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In The

Supreme Court of Virginia

RECORD NO. 181014

WILLIAM D. SROUFE,

Appellant,

v.

MURIEL TAMERA WALDRON,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Muriel Tamara Waldron ("Waldron") sued William D. Sroufe ("Sroufe") in the Patrick County Circuit Court ("trial court") for defamation per se. *See* Fourth Amended Complaint ("Complaint"), pp. 11-13 (JA 11-13). Although her Complaint stated additional causes of action against Sroufe and others, this appeal pertains to Waldron's defamation per se claim arising from an April 9, 2015 statement Sroufe made about Waldron to the Patrick County School Board ("board"). (JA 108-12, 123, 307)

During the relevant time, Waldron served as Principal of Stuart Elementary School ("SES") within the Patrick County Schools Division ("PCS"). Complaint ¶1 (JA 1, 84). Sroufe served as PCS' Superintendent. Complaint ¶2 (JA 1, 295).

On April 24, 2015, Sroufe met with Waldron on several matters pertaining to her professional work. (JA 119-21) He removed her as SES' principal that day. Id. Days earlier, on April 15, 2015, Sroufe called Waldron to his office and made several disapproving statements to her; one concerned her role at SES respecting Individual Education Plan ("IEP") teams' referral of intellectually disabled students to Virginia Alternate Assessment Participation ("VAAP") programming.

(JA 99, 103, 114-16); *and see* Pl. Ex's. 10, 11, 20, 21 (JA 438-43, 521, 525-35, 536); D. Ex. 4 (JA 562).

For intellectually disabled students VAAP represents an alternative to standard grade-level curriculum and testing tailored to the Standards of Learning ("SOL"). Pl. Ex. 11, pp. 4-6; Pl. Ex. 20 (JA 439-43, 525-35). A school system's SOL testing results bear upon its State-level achievement assessment and, ultimately, upon its schools' accreditation. (JA 312-13, 548-55, 560 (Column 5, ¶1)).

SOL's yield an objective student learning benchmark based upon standard grade-level curriculum; VAAP yields a relatively subjective learning benchmark based upon a simplified curriculum known as Aligned Standards of Learning ("ASOL"). Pl. Ex.'s 10, 11, 20 (JA 438-43, 525-35); *and see* (JA 206-208, 356-60).

Sroufe's statement about Waldron read as follows:

> You failed to ensure that the IEP teams understand the VAAP participation criteria and apply them appropriately when considering students with disabilities for the VAAP. Your actions will result in students being required to take SOL assessments who, under a correct interpretation of the criteria, should not have been required to do so.

Pl. Ex. 24 (JA 537)[1] *See also* (JA 20, 24, 87).

[1] Herein referred to as "Sroufe's," "the," or "his" statement.

Sroufe made the statement to the board in closed session. (JA 111-12, 123) He did so to obtain the board's approval of his plans to remove Waldron as SES's principal, bypass her due process rights under PCS' *Principal Performance Evaluation System*, and otherwise take negative actions toward her. (JA 117-18, 124-25, 307, 315-17, 469-70, 519).

Sroufe stipulated at trial to his statement's publication. (JA 123) The trial court ruled that Sroufe's statement constituted actionable defamation per se. (JA 229, 349); *and see* Instruction 6 (JA 26) Sroufe did not appeal that ruling.

At the close of Waldron's case, Sroufe moved to strike. (JA 247-53) The trial court overruled the motion. (JA 252-53) Upon the motion's renewal, the court overruled it again. (JA 349) The trial court submitted the statement to the jury. (JA 24) The jury found for Waldron, awarding her $500,000. (JA 27).

Post-trial, Sroufe moved to set aside the verdict, which motion the trial court denied. *Letter Opinion*, *as amended August 2, 2017* ("letter opinion"), p. 18 (JA 74). In its *Revised Judgment and Final Order* of June 7, 2018, the trial court reiterated its denial of Sroufe's

motion to set aside the jury's verdict and entered judgment for Waldron in accordance with that verdict. (JA 49-50).

STATEMENT OF FACTS

A. The Factual Record

Waldron's career in education spanned over 28 years. (JA 83-84) She taught for 18, and served in administration for 10 years. Id. In 2009, she became SES' principal. (JA 84) SES teachers and staff testified to her excellent reputation as principal. (JA 221-26, 228, 231-32).

Sroufe, an EdD and a former PCS elementary school principal, became Superintendent in 2013. (JA 295-96) Dr. Cindi Williams ("Williams") served as SES' Assistant Superintendent of Instruction, reporting to Sroufe. (JA 239, 296-97) Since December 2013, Ann Fulcher ("Fulcher") served as SES' Director of Special Education, having succeeded John Westphalen ("Westphalen") in that job. (JA 267, 269) Sroufe, Williams and Fulcher worked together in SES' central office, along with other administrative personnel. (JA 296-97, 340-42).

In December 2014, Williams professionally evaluated Waldron. Pl. Ex. 25 (JA 538-47); *and see* (JA 239-41). Williams described Waldron's work at length and in exemplary terms. (JA 538-47) Her evaluative comments concluded with the summation, "Great work!" (JA 547).

Toward "the end of March" 2015, Dr. Karen Wood, a longtime PCS administrator and central office employee, overheard a conversation between Williams and Fulcher. (JA 340-42) The conversation related to Sroufe's plan to raise PCS' system-wide SOL scores, in part by increasing the number of SES' intellectually disabled students referred into VAAP:

> [M]y office door stays open 99.99 percent of the time, and I noticed that Ms. Williams was walking down the hall and when she got to the edge of Ms. Fulcher's office she said we are going to have to look at the VAAP, Stuart particularly does not have enough students classified in VAAP in order to get our test scores where they need to be, and that was the comment. And Ms. Fulcher said we'll work on it[.]

(JA 341-42)

Fulcher thereafter conducted a limited review of SES' special education students' IEP "paper" files as maintained in the central

office.[2] (JA 270-74) At trial, *inter alia*, she admitted the inadequacy of her file review, the incompleteness of the central office's IEP files, the ready availability of more complete IEP file materials, her failure to obtain the more complete files or even identify the students' IEP team members, and her resultant inability to discern whether the students' IEP teams correctly applied VAAP participation criteria. (JA 271-77, 285-87) She acknowledged her erroneous view that a child with an IQ of 69 or lower suffered "a significant cognitive disability," which category of disability constitutes one of five VAAP participation criteria. (JA 271-72); *and see* (JA 211); Pl. Ex. 10 (JA 438).

Yet finding no "Appendix D," i.e., *VAAP Participation Criteria* form in the files, Fulcher wrongly claimed that SES' IEP teams for mildly intellectually disabled students were not considering these children for VAAP. (JA 217, 280, 286-87); *and see* Pl. Ex. 10, 21 (JA 438, 536) On April 10, 2015, Fulcher visited SES to confront Waldron and to seek increased VAAP referrals. (JA 142).

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[2] She also prepared what became Pl. Ex. 21, targeting seven SES mildly intellectually disabled students whose IEP teams had not referred them to VAAP. (JA 536); *see also* (JA 191, 329); Pl. Ex. 16, (JA 521). The relevant group of SES' students was reduced to five, however, as one student transferred to another jurisdiction and one was homeschooled during the 2014-2015 academic year. (JA 279, 521, 536).

The Appendix D form states the five VAAP participation, or "eligibility" criteria in a check-the-box, yes-or-no format for IEP teams' use. (JA 438) Students enrolled in grades 3 through 8 or in high school may be considered for VAAP referral, i.e., for participation in the VAAP alternative curriculum and assessment via a portfolio of the student's school work compiled throughout the academic year. Id.; *see also* Pl. Ex.'s 11, 20 (JA 439-43, 525-35). The following documents, introduced into evidence below, explain application of the criteria as promulgated by the Virginia Department of Education ("VDOE"): *Students with Disabilities: Guidelines for Assessment Participation* and *VDOE GUIDANCE DOCUMENT: VAAP Participation Criteria and the Determination of Significant Cognitive Disabilities.* Pl. Ex.'s 11, 20 (JA 439-43, 525-35).

The five VAAP participation criteria are:

1. Does the student have a current IEP or one that is being developed?

2. Does the student demonstrate significant cognitive disabilities?

3. Does the student's present level of performance indicate the need for extensive, direct instruction and/or intervention in a curriculum based on Aligned Standards of Learning? The present level of performance, or student evaluation, may include personal

management, recreation and leisure, school and community, vocational, communication, social competence and/or motor skills.

4. Does the student require intensive, frequent, and individualized instruction in a variety of settings to show interaction and achievement?

5. Is the student working toward educational goals other than those prescribed for a Modified Standard Diploma, Standard Diploma, or Advanced Diploma?

(JA 438).

If the answer is "yes" to each criteria inquiry, then an intellectually disabled student qualifies for VAAP. (JA 438) But a response of "no" for any question "indicates that the student is **NOT** eligible for the VAAP." Id.; (emphasis in original).

During her April 10, 2015 visit to SES, Fulcher also met with one of SES' special education teachers, Brandy Street ("Street"). (JA 91-99, 140, 437) Street, however, had not led the IEP team meetings for the five SES students targeted by Fulcher. (JA 88-89, 97, 145); *and see* Pl. Ex's. 9, 16 (JA 437, 521). Instead, months prior to the 2014-2015 academic year, during Spring 2014, special education teacher Anita Epperly ("Epperly") led those IEP team meetings. (JA 88, 122,

161-64, 286) The IEP teams considered each student for a VAAP referral. (JA 161-64) Without dissent, each IEP team decided that the student did not qualify for a VAAP referral.[3] (JA 161-64, 197).

Epperly had taught these five students from kindergarten or first grade through fourth grade and considered them high-achieving, mildly intellectually disabled students. (JA 100-101, 151-52, 158-62) Because they were not participating in VAAP, the students previously had undergone SOL testing and, although they had not earned passing SOL test scores, their scores demonstrated significant learning capabilities. (JA 158-62, 164) For the 2014-2015 academic year, the students advanced to Street's fifth grade class and were scheduled to undergo SOL testing in the weeks following Sroufe's April 9, 2015 condemnation of Waldron to the board. (JA 88, 145, 164-65); Pl. Ex. 20, pp. 4-7 (JA 529-31).

During the trial, Waldron presented extensive expert and lay testimony that the Epperly-led IEP teams for these students correctly understood and applied VAAP participation criteria, decided against

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[3] Should a parent disagree with an IEP team decision, VDOE provides a process to resolve that disagreement. (JA 368-69) *See generally* Smith v. James C. Hormel Sch.201 of the Inst. of Autism, 2010 U.S. Dist. LEXIS 29026, **7-11 (March 26, 2010)(litigation arising from VDOE dispute resolution process).

VAAP referral for each of the five students, and therefore properly did not include an Appendix D form in the students' IEP records. (JA 88-89, 106-107, 121-22, 145, 152-53, 156-57, 160-68, 170-73, 192, 197, 213-16, 343-44, 385).

Waldron also presented evidence in sharp disagreement with Fulcher's subsequent accounts of her April 10, 2015 meetings with Waldron and Street. *See e.g.* (JA 99, 114-16, 133-42); Pl. Ex.'s 9, 16, 18, 19; D. Ex.'s 3, 4 (JA 437, 521, 523-24, 561-62). Waldron testified in direct contradiction of Fulcher's accounts, including to state that Fulcher misunderstood the import "of her conversation with Mrs. Street." (JA 140-42); *and see* (JA 130).

Fulcher testified that she told Sroufe of her concerns about the number of VAAP students at SES, but Fulcher and Sroufe gave inconsistent accounts of their conversations. Sroufe testified that Fulcher "told me that students that were being taught ASOL, Aligned SOL's, were being tested with SOL's, and I think one had been considered for a VAAP. And then she explained to me …that the VAAP criteria form should have been filled out[.]" (Tr. March 29, 2017, p. 566) Fulcher testified that before she met with Waldron, she told Sroufe "I discussed students that we need to be certain we were assessing them

correctly." Id., p. 522. She denied speaking to Sroufe about his statement prior to his making it to the board on April 9, 2015. (JA 291)

Sroufe testified that he and Fulcher together performed the investigation of the relevant SES students' central office IEP records. (JA 319-26) Neither he nor Fulcher contacted Epperly. (JA 169-70, 322-23).

In any event, both parties' expert witnesses, Michelle Davis, who was called to testify by Waldron, and John M. Eisenberg, who gave a *de bene esse* deposition at Sroufe's behest, concurred in the unreasonableness of such a cursory investigation as that performed by Sroufe and Fulcher. (JA 208-11, 216, 388-89) The jury considered this evidence not only in relation to the falsity of Sroufe's statement, but also as to his abrogation of his qualified privilege in making his statement to the board. *See* Instructions 2 and 3 (JA 24-25).

After making his statement Sroufe commenced an effort to bolster it. At trial he contended that Waldron did not understand the "1% cap," or limitation that VDOE applies to a school system's accreditation-related accountability standards with respect to VAAP participation. (JA 131, 140-41, 299-302, 373-74, 390); Pl. Ex. 27 (JA 548-55) *see also* (JA 213-16). Sroufe, and at his direction Fulcher,

contended that under Waldron's leadership, SES' special education teachers improperly limited IEP teams' VAAP referrals through application of the 1% cap. (JA 274-77, 279-83, 299-302, 319-21); Pl. Ex. 16; D. Ex. 3 (JA 521, 561).

Sroufe made this claim despite the facts that neither he nor Fulcher interviewed Epperly or any member of the relevant students' IEP teams, or reviewed any of the students' complete IEP team files as stored at SES. (JA 169-70, 319-26).

By contrast, Waldron presented evidence to refute Sroufe's 1% cap-related claim. Her evidence contended:

(1) No 1% cap constitutes any part of VAAP participation criteria; as a result, IEP teams do not consider any such cap; (JA 216, 373-74;) Pl. Ex.'s 10, 11, 16, 20, 27 (JA 438-43, 521, 525-35, 548-55).

(2) Sroufe's statement did not reference a 1% cap; Pl. Ex. 24 (JA 537)

(3) Epperly's IEP teams did not consider or apply a 1% cap, and did not limit VAAP student referrals with regard to such a cap or for any other reason; (JA 164-72, 177-83).

(4) Epperly correctly understood VAAP participation criteria, and led the relevant students' IEP teams' application of those criteria in

compliance with her multiple VDOE trainings and 19 years' special education experience; (JA 113, 151-54, 158-74).

(5) Waldron, Street and Epperly audited the IEP team records of SES' intellectually handicapped students and determined that their IEP teams correctly understood and applied VAAP participation criteria, and did not consider or apply a 1% cap; (JA 93-99, 103-107, 112-13, 132-33, 173-74).

(6) Ms. Davis reviewed a wide range of relevant information and data, and testified in her expert opinion that SES students' IEP teams correctly understood and applied VAAP participation criteria, and did not limit VAAP referrals due to or otherwise apply a 1% cap; (JA 203-16).

(7) During Waldron's tenure as SES principal, the total number of PCS' annual VAAP referrals did not approach 1% of its total student population; (JA 292); Pl. Ex. 18 (JA 523).

(8) Westphalen, the PCS special education director preceding Fulcher, reserved to himself consideration and implementation of the system-wide 1% cap accountability standard, and any misunderstandings or misapplications of it were attributable to him alone; (JA 177-82, 192, 195-96, 287-88); Pl. Ex. 27; D. Ex. 3, 4 (JA 548-55, 561-62).

(9) Fulcher conducted no VAAP trainings and changed none of Westphalen's policies from December 2013 through April 2015; (JA 283-87, 345); *and see* Pl. Ex. 18 (JA 523).

(10) The content of Fulcher's own April 10, 2015 letter to Waldron refuted Fulcher's assertion of alleged 1% cap limitations. In that letter, Fulcher asserted that "Mrs. Street said that she had been told in the past that…she could only do one VAAP." (JA 437) Yet, in the same letter, Fulcher acknowledged that IEP teams led by Street made *three* VAAP referrals for the 2012-13 school year; (JA 437); Pl. Ex. 18; D. Ex. 3 (JA 523, 561); *see also* (JA 140-41).

(11) Fulcher admitted during her cross-examination that SES' IEP teams correctly applied VAAP participation criteria, and Sroufe acknowledged this admission during his testimony; (JA 276-77, 325); *see also* (JA 285-87, 290).

(12) Waldron impeached Sroufe's and Fulcher's credibility, including with prior inconsistent statements and rebuttal witnesses. (JA 285-87, 289-90, 319, 323-24, 326-29, 330-33, 337-38, 340-46); Pl. Ex.'s 17-19, 33 (JA 522-24, 559-60); *see also* (JA 385-91).

The trial court itself noted the "outright impeachment of" Fulcher, and, that Sroufe "flatly contradicted his own witness [Fulcher], which

left the impression that there was a toxic combination of dishonest testimony" by Sroufe and Fulcher. (JA 62-63); (clarification added). Yet, in its letter opinion, the trial court ignored the above-enumerated evidence to express its disagreement with the jury's apparent acceptance of it. *See e.g.* (JA 68-71).

Waldron and Epperly testified that Sroufe's statement was false, and Ms. Davis gave expert testimony that it was false. (JA 113, 169, 172, 213-16) Each witness described the empirical efforts made to support their conclusion. (JA 93-99, 103-107, 112-13, 132-33, 173-74, 209-16) Mr. Eisenberg, who led VDOE's efforts to promulgate VAAP participation criteria, corroborated the empirical ability to prove true or false assertions about whether an IEP team understood and correctly applied VAAP participation criteria. (JA 385-89)

By its verdict, the jury necessarily found Waldron's evidence credible and rejected Sroufe's evidence as not credible. (JA 27) The jury received an explicit instruction charging them to make these determinations. (JA 23)

Yet in the Opening Brief of Appellant at page 11, Sroufe lifts selected questions posed to Epperly during cross-examination about her deposition testimony and referencing her past experiences with

Westphalen's putative misapplications of the 1% cap.[4] Ignoring all contrary evidence, Sroufe then contends *ipse dixit* that his statement was true. Id., pp. 11-12.

On the issue of "sting," as argued below, Waldron asserts that because Sroufe's statement constituted defamation per se she bore no legal obligation to prove that the statement actually damaged her reputation. Yet Waldron introduced to the jury substantial evidence of damage to her professional reputation and standing, and of the opprobrium and humiliation that Sroufe's statement caused her to suffer. *See e.g.* (JA 121, 126-28, 234-36).

B. The Trial Court's Letter Opinion

Waldron asserts that Sroufe cannot rely upon the trial court's letter opinion's legal and factual conclusions. That letter opinion constitutes a textbook example of a judge's personal disagreement

[4] The quoted passage acknowledged that it was not Epperly's "job" to administer the 1% cap. Opening Brief of Appellant, p. 11. Epperly emphatically testified that it was not her job to apply any 1% cap, and Sroufe's counsel agreed with her in that regard. Id. Epperly further testified, "I didn't misunderstand my job." Id. Indeed, it would be impossible for an IEP team meeting in the Spring of 2014 to determine the total number of PCS students receiving VAAP referrals, as that number was not compiled on a system-wide basis until September of the 2014-2015 academic year. (JA 283-85, 321); Pl. Ex. 27 (JA 549 ¶3).

with a jury verdict subordinated to the court's duty to sustain a verdict supported by sufficient evidence. *See generally* Va. Code § 8.01-680; Coleman v. Blankenship Oil Corp., 221 Va. 124, 128-29 (1980)("[T]he trial judge cannot substitute his conclusion for that of the jury…The weight of a jury's verdict, when there is credible evidence upon which it can be based, is not overborne by the trial judge's disapproval.").

On the legal issue whether Sroufe's statement contained actionable factual connotations, the record is replete with evidence that the statement was subject to empirical proof of its falsity. (JA 93-99, 103-107, 112-13, 132-33, 169, 172-74, 209-16) Yet the trial court clearly labored over the decision whether Sroufe's statement constituted one of fact or opinion. *Compare* letter opinion pp. 12-18 (JA 68-74); *with* (JA 252-53, 349 (overruling motions to strike) and *Revised Judgment and Final Order* (JA 49-50), (overruling Sroufe's motion to set aside the verdict and entering final judgment for Waldron).

On this issue, and despite its letter opinion's purported conclusions, the trial court acknowledged at trial that "I could be wrong. I could definitely be wrong. I could be wrong. I want to see what a jury will do." (JA 252-53); *see also* (JA 349). And because the issue

constitutes one of law, these trial court equivocations are inapposite to this appeal.

Because the judge admittedly went outside of the record and relied upon his personal views as a community member to support his legal and factual conclusions, the letter opinion cannot serve as legal or factual authority on appeal. (JA 65, 67, 72-74) *See generally* CPM Va., LLC v. MJM Golf, LLC, 291 Va. 73, 85-86 (2015)(Court does not consider matters outside of trial court record; held "fatal" to litigant's cause to make "thematic argument" or make "use of matters outside the trial court record.") Waldron submits the impossibility of separating out on appeal which of the trial court's legal and factual conclusions flowed in whole or part from sources outside of the record.

The trial court's legal and factual conclusions are further undermined by its disdain for Waldron's case theory regarding Sroufe's plan to boost PCS' SOL scores, and its lament of the jury's perceived belief in it. (JA 65-74) For example, during the trial, the court derisively stated to Waldron's counsel that the jury "may see this differently than I do because you've done a really nice job of manipulating the case." (JA 254) In its letter opinion, the trial court referred to Waldron's case theory as a "VAAP for Glory…scheme" of "smoke and mirrors" that the

court deemed "unfair and unconscionable." (JA 66-67, 73) No one can know how much the court's animus toward Waldron's case theory colored its letter opinion's content.

Waldron observes that while the elements of defamation per se did not require her to prove Sroufe's motives for acting maliciously to damage her reputation, Virginia law entitled her to develop her case theory. *See* Baker v. Carrington, 138 Va. 22, 24 (1924)("[T]he plaintiff was clearly entitled to have his theory of the case presented to the jury[.]").

And Waldron presented substantial evidence to support her case theory. For example, consistent with the plan Karen Wood overheard, Sroufe caused VAAP referrals of PCS students to skyrocket. (JA 331-33, 559-60); Pl. Ex.'s 17-19 (JA 522-24); *see also* (JA 390). Fulcher personally intervened in IEP team meetings at SES, ensuring that the relevant five students and others received VAAP referrals for the 2015-2016 academic year. (JA 193-94, 293-94, 337-38) No one stood in Fulcher's way, fearing Waldron's fate. (JA 193-94, 337-38) Fulcher dubbed her strategy, "force a choice." (JA 293-94, 556).

Predictably, during the following 2015-2016 academic year, PCS' system-wide SOL scores precipitously increased. (JA 330-33,

390); Pl. Ex.'s 17-19, 27 p. 5 ("a few students have a significant impact") (JA 522-24, 552). Sroufe wrote a newspaper article trumpeting the achievement. (JA 332, 334-35); Pl. Ex. 33 (JA 559-60). But months later, VDOE administratively "reassigned" several scores because from a system-wide perspective PCS exceeded the 1% cap; VDOE thus lowered PCS' SOL scores for accreditation purposes.[5] (JA 245, 330-33); *see also* Pl. Ex. 27, p.2 (JA 549).

SUMMARY OF ARGUMENT

Sroufe made the statement to the board to obtain its assent to his plan to remove Waldron as SES' principal and impose other negative measures upon her. As a matter of law, Sroufe's two-sentence statement contained provably false factual connotations. Viewed holistically, the statement accused Waldron of professional misconduct that educationally harmed SES' intellectually disabled students.

The record contains substantial evidence to support the jury's verdict. Waldron factually proved Sroufe's statement's falsity through

[5] For school system accountability purposes, VDOE initially counts all VAAP students as having passed the SOL tests. (JA 330-32) If the school system exceeds the 1% cap, VDOE later "reassigns" a number of those "passing" scores, lowering the school system's overall SOL pass rate. (JA 548-49).

both expert and lay witnesses. The jury accepted her evidence as dispositive and acted within its province to do so. (JA 21-25, 27)

Sroufe did not appeal the trial court's ruling that his statement constituted defamation per se. Nor did Sroufe offer any jury instruction on "sting." As defamation per se, Sroufe's statement necessarily harmed Waldron's reputation. Without objection, the jury received an instruction explicitly stating that Waldron could "recover compensatory damages without any proof of actual or peculiar injury." (JA 26) Waldron therefore bore no burden to establish sting, i.e., that Sroufe's statement damaged her reputation or otherwise subjected her to opprobrium, humiliation or other injury. The trial court's defamation per se ruling mooted any issue of sting. Sroufe failed to preserve for appellate review any issue regarding sting.

Nevertheless, Waldron introduced substantial sting evidence. Her evidence described the harm that Sroufe's statement caused to her professional reputation. Waldron also established that Sroufe's statement caused her to suffer opprobrium and other injuries.

AUTHORITIES AND ARGUMENT

I. The trial court correctly entered judgment upon the jury's verdict, having denied Sroufe's motions to strike and to set aside that verdict. Sroufe's statement contained provably false factual connotations, was false and constituted injurious defamation per se.

STANDARDS OF REVIEW

The Court reviews de novo a trial court's determination "[w]hether a statement is an actionable statement of fact or non-actionable opinion." Jordan v. Kollman, 269 Va. 569, 576 (2005); *and see* Cashion v. Smith, 286 Va. 327, 336 (2013).

The falsity of Sroufe's statement presented a jury issue. Hyland v. Raytheon Tech. Servs. Co., 277 Va. 40, 48 (2009)("[T]he jury's function is to evaluate the evidence presented and to determine whether the plaintiff has met her burden of proving that the allegedly defamatory statement is false.").

When a trial court declines to strike a plaintiff's evidence and to set aside a jury verdict, the Court reviews the evidence's sufficiency with deference to the jury's verdict and the judgment based upon it. Bitar v. Rahman, 272 Va. 130, 137, 141 (2006). "Armed with a jury verdict approved by the trial court," Waldron assumes "the most favored position known to the law…She is entitled to have the

evidence, and all inferences that may be reasonably drawn from it, viewed in the light most favorable to her. The judgment of the circuit court will not be set aside unless it is 'plainly wrong or without evidence to support it.'" Id., at 137 (*quoting in part* Va. Code § 8.01-680; other citations omitted).

Finally, with respect to Sroufe's sting argument, the trial court ruled that Sroufe's statement constituted defamation per se. (JA 229, 349); *and see* Instruction 6 (JA 26). Sroufe did not appeal that ruling. A defamation per se statement is "necessarily hurtful" in its effect upon a plaintiff's reputation. Fleming v. Moore, 221 Va. 884, 889-90 (1981). As a result, "if the published words are determined by the trial judge to be actionable *per se* at common law, compensatory damages for injury to reputation, humiliation, and embarrassment are presumed." Great Coastal Express v. Ellington, 230 Va. 142, 151 (1985).

Waldron therefore bore no burden to establish sting, i.e., that Sroufe's statement tended "to injure [her] reputation in the common estimation of mankind[.]" Schaecher v. Bouffault, 290 Va. 83, 92 (2015)(clarification added). The legal presumption of injury to Waldron's reputation mooted any issue respecting sting. Moreover, Sroufe's failure to appeal the trial court's defamation per se ruling

foreclosed that ruling's appellate review, including the subsidiary issue whether his statement carried sting. Rule 5:17(c)(1)(i)("Only assignments of error assigned in the petition for appeal will be noticed in this Court.").

ARGUMENT

A. Sroufe's statement contained provably false factual connotations; it was not an expression of pure opinion.

In Jordan, the Court stated that, "[h]istorically, a cause of action for defamation has been viewed as a means to protect a basic right because 'the individual's right to personal security includes his uninterrupted entitlement to enjoyment of his reputation.'" 269 Va. at 575 (citations omitted). "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." Gazette, Inc. v. Harris, 229 Va. 1, 7 (1985) *quoting* Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

"For a statement to be actionable, it must 'have a provably false factual connotation and thus [be] capable of being proven true or false.'" Schaecher, 290 Va. at 98, *quoting* Cashion, 286 Va. at 336. The determination is an issue of law. Hyland, 277 Va. at 47; *and see* Wjla-TV v. Levin, 264 Va. 140, 152 (2002)(accord).

Allegedly defamatory statements must be considered in context, giving the words "their plain and natural meaning…as other people would understand them, and according to the sense in which they appear to have been used" to their intended audience. Schaecher, 290 Va. at 93; (citations omitted).

Although pure expressions of opinion are not actionable, "[f]actual statements made in support of an opinion, however, can form the basis for a defamation action." Hyland, 277 Va. at 47; (citations omitted). In Raytheon Tech. Services Co. v. Hyland, 273 Va. 292, 304 (2007), the Court favorably quoted the United States Supreme Court to explain this principle:

> As…noted in Milkovich v. Lorain Journal Co., 497 U.S. 1…(1990), 'expressions of 'opinion' may often imply an assertion of objective fact.' Id. at 18. The Supreme Court went on to state, "[s]imply couching…statements in terms of opinion does not dispel these implications." Id. at 19.

273 Va. at 303.

In Hyland, the Court held that in "determining whether a statement is one of fact or opinion, a court may not isolate one portion

of the statement at issue from another portion…Rather, a court must consider the statement as a whole."[6] 277 Va. at 47; (citations omitted).

Sroufe made his statement to the board to obtain its assent to his plan remove Waldron as SES' principal and impose other negative measures upon her.[7] (JA 307) The statement professionally condemned Waldron through cause-and-effect factual assertions.[8]

As to "cause," Sroufe stated that Waldron **failed to ensure** two distinct things. (JA 537) One, that SES' IEP teams **understood** VAAP participation criteria. Id. And two, that SES' IEP teams **correctly**

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[6] Turning to the jury's role, the Court added that "[t]he requirement that an allegedly defamatory statement be considered as a whole also is vital to a determination of the truth or falsity of defamation claim, because defamatory statements may be made by implication, inference, or insinuation…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 opinion and other stated facts. Hyland, 277 Va. at 47-48; (citations omitted)

[7] Sroufe cannot contend on appeal that he relied upon counsel advice to justify any of his actions. He intimates such reliance at pages 4 and 5 of the Opening Brief of Appellant. Yet Waldron objected to such testimony at trial, the trial court sustained the objection and Sroufe's counsel withdrew his question about putative reliance on counsel advice. (JA 308-11).

[8] In Andrews v. Va. Union Univ., 2007 U.S. Dist. LEXIS 85273, **26-30 (Nov. 19, 2007), Judge Robert F. Payne, applying Virginia law, ruled actionable as defamation per se a university administrator's cause-and-effect statements that the plaintiff, a professor, "misadvised" students and therefore they "would not be able to graduate on time".

applied those criteria "when considering students with disabilities for the VAAP." Id.

An IEP team's understanding of VAAP criteria and the correctness of their application can be empirically determined. Both Ms. Davis and Mr. Eisenberg described the investigative measures available to empirically determine the correctness of an IEP team's understanding and application of VAAP participation criteria.[9] (JA 209-12, 387-89) The methodology centered upon reviewing the individual students' IEP files and interviewing one or more IEP team members. Id.

Ms. Davis performed this type of investigation and testified about it. (JA 203-16) Ms. Davis testified that SES' IEP teams correctly understood and applied VAAP participation criteria. (JA 213-16) In corroboration of that conclusion, both Waldron and Epperly testified that they, along with Street, audited each relevant child's IEP file and

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[9] As observed by Judge Payne in Gilberston v. Jones, 2016 U.S. Dist. LEXIS 110179, *20 (Aug. 16, 2016), "Allegations that a person has performed below a professional standard are actionable, because expert testimony may be employed to determine whether the plaintiff met the relevant professional standard." *Citing* Cashion, 286 Va. at 337(wherein the Court recognized that expert testimony regarding the competency the physician plaintiff's patient care could establish the truth or falsity of an alleged defamatory per se statement).

verified that the students' IEP teams correctly understood and applied VAAP participation criteria. (JA 93-99, 103-107, 112-13, 132-33, 173-74)

As to "effect," Sroufe stated that Waldron's failures "**will result**" in "students being required to take SOL assessments who under a correct interpretation of the criteria, **should not**" take those tests. (JA 537) Context matters here. First, an intellectually disabled student's incorrect placement into SOL testing educationally detriments that child. (JA 277, 281-82, 391-94) Second, Epperly chaired the IEP team meetings for the relevant SES students during Spring 2014. By deciding against VAAP referrals, the students were slated for SOL testing during the subsequent academic year, that is, in May 2015, which testing was scheduled to occur just weeks after Sroufe's statement. (JA 164-65, 302); Pl. Ex. 20, pp. 4-7 (JA 529-32).

Thus, the second sentence of Sroufe's statement was not mere "predictive" opinion. When Sroufe made his April 9, 2015 statement, the relevant five students' SOL testing was imminent. Nothing in the record contradicts that the students took their fifth grade SOL tests as

scheduled.[10] *See* (JA 158). Indeed, for the 2014-2015 academic year, those students would not have compiled the portfolio of materials necessary for VAAP assessment. *See* (JA 164-65); Pl. Ex. 20, 27, (JA 530 ¶ "E," 531 ¶ "III, 557 ¶ "K").

Yet, for the sake of argument, even if one accepts Sroufe's argument that his second sentence was opinion, by supporting it with factual assertions that Waldron failed to ensure SES' IEP teams' understanding and correct application of VAAP participation criteria, the entire two-sentence statement was actionable. *See* Hyland, 277 Va. at 47 ("Factual statements made in support of an opinion…can form the basis for a defamation action.").

Clearly, if SES' IEP team members correctly understood and applied VAAP participation criteria, then if the team decided against a VAAP referral the student did *not* improperly take SOL tests. *See* (JA 89-90, 205-208, 370-73). This factual conclusion holds true regardless whether the student achieved a passing SOL test score. (JA 206).

Indeed, the distinction between (a) an IEP team's correct understanding and application of VAAP participation criteria and (b) its

[10] In the Opening Brief of Appellant, page 9, Sroufe concedes that his two-sentence statement contained factual connotations, arguing that "both of Sroufe's sentences were true."

decision whether to refer a student into VAAP, demonstrates the fallacy of Sroufe's "reasonable people may differ" argument.[11] When an IEP team correctly understands and applies VAAP participation criteria, the team properly may decide ***for or against*** a student's VAAP referral. Neither IEP team choice would negate the actionable factual connotations of Sroufe's statement to the board in condemnation of Waldron. (JA 537).

Sroufe's statement accused Waldron of professional misconduct that educationally harmed SES' intellectually disabled students. The record demonstrates the provably false factual connotations comprising his statement. The statement therefore constituted actionable defamation per se. Schaecher, 290 Va. at 98; *see also* Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 8 (1954)("Every false and unauthorized imputation…which imputes to a business or professional [person] conduct which tends to injure him in his business or profession is libelous and actionable[.]")(clarification added).

[11] It likewise demonstrates that the trial court erred in adopting this argument in its letter opinion. (JA 69-71).

B. The record supports the jury's finding that Sroufe's statement was false.

Whether Waldron proved Sroufe's statement false by a preponderance of the evidence constituted a jury question. Jordan, 269 Va. at 576; Hyland, 277 Va. at 48; *and see* Instruction 2 (JA 24). "Trial by jury is a sacred right…The role of a jury is to settle questions of fact." Supinger v. Stakes, 255 Va. 198, 203 (1998).

The trial court instructed the jury to evaluate the evidence and, *inter alia*, decide whether Waldron proved that Sroufe's statement was false. (JA 23) Following their deliberations, the jury rendered a verdict based on Waldron's having carried her burden of proof. (JA 27) The sum total of Sroufe's contrary arguments on appeal and the trial court's letter opinion conclusions represent nothing more than disagreement with the jury's verdict. *See* Opening Brief of Appellant, pp. 13-14; (JA 68-71).

Waldron presented substantial evidence that Sroufe's statement was false. Both Waldron and Epperly testified to its falsity. (JA 113, 169, 172) Ms. Davis testified to her expert opinion that it was false. (JA 213-16) As detailed above at pages 12 through 15, not only did Waldron present this affirmative evidence of the statement's falsity, she also rebutted Sroufe's contrary evidence and impeached his and

Fulcher's credibility. *See e.g.* (JA 276-77, 289-90, 319, 323-33, 337-38, 340-46).

In Brown v. Hardin, 225 Va. 624, 638 (1983), the Court held, "In testing the credibility and weight to be ascribed to the evidence, we must give…juries the wide discretion to which a living record, as distinguished from a printed record, logically entitles them."

The record contains sufficient evidence to support the jury's finding that Sroufe's statement was false. The trial court correctly entered judgment upon the jury's verdict. (JA 49-50) That verdict is neither plainly wrong nor lacking sufficient evidence to support it. *See* Va. Code § 8.01-680; Bitar, 272 Va. at 137, 141.

C. The trial court's defamation per se ruling mooted any issue regarding "sting;" Sroufe failed to preserve for appellate review any issue regarding sting; and, Sroufe's statement carried substantial sting injurious to Waldron's professional reputation.

The trial court held that Sroufe's statement constituted defamation per se. (JA 229, 349) It stated, "It's a per se case. This was definitely vocational and work related and impacted her and her trade or profession." (JA 349) Sroufe offered no jury instruction on sting and chose not to appeal the trial court's ruling that his statement constituted actionable defamation per se.

As defamation per se, Sroufe's statement was actionable without regard to special damages, in that "[i]t is difficult, if not impossible, to prove with mathematical precision the quantum of damages for injury to reputation and embarrassment that may flow from a defamation. For this reason, the common law, as early as 1670, modified the usual standard of proof of damage in those cases where the words are actionable *per se*." Ellington, 230 Va. at 148.

A defamation per se statement requires no proof of sting, i.e., whether Sroufe's statement tended "to injure [Waldron] reputation in the common estimation of mankind[.]" Schaecher, 290 Va. at 92; (clarification added). The words "contain an imputation that is 'necessarily harmful' in its effect" upon its victim's professional reputation. Fleming, 221 Va. at 889-90, *quoting* James v. Haymes, 160 Va. 253, 261-62 (1933). As a result, "if the published words are determined by the trial judge to be actionable *per se* at common law, compensatory damages for injury to reputation, humiliation, and embarrassment are presumed." Ellington, 230 Va. at 151.

Waldron therefore bore no burden to establish sting. The legal presumption of injury to Waldron's reputation mooted any issue respecting sting. Sting therefore is a "nonissue" on appeal. Moreover,

Sroufe's failure to appeal the trial court's defamation per se ruling foreclosed that ruling's appellate review, including review of any subsidiary issue regarding whether his statement carried sting. Rule 5:17(c)(1)(i)("Only assignments of error assigned in the petition for appeal will be noticed in this Court.").

In any event, the statement did carry injurious sting. Sroufe spoke directly to Waldron's employing school board, accusing her of misconduct detrimental to SES' intellectually disabled students' educations. (JA 537) Through the statement Sroufe justified to the board, *inter alia*, his intention to remove Waldron as SES' principal without due process, demoting her from a position she'd held since 2009. *See* (JA 119-25, 128, 307).

Waldron proved that the publication of Sroufe's statement caused severe damage to her reputation, subjected her to opprobrium and caused her severe mental anguish. (JA 111, 119-25, 128, 234-36) *See* Schaecher, 290 Va. at 92 (elements of sting include injury to reputation; throwing contumely, shame or disgrace upon another; holding one up to scorn, ridicule, or contempt; or rendering her infamous, odious or ridiculous). Several SES staff members testified that prior to Sroufe's statement's publication, Waldron enjoyed an

excellent reputation as a school principal. (JA 221-26, 228, 231-32) Yet because of the statement's publication, Waldron suffered damage to her professional reputation; could not find another job; required medical attention; and testified to "devastating" effects, including that "I have been humiliated beyond repair." (JA 121, 124-25, 128, 234-36) Sroufe did not challenge this evidence.

Thus, even if Waldron was required to establish sting, she offered substantial and unrebutted evidence of damage to her professional reputation and other injuries causally related to Sroufe's statement.

Sroufe offers no basis for reversal of the final judgment.

CONCLUSION

The trial court correctly entered final judgment upon the jury's verdict in Waldron's favor. Sroufe's statement contained provably false factual connotations. Waldron presented substantial evidence of that statement's falsity and the jury found that evidence sufficient.

The trial court ruled that Sroufe's statement constituted defamation per se. Sroufe did not appeal that ruling. As defamation per se, Waldron did not need to establish that Sroufe's statement carried sting. The trial court's defamation per se ruling therefore

mooted any issue of sting. Sroufe otherwise failed to preserve the matter for appellate review.

Nevertheless, Waldron presented substantial evidence of sting including the damage to her professional reputation and other injuries she suffered because of Sroufe's statement.

Waldron asks the Court to affirm the final judgment.

Respectfully submitted,
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CERTIFICATE

I hereby certify that on this 26th day of March, 2019, pursuant to Rule 5:26, three paper copies of the Brief of Appellee have hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Brief of Appellee was served, via email, upon: Jim H. Guynn, Jr., (VSB No. 22299), GUYNN & WADDELL, PC, 415 South College Avenue, Salem, VA 24153: jimg@guynnwaddell.com.

In accordance with Rule 5:26(b), this brief contains 6,996 words exclusive of its cover page, table of contents, table of authorities, and certificate.

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