Ms. Schaecher's selection for the resident manager serve only to further harm Ms. Schaecher's reputation and that of HTDLLC and its Project. Bouffault insinuates that the proposed kennel's resident manager is fiscally irresponsible and possibly homeless. There can be no other purpose for Bouffault's statements other than to defame the small group of people,

namely Ms. Schaecher's family, who are associated with the proposed kennel project.

8. On October 3, 2013, Bouffault again states that Ms. Schaecher and HTDLLC's proposed development of the Property violates private restrictive covenants to which Bouffault is not a party, and the enforcement of which Bouffault admits is not within the jurisdiction of the county. (JA 108-109, 143-144). Bouffault makes these statements to incite the neighbors and to insinuate that Ms. Schaecher has no regard for the restrictions on the Property, and is otherwise violating the law by her proposed use for the Property. Bouffault's statements are defamatory because they impute unlawful conduct to Ms. Schaecher and to the proposed use of the Property. Bouffault's defamatory statements have nothing to do with the criteria being considered for the Special Use Permit or any relevant local ordinance. To the contrary, Bouffault states that Ms. Schaecher and the HTDLLC project will violate a private covenant, to which Bouffault is not privy, nor to which is she a beneficiary. Bouffault has no legal right with respect to the private restrictive covenants, but still asserts that Ms. Schaecher is violating the covenants so as to ruin Ms. Schaecher's reputation among the adjoining landowners.

9. On October 4, 2013, Bouffault asserted that Ms. Schaecher called local government officials liars and further asserted that Ms. Schaecher was lying to government officials and that Ms. Schaecher was not trustworthy. (JA 109-110, 146). Bouffault's statements are *per se* actionable. Some words are actionable *ex vi termini,* without any explanation whatsoever, because they convey the charge in such clear and unambiguous language that no other possible construction can be put upon them. Statements charging that plaintiff has been guilty of dishonest acts or guilty of lying are actionable per se. *Poulston v. Rock,* 251 Va. 254, 260, 467 S.E.2d 479, 484 (1996); *Freedlander v. Edens Broadcasting, Inc.*, 734 F. Supp. 221 (E.D. Va. 1990); *Perk v. Vector Resources Group, Ltd.,* 253 Va. 310, 485 SE.2d 140 (1997); *Tronfeld v. Nationwide Mutual Insurance Co.,* 272 Va. 709, 636 S.E.2d 447 (2006).

The false and defamatory statements alleged in the Complaint are actionable under Virginia law. The circuit court's failure to apply the law, determination that the statements were not defamatory or actionable and dismissal of Appellants' defamation claims on demurrer were reversible error.

II. BOUFFAULT'S STATEMENTS ARE ACTIONABLE AND NOT PROTECTED OPINION UNDER VIRGINIA LAW.

To the extent that Bouffault has attempted to couch her defamatory statements within an alleged opinion does not render her defamatory statements unactionable. The fact that a statement conveys an opinion does not, by itself, entail that the statement is not defamatory. An opinion that is laden with factual content may be defamatory. *Raytheon Tech. Servs. Co. v. Hyland*, 273 Va. 292, 641 S.E.2d 84, 90-91; *see Milovich v. Lorain Journal Co.,* 497 U.S. 1, 18 (1990) (noting that an expression of "opinion" may often imply an assertion of objective fact and consequently be actionable. A speaker may not protect herself from liability by qualifying a statement of fact as "my opinion." *Swengler v. Itt Corp. Electro-Optical Prods. Div.,* 993 F.2d 1063, 1071 (4th Cir. 1993).

Accordingly, the United States Supreme Court affirmed a judgment that a statement implying that an attorney was "unethical" and "capable of extortion" was a statement of fact that may be actionable. *Cretella v. Kuzminski,* 2008 U.S. Dist. LEXIS 42152, *13 *citing Harte-Hanks Commc'ns, Inc. v. Connaughton,* 491 U.S. 657, 662 n.3 (1989). Similarly, this Court has held that a statement that a manager's performance was significantly lower than expected was a statement of fact, even though it implied a judgment. *Raytheon Tech. Servs.*, 273 Va. at 304, 641 S.E.2d at

91. Even though allegations by a doctor's patients that they were sexually assaulted by the doctor were arguably expressions of their opinions about the treatment that the patients had received, they were published as fact and without being placed in the context of information that contradicted the image that those statements conveyed. *WJLA-TV v. Levin,* 264 Va. 140, 564 S.E.2d 383 (2002). Many courts have regarded accusations of unlawful activity as statements of fact. *Carwile,* 196 Va. 1, 82 S.E.2d 588, 591-92. Accordingly, the question for the Court to resolve is whether the defamatory statements alleged could be shown to be false, whether the statements are expressed as facts or opinion. *Cretella,* 2008 U.S. Dist. LEXIS at *14.

As demonstrated above, all of Bouffault's defamatory statements could be shown to be false. For example, the defamatory statements concerning Ms. Schaecher's violation of the conservation easement was easily demonstrated to be false by the VOF's letter confirming its approval of the proposed use for the Property. (JA 104,123). In that same regard, Bouffault's contention that Ms. Schaecher is operating an illegal kennel is easily proven false by Loudoun County public records. There is no basis in truth or fact for the defamatory statements alleged; and therefore, Bouffault's statements are actionable.

III. LEGISLATIVE IMMUNITY DOES NOT SHIELD A PERSON WHO IS NOT A MEMBER OF A LEGISLATIVE BODY NOR CONDUCTING LEGITIMATE LEGISLATIVE ACTIVITY FROM LIABILITY FOR INTENTIONAL TORTS.

The circuit court's determination that legislative immunity is applicable to shield Bouffault's intentional misconduct is also erroneous. There was no evidence before the circuit court to support a finding that Bouffault is a member of a legislative body engaged in law making activity when she published the defamatory statements alleged. To the contrary, the record is clear that Bouffault acted outside of any commission meeting or public meeting when Ms. Schaecher would have had an opportunity to address and remedy Bouffault's false and defamatory accusations, and instead, sent private email messages from her private email account containing false and defamatory statements in a personal campaign to ruin Ms. Schaecher's reputation and that of her business developing the Property. Legislative immunity cannot shield Bouffault from liability for her intentional misconduct.

A. Legislative immunity is an affirmative defense and Bouffault's unsupported contentions in a demurrer fail to satisfy Bouffault's burden of proof.

The circuit court erred in finding that legislative immunity shielded Bouffault from liability for her intentional misconduct simply by virtue of Bouffault being a

member of the planning commission. There was no evidence before the circuit court to conclude that Bouffault was a member of a legislative body and that she was engaged in law making activity when she made the defamatory statements. Bouffault's unsupported contentions in a demurrer are insufficient to establish the applicability of the affirmative defense of legislative immunity. There is no factual basis to conclude that immunity is applicable in the instant case.

In *Fox v. Deese,* 234 Va. 412, 362 S.E.2d 699 (1987), this Court held that the trial court erred in ruling on a claim of immunity on a demurrer stating that resolution of the facts necessary to determine whether immunity was applicable requires an evidentiary hearing. In *Fox,* a concert promoter planned to produce a two-day concert at a government stadium. The promoter had a series of meetings with the government officials and an agreement was reached to allow the concert. The government officials delayed delivery of the written contract to the promoter until after the promoter had made costly commitments in preparation for the event and then delivered a contract which differed considerably from the original agreement. The government officials then assured plaintiff that tickets to the concert would be on sale two weeks prior to the concert when in fact tickets were not put on sale until three days before the concert. As a result of the changed contract requirements, the delayed sale of tickets and other

factors, the promoter suffered large losses from the concert. The concert promoter brought an action against the governmental entity and four government officials, individually, seeking compensatory and punitive damages. The individual governmental officials asserted sovereign immunity and demurred to the promoter's claims.

In holding that the trial court erred in sustaining the individual government officials' demurrer, this Court noted that the amended complaint not only alleged that defendants committed intentional torts, but that defendants were acting outside of their scope of authority, and that resolution of these allegations, if contested, requires an evidentiary hearing. The Court further stated that the ***government officials are not immune if the evidence establishes that they committed intentional torts, irrespective of whether they acted within or without of their scope of authority,*** or they acted outside of their scope of employment. 234 Va. at 423-24, 362 S.E.2d at 706. (*Emphasis added*).

In the instant case, Ms. Schaecher and HTDLLC have pleaded that Bouffault has committed intentional torts, specifically defamation and tortious interference. Ms. Schaecher and HTDLLC have also pleaded that Bouffault also acted outside of any scope of authority as a commission member by stating that Bouffault acted in a manner to satisfy her own self-

interest, and individually through her personal email account and through verbal statements to third parties concerning Ms. Schaecher and HTDLLC and her specific intent to defame, humiliate and/or damage the reputation of Ms. Schaecher, her business HTDLLC, and/or to tortuously interfere with HTDLLC's Sale Contact and/or to prevent the intended kennel use of the Property (JA 103). Bouffault had a personal interest in preventing the kennel use as she was personally opposed to the proposed use as her personal residence is located within a mile of the proposed kennel. (JA103).

Moreover, Ms. Schaecher and HTDLLC have specifically pleaded that Bouffault acted in a manner to promote her own self interest. Specifically, Bouffault made false, misleading and defamatory statements to the local newspapers, to Clarke County employees and residents that are not involved in the review of a special use permit application, to interfere with the Sales Contract and to defame HTDLLC and Ms. Schaecher and damage their reputations. (JA 103-117). Ms. Schaecher's and HTDLLC's allegations of intentional misconduct and Bouffault's disregard for the obligations and responsibilities of her position, and instead to be acting in her own self interest, are sufficient factual allegations to defeat Bouffault's unsubstantiated claims of immunity. Bouffault's

unsupported contentions as to the applicability of some sort of immunity are not sufficient to refute the uncontested allegations of Bouffault's liability for intentional torts at the demurrer stage.

B. Bouffault's unsubstantiated contentions of immunity cannot shield Bouffault from liability for intentional torts.

Legislative immunity does not shield Bouffault from suit based on her intentional misconduct. *Fox v. Deese, supra.* This Court has definitively stated that even sovereign immunity is not applicable to shield state employees from liability for intentional torts. *Elder v. Holland,* 208 Va. 15, 19, 155 S.E.2d 369, 372 (1967). This Court has clearly stated that absolute immunity is not applicable to governmental employees for intentional misconduct.

> Although a valid reason exists for state employee immunity, the argument for such immunity does not have the same strength it had in past years. This is because the intrusion of government into areas formerly private, and because of the thousand-fold increase in the number of governmental employees. ***We find no justification for treating a present day governmental employee as absolutely immune from tort liability***, just as if he [or she] were an eighteenth century sovereign.

James v. Jane, 221 Va. 43, 52-53, 282 S.E.2d 864 (1980) (*emphasis added*). Immunity determinations must be made on a case by case basis, balancing various factors. *Benjamin v. University Internal Med. Found.,*

254 Va. 400, 492 S.E.2d 651 (1997). If the employing entity has immunity, an employee thereof sued in tort arising out of the employment may claim such immunity, which will be measured by the four part test set forth in *James v. Jane, supra.* Thus, if an individual works for a governmental body that shares the protections from exposure to suit afforded the sovereign, the inquiry shifts to the study of four factors used to measure the discretion and governmental interests involved in the job actually performed by the individual defendant. ***However, acts outside the scope of public employment and intentional tort are not within the protections of the immunity doctrine***. *Fox v. Deese, supra.*

Bouffault is not a government employee and she is not an elected government official. Bouffault is an appointed member of a commission that reports to the Board of Supervisors. As such, she has no authority to exercise any judgment and has no decision-making authority. Most importantly, as a commission member, she has no legislative authority. Therefore, it is clear in the instant case that legislative immunity cannot apply simply by virtue of Bouffault's position as a commission member. However, in addition, Bouffault did not present any evidence to support the application of immunity in the instant case. Bouffault did not file a plea in

bar and did not provide any evidentiary support of Bouffault's baseless assertions of immunity in the instant case.

C. Legislative immunity is not available to Bouffault because she is not a member of a legislative body engaged in law making activity.

Legislative immunity only applies to municipal *legislators* when they are acting within the sphere of legitimate legislative activity. *Board of Supervisors of Fluvanna County v. Davenport & Co., LLC,* 285 Va. 580, 742 S.E.2d 59 (2013). Legislative actions include, but are not limited to, 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, holding hearings and introducing material at committee hearings ***within the legislative process***. *Id, emphasis added.*

There was no evidence before the circuit court to support the application of legislative immunity. As a planning commission member, Bouffault is not a member of a legislative body. Planning commission members are not elected by constituents to represent their interests. At the local level, the Board of Supervisors holds any grant of legislative authority and such power cannot be delegated. *Sinclair v. New Cingular Wireless PCS, LLC,* 283 Va. 567, 582, 727 S.E.2d 40, 47-48 (2012) (Generally Assembly has

not allowed local governing bodies to delegate legislative decisions to planning commissions. While the General Assembly describes planning commissions as primarily advisory bodies, it has declined to grant them executive, legislative, or judicial powers.). A planning commission does not act in a lawmaking capacity when it considers matters for recommendation to the Board that are legislative in nature.

Official immunity of any sort does not apply to the performance of a ministerial duty. *Heider v. Clemons,* 241 Va. 143, 400 S.E.2d 190 (1991). A ministerial duty is defined as one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, her own legal judgment upon the propriety of the act being done. *Dovel v. Betram,* 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945). For example, the review of a subdivision plat or a site plan for compliance with the county's zoning ordinances is a ministerial duty. Similarly, a planning commission does not act in a legislative capacity when it considers matters for the recommendation to the Board even if the Board's decision would be legislative in nature.

Bouffault clearly was not engaged in legitimate legislative activity when she made the defamatory statements. The defamatory statements alleged were contained in Bouffault's personal email messages sent from

her personal email account. Bouffault was not 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, holding hearings and introducing material at committee hearings ***within the legislative process***. Bouffault's conduct was quite the opposite, in that she sought an end run around a public process by sending email messages from Bouffault's personal email account that defamed Ms. Schaecher and her business by calling them liars, law breakers and debt dodgers. Bouffault did not make these statements in a public forum or during the public hearings on Ms. Schaecher's and HTDLLC's proposed use of the Property during which Ms. Schaecher could refute the statements. But for Ms. Schaecher's FOIA request, Ms. Schaecher would have had no idea how Bouffault had poisoned the well and defamed Ms. Schaecher's reputation through Bouffault's private email messages.

Making defamatory statements to a local newspaper clearly is not legislative activity, nor is seeking the county attorney's unlawful enforcement of a private restrictive covenant to claim that Ms. Schaecher's and HTDLLC's proposed use of the Property was illegal. (JA 104-110). The intentional misconduct alleged against Bouffault cannot be construed

as legitimate law making activity. There is no blanket immunity to legislators for intentional torts. This Court has stated:

> Assuming without deciding, that absolute privilege is afforded to subordinate legislative bodies, the ***creation of legislation*** is the nexus that supports the application of privilege. ***Absolute privilege therefore does not attach to communications made by participants in proceedings conducted by a board of supervisors that do not concern the creation of legislation.***

Isle of Wight County v. Alan Nogiec, 281 Va. 140, 155, 704 S.E.2d 83, 90 (2011). (*Emphasis added*). In *Isle of Wight County,* the Court affirmed the trial court's determination that absolute or legislative privilege did not apply to shield a county administrator from liability for his defamatory statements made during a county board of supervisor's meeting. This Court noted that it was the defendant county administrator's burden to prove that the statements giving rise to the defamation claim were absolutely privileged, and that the evidence did not demonstrate that the Board was acting in a legislative capacity when defendant county administrator gave his report. To the contrary, the Court noted that the Board was clearly acting in a supervisory or administrative capacity during a board meeting.

In the instant case, Bouffault is entirely removed from the legislative process in that she is not a member of a legislative body. Bouffault is an appointed member of a commission that is charged with reviewing land use

applications, a purely administrative function. Assuming without conceding that any of Bouffault's conduct was a legitimate part of the review of a land use application, such activity has nothing to do with the legislative process.

Pursuant to Virginia Code, county officials are not immune from legal action for intentional or willful misconduct or gross negligence. Virginia Code § 15.2-1405 expressly provides:

> The members of the governing bodies or any locality or political subdivision and the members of boards, commissions, agencies and authorities thereof and other government bodies of any local governmental entity, whether compensated or not, shall be immune from suit arising from the exercise or failure to exercise their discretionary or governmental authority as members of the governing body, board, commission, agency or authority which does not involve the unauthorized appropriation or misappropriation of funds. ***However, the immunity granted by this section shall not apply to conduct constituting intentional or willful misconduct or gross negligence.***

(*Emphasis added).* Legislative immunity cannot shield Bouffault from liability for her intentional misconduct, and the circuit court's determination to the contrary was erroneous.

IV. HTDLLC SUFFICIENTLY PLEADED A CLAIM FOR TORTIOUS INTERFERENCE, AND BOUFFAULT'S DEMURRER TO THIS CLAIM SHOULD HAVE BEEN DENIED.

The circuit court erroneously determined that HTDLLC failed to state

a claim for tortious interference. Since the circuit court determined that some of the alleged bases of interference, those being Bouffault's defamatory statements, were not actionable, the circuit court erroneously concluded that HTDLLC had not stated a claim for tortious interference without consideration of all the allegations of the Complaint.

A party to a contract has property rights in the performance of, and anticipated profits from the contract, and these rights are entitled to protections in the courts. *Duggin v. Adams,* 234 Va. 221, 360 S.E.2d 832 (1987). The requisite elements for a *prima facie* showing of a claim of tortious interference with a contract are: 1) the existence of a valid contract; 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 has been disrupted. *Id.*

HTDLLC has pleaded a valid contract and attached a copy to its Complaint. (JA 118-120; 149-189). HTDLLC clearly asserted that Bouffault had knowledge of the Sales Contract as it was represented in HTDLLC's Special Use Permit Application which is public record and Bouffault was notified of such as a neighboring landowner. (JA 103, 118). HTDLLC has alleged specific instances of Bouffault's intentional tortious

conduct which constitutes interference. (JA 118-119). Methods of interference considered improper are those means that are illegal or independently tortious, such as violence, ***threats or intimidation***, bribery, fraud, deceit, ***defamation***, misuse of inside or confidential information or breach of fiduciary relationship. *Duggin,* 234 Va. at 227, 360 S.E.2d at 836, *emphasis added.* However, a plaintiff need not establish an independent tort to satisfy the requisite improper means element. Tortious interference means only that the interference was intentional and improper under the circumstances, not that the improper methods used were inherently illegal or tortious. *Maximus v. Lockheed*, 254 Va. 408, 493 S.E.2d 375 (1987), *citing Duggin,* 234 Va. 227-228, 360 S.E.2d at 836-837).

HTDLLC has asserted Bouffault's defamatory statements as well as Bouffault's conduct in engaging third parties to threaten and harass persons who supported HTDLLC's proposed use of the Property. Bouffault's conduct delayed and increased the cost of the process necessary for HTDLLC to obtain the requisite approvals to close the transaction, and caused the Sellers serious reservations as to HTDLLC's ability to gain the necessary approvals to close the transaction. In order to persuade the Sellers not to terminate the Sales Contract, HTDLLC had to

pay an additional deposit amount, $10,000.00, and agree to non-refundable installment payments during the continued approval process. Bouffault's tortious conduct increased the cost of the transaction to the point that it became cost prohibitive. (JA 119-120, 149-189).

The fact that HTDLLC could terminate the Sales Contract does not defeat HTDLLC's tortious interference claim. When a contract is terminable at will, a plaintiff, in order to present a *prima facie* case of tortious interference, must allege and prove not only an intentional interference that caused the termination or breach of the contract, but also that the defendant employed improper methods. *Duggin v. Adams,* 234 Va. 221, 227, 360 S.E.2d 832, 836 (1987); *Hechler Chevrolet v. General Motors Corp.,* 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985) (Until a party terminates an at-will contract, it is "valid and subsisting, and a third party may not improperly interfere with it.).

HTDLLC has alleged that Bouffault engaged in improper methods. Specifically, HTDLLC has alleged that Bouffault: 1) made false, reckless, defamatory and/or misleading statements to the press, planning commission members, members of the Board of Supervisors, and third parties causing HTDLLC to incur additional costs and expenses to refute Bouffault's defamatory statements; and 2) engaged third parties to threaten

and harass persons who supported HTDLLC's proposed use for the Property. (JA 118-119). HTDLLC satisfied its burden in this regard.

Finally, HTDLLC alleged that it had been damaged in that it had incurred additional costs and expenses to redress Bouffault's defamatory statements and improper interference, including but not limited to fees and costs to continue to employ engineers, scientists, appraisers, acoustical consultants, and others to respond to and refute Defendant's defamatory statements and address Defendant's threatening, intimidating and harassing conduct in a continued attempt to comply with the terms of the Sales Contract. (JA 119-120). HTDLLC has sufficiently pleaded a *prima facie* case for tortious interference, and the circuit court's dismissal of this claim on demurrer is reversible error.

V. BOUFFAULT'S INTENTIONAL INTERFERENCE CAUSING INCREASED COST OF PERFORMANCE AND RENDERING THE CONTRACT COST PROHIBITIVE IS ACTIONABLE UNDER VIRGINIA LAW.

One who intentionally and improperly interferes with the performance of a contract between another and a third person, by preventing the other from performing the contract ***or causing his performance to be more expensive or burdensome*** is subject to liability to the other for the pecuniary loss resulting to him. *Restatement of Law, Second, Torts,* § 766A. The tort of intentional interference with business relations developed

first in the form of interference with prospective advantage. *Id.* Liability was then extended to inducing a third party to break his existing contract with the plaintiff, even though the means of inducement was not otherwise tortious. *Id.* Later cases extended this latter form of the tort beyond inducing a party to break a contract, meaning persuading him by operating on his mind and thus causing him to choose to break the contract, to causing him not to perform the contract by preventing his performance by some means other than influencing his mental choice. In this case, the interference is the same, the only difference is that the conduct preventing the performance operates on the injured party himself, rather than the third persons. *Id.*

This interference as to the injured party is consistently recognized as actionable. *Morris v. Blume,* 55 N.Y.S.2d 196, 199 (1945) (An unlawful interference with a person in the performance of his contract with a third person is as much a legal wrong as an unlawful inducement of a breach of the contract by a third person); *aff'd mem.*, 269 A.D. 832, 56 N.Y.S.2d 414 (president of corporation prevented plaintiff, its employee, from performing his contract of employment); *McNary v. Chamberlain,* 34 Conn. 384, 91 Am. Dec. 732 (1867) (making performance of his contract more expensive to the plaintiff); *Cue v. Breland,* 78 Miss. 864, 29 So. 850 (1901); *Sidney*

Blumenthal & Co. v. United States, 30 F.2d 247 (2d Cir. 1928) (carrier made transshipment on different carrier from that called for in bill of lading, so that when goods lost shipper was liable to consignee); *South Central Livestock Dealers, Inc. v. Security State Bank,* 551 F.2d 1346 (5th Cir. 1977) (wrongful offset of account and seizure of plaintiff's feedlot); *Harber v. Ohio Nat'l Life Ins. Co.,* 512 F.2d 170 (8th Cir. 1975) (defendant insurance company restricts sales one of plaintiff agency's employees could make); *Richardson v. La Rancherita La Jolla, Inc.,* 98 Ca. App.3d 73, 159 Cal. Rpter. 285 (1979) (lessor's wrongful refusal to recognize lease in lessee corporation when original stockholders sold all their shares of stock to other persons); *White v. Massee,* 202 Iowa 1304, 211 N.W. 839 (1927) (excluding plaintiff from location where contract must be performed); *Sumwalt Ice & Coal Co. v. Knickerbocker Ice Co.,* 114 Md. 403, 80 A. 48 (1911) (intimidating plaintiff); *Rinaldi v. Tana*, 252 Md. 544, 250 A.2d 533 (1969) (plaintiff's co-contractor refused to perform his part of contract); *Yankee Network v. Gibbs,* 295 Mass. 56, 3 N.E.2d 228 (1936) (fraudulently inducing plaintiff to break his contract); *Bacon v. St. Paul Union Stockyards Co.,* 161 Minn. 522, 201 N.W. 326 (1924) (excluding plaintiff from place of performance); *Coonis v. Rogers,* 429 S.W.2d 709 (Mo. 1968) (putting sugar in gas tank of plaintiff's truck preventing performance); *Kyriazi v. Western*

Electric Co., 461 F.Supp. 894 (D.N.J. 1978) (harassment by co-workers); *L & H Investments, Ltd. V. Belvey Corp.,* 444 F. Supp. 1321 (W.D.N.C. 1978) (lessor's refusal to consent to lessee's lease assignment); *Lichter v. Fulcher,* 22 Tenn. App. 670, 125 S.W.2d 501 (1938) (depriving plaintiff of labor needed to perform contract); *Tippett v. Hart,* 497 S.W.2d 606 (Tex. Civ. App. 1973), *refused n.r.e.,* 501 S.W.2d 874 (1973) (grazing cattle on public land in violation of plaintiff's contract with the government); *Cherberg v. Peoples Nat'l Bank,* 88 Wash.2d 595, 564 P.2d 1137 (1978) (owner of building leased to plaintiff restaurant terminated lease and restaurant closed); *Pacific Typesetting Co. v. International Typographical Union,* 125 Wash. 273, 216 P. 358 (1923) (tortiously inducing plaintiff to break his contract).

HTDLLC respectfully submits that this Court has recognized an actionable claim for a defendant's tortious interference with the plaintiff's performance of plaintiff's contract in *Duggin v. Adams, supra.* In *Duggin,* plaintiff sued defendant attorney claiming tortious interference with his terminable-at-will contract rights with seller for the purchase of land. Plaintiff alleged that defendant used his position as seller's attorney to gain confidential information which he used to his own advantage and that by causing the seller to sell to him instead, he deprived plaintiff of expected

gain from the contract assignment. Specifically, plaintiff alleged defendant's direct tortious interference with plaintiff's performance of his own contract.

Duggin entered a contract to purchase land from Williams. Adams, an attorney at law represented Williams throughout the transaction with Duggin. Performance of the contract was contingent upon the results of certain engineering studies and upon Fairfax County's approval of an application to rezone the land. The contract provided that either party could terminate it in the event the rezoning contingency was not met. At the expiration of the 18-month period, the land had not been rezoned. Duggin and Williams entered into an addendum which extended the contract period for an additional 18 months and also provided that the subject contract can be cancelled by either party. Duggin expended a great amount of money, time and effort for engineering tests on the rezoning application, consequently the value of Williams land was substantially increased. As Williams' attorney, Adams learned that Centennial Contractors, Inc. ("Centennial") was willing to pay Duggin an assignment fee for Duggin's contractual rights. Adams used this knowledge to intentionally interfere and deprive Duggin of his property rights.

In carrying out his plan, Adams wrote a letter to Duggin wrongfully accusing Duggin of breaching the contract and stating that Duggin had forfeited his deposit. Because Adams knew the contract had not been breached, his letter was a malicious, knowing, intentional act to mislead and intimidate Duggin into giving up his contract rights. Duggin assigned the contract to Centennial.

On the same day that Centennial notified Adams that it was ready to settle with Williams, Adams wrongfully induced Williams to sign a contract giving Adams the right to purchase the subject property and requiring Williams to cancel her contract with Duggin. The day before Centennial called for settlement, Adams advised Williams not to attend the settlement and then subsequently contracted with Centennial and offered to sell Centennial the Williams property.

In considering whether Duggin's claim should have survived demurrer, this Court specifically noted Duggin's allegations of Adams' direct interference with Duggin in reversing the circuit court's dismissal and remanding the case.

> Adams first wrongfully accused Duggin of breaching the contract, asserting that Duggin, therefore, had forfeited his deposit. Duggin alleges that because Adams knew Duggin had not breached the contract, Adams' actions were malicious, knowing, intentional and wrongful and were undertaken to fraudulently

> mislead and intimidate Duggin into giving up his contract rights.

234 Va. at 229, 360 S.E.2d at 837. This Court recognized Adams' tortious interference with Duggin in misleading him to give up his contract rights as actionable conduct.

A party to a contract has a right of action against persons who, by conduct short of actually inducing the other party to breach the contract, substantially interferes with the performance of that contract. The promisee may recover for any act which retards, makes more difficult, or prevents performance or makes performance of a contract of less value to him. *Law Research Service,* 336 Fed. Supp. 510, 512 (E.D. Mo. 1971)**;** 45 Am. Jur.2d, Interference, § 41; *see also,* Annotation, 84 A.L.R. 43, 52, s. 26 A.L.R.2d 1227, 1240 § 3. In an action for interference, the plaintiff must allege facts showing he had an interest which was legally protected against the alleged interference by the defendant and that such interference was the legal cause of the damage to the plaintiff, although it is not necessary to negate justification. What is required is that sufficient facts be alleged with specificity to give the adverse parties reasonable notice of what they must be prepared to meet. It is not necessary that every element be alleged expressly if the facts alleged, at least by implication, sufficiently apprise the

defendants of the particular element of the tort. 43 Am. Jur.2d Interference, § 55.

In the instant case, HTDLLC had a legally protected right in the Sales Contract to purchase the Property. As alleged in the Complaint, Bouffault intentionally interfered with the Sales Contract to prevent HTDLLC's proposed kennel use of the Property, to benefit her own self interest. (JA 118-119). As with the land contract in *Duggin* which required rezoning to proceed, HTDLLC required the necessary county approvals in order to proceed with the proposed kennel use and to secure the necessary financing. (JA 85, 118-120). Bouffault knew this and intentionally interfered with HTDLLC and the Sellers while HTDLLC and the Sellers worked to obtain the necessary county approvals, thus delaying the settlement of the Sales Contract and significantly increasing HTDLLC's cost of performance.

As alleged, Bouffault's intentionally tortious conduct included:

> a. Making false, reckless, defamatory and/or misleading statements to the press, Clarke County government officials, the planning commission and members of the Board of Supervisors, and to other third parties causing HTDLLC to incur additional costs and expenses to refute Defendant's false, misleading and defamatory statements and to remedy the harm caused by such defamatory statements; and

> b. Making false, reckless, defamatory and/or misleading statements which delayed the review of HTDLLC's Special Use Permit Application and increased the costs and expenses incurred by HTDLLC to have its Special Use Permit Application reviewed; and
> c. Making false and defamatory statements about HTDLLC's proposed use for the Property causing HTDLLC to incur additional expenses to refute the false and defamatory statements and to remedy the damage caused by Defendant's false and defamatory statements; and
> d. . . . [E]ngaging third parties to threaten and harass persons who openly supported HTDLLC's proposed use for the Property causing the Sellers reservations in continuing HTDLLC's Sales Contract.

(JA 119). Bouffault's intentionally tortious conduct resulted in HTDLLC and Ms. Schaecher having to retain additional engineers, consultants, scientists, appraisers and other additional services from specialized experts to refute and address Bouffault's defamatory statements and tortious conduct in order to negotiate amendments to the contract to avoid breach and/or termination of the Sales Contract until the transaction became cost prohibitive and HTDLLC had to terminate the Sales Contract. (JA 119-120). Bouffault's tortious interference further caused the Sellers' reluctance and unwillingness to continue the Sales Contract with HTDLLC resulting in HTDLLC having to make an additional payment in the amount of $10,000 to the Sellers and to renegotiate the Sales Contract to provide for

installment payments of $5,000 per month. To convince the Sellers to continue in the Sales Contract, HTDLLC had to renegotiate, resulting in far less favorable terms at considerable expense to HTDLLC. (JA 119-120, 149-152).

Due to Bouffault's intentional interference, HTDLLC could not afford to continue performance of the Sales Contract and had to terminate it prior to settlement at a significant loss to HTDLLC. Whether Bouffault's conduct interfered with the Sellers and/or directly with HTDLLC's ability to perform or cost of performance, Bouffault's conduct is actionable and unlawful. HTDLLC has sufficiently pleaded the requisite elements for a claim of tortious interference and as such Bouffault's demurrer should have been denied.

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

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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 Opening 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 20th day of January, 2015.

Gina L. Schaecher, Esq.