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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

770738

CHARLES V. WATT

v.

WILLIAM H. McKELVIE

APPENDIX

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Date Filed:
7/13/76

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

CHARLES V. WATT,
Plaintiff

v.

MOTION FOR JUDGMENT

WILLIAM H. McKELVIE
1213 Devere Drive
Silver Spring, Maryland

To be served by: Secretary of Commonwealth
Statutory Agent
P.O. Box 1475
Richmond, Virginia 23219

and

JOSEPH H. CALICOTT
3312 Skyview Place
Lynchburg, Virginia

and

RAYMOND E. HOGAN
Richland Drive
Lynchburg, Virginia,

Defendants

Comes now the Plaintiff, Charles V. Watt, by counsel, and files this his motion for judgment, stating as follows:

1. That the Plaintiff during the period of June, 1972 to date has been self-employed as a manufacturer's representative representing major medical firms with respect to hospital furniture, equipment and supplies, and as an independent medical design and marketing consultant with respect to hospital furniture, equipment and supplies.

2. That to the best of Plaintiff's knowledge, the Defendant McKelvie was, during the aforesaid priod, a manufacturer's representative of various product lines of manufacturers and suppliers of hospital and laboratory equipment, fixtures, furnishings, supplies and other hospital laboratory services.

2A. That jurisdiction and venue with respect to Defendant McKelvie is established under Sections 8-81.2(4) and .4, respectively, of the Code of Virginia of 1950, as amended, and that service of process for Defendant McKelvie is to be made pursuant to Section 8-81.3 of the Code of Virginia of 1950, as amended.

3. That Defendant Calicott is a physician, specializing in the practice of pathology, and was in the year 1975 in the Department of Pathology at Lynchburg General-Marshall Lodge Hospitals, Inc.

4. That Defendant Hogan is Executive Vice President of Lynchburg General-Marshall Lodge Hospitals, Inc., and was so employed in that capacity in the year 1975.

5. That on December 26, 1973, Plaintiff Watt entered into a contract with Lynchburg General-Marshall Lodge Hospitals, Inc. to do medical design consulting work with respect to laboratory furntiure, equipment and supplies wherein he accurately represented himself as an independent consultant in said field, said contract being executed on behalf of the hospital by Defendant Hogan.

6. That on or about February 18, 1975, Defendant McKelvie telephoned Defendant Calicott in Lynchburg, Virginia and slanderously notified him of the following:

(a) That during the entire time of Plaintiff Watt's contract with Lynchburg General Plaintiff Watt was a representative of Defendant McKelvie and that through McKelvie Plaintiff Watt was a representative of Portable Laboratories, Inc. (Porta-Lab), a furniture laboratory manufacturer; and

(b) That the design work, etc. which Plaintiff Watt had supplied Lynchburg General through his contract with it had all been done by Porta-Lab; and

(c) That Defendant McKelvie had represented to Defendant Calicott that Plaintiff Watt had been a representative of Porta-Lab through McKelvie from the time he had originally started working on the contract with Lynchburg General; and

(d) That the plans and specifications provided by Plaintiff Watt including room layouts and the placement of laboratory furniture were not prepared by Mr. Watt, but were prepared by representatives of Porta-Lab.

7. That Defendant McKelvie also in February of 1975, immediately after the call to Defendant Calicott, called Defendant Hogan in Lynchburg, Virginia, and reported slanderously to Defendant Hogan the following:

(a) That Watt was a representative of Porta-Lab through McKelvie Associates at the time he entered into the contract with Lynchburg General in December of 1973; and

(b) That Mr. Watt had represented himself as an independent consultant and had prepared plans which carried Mr. Watt's name as a company, when in fact, throughout the entire time Watt was associated with McKelvie Associates and was supposed to be representing McKelvie Associates and Porta-Lab.

That shortly after said telephone call Mr. William M. McKelvie made a personal visit to Defendant Hogan in Lynchburg, Virginia, reiterating the previous allegations in this numbered paragraph, and that the services provided by Watt should have been furnished as representative of McKelvie's services for which there would have been no charge.

8. That the statements made by Defendant McKelvie to Defendants

Calicott and Hogan as aforestated in Paragraphs 6 and 7, respectively, were repeated by Defendants Calicott and Hogan under oath in the City of Charlottesville on March 2, 1976, at 230 Court Square, Charlottesville, Virginia, in the presence of Russell P. Crannis, Notary Public, and in the presence of Charles V. Watt, Eric G. Peters, and Paul M. Peatross, Jr., and as stated constituted slander.

9. That the Defendant, William H. McKelvie, slandered the Plaintiff by stating under oath in the City of Charlottesville on May 19, 1976, the following declarations:

(a) "My opinion is that 90 per cent of what Mr. Watt did was given to him by one of my manufacturers", which pertained to the work Mr. Watt did for Lynchburg General;

(b) "And he took this contract with Lynchburg General denying that he represented me and my product lines";

(c) In response to a question from Mr. Watt's attorney, "Did you ever tell Dr. Calicott or Mr. Hogan that all this spec work and all had been Porta-Lab's work that Mr. Watt had put his name on?", Mr. McKelvie replied, "It's copied from Porta-Lab."

(d) "When Mr. Watt sends a sepia to Portable Labs to have work done, then I would say that, yes, Portable Labs did a majority of the work."

(e) "The presentation of the drawings by the architect are almost a copy of the information that we gave Mr. Watt."

10. That the Plaintiff, Charles V. Watt, did not represent Portable Laboratories, Inc. or Porta-Lab at the time he entered into the contract with Lynchburg General, and he was not connected with any manufacturer which would affect his independent judgment in doing

consultant work for the hospital pursuant to his contract; that Mr. Watt prepared the drawings entirely on his own with the help of Porta-Lab and others concerning electrical and mechanical work which has to be coordinated with the architects, the hospital and said mechanical and electrical contractors; that the statements that 90 per cent of his work or a majority of his work was provided by Porta-Lab or one of Mr. McKelvie's manufacturers is a total falsehood and that the statements repeated by Dr. Calicott and Mr. Hogan are untrue.

11. That on April 3, 1974, in the Circuit Court of the County of Albemarle, Lynchburg General-Marshall Lodge Hospitals, Inc. did file a motion for judgment against Plaintiff Watt based on said slanderous statements suing for the sum of $5,950.00, and that on April 4, 1975, the said William H. McKelvie did file a motion for judgment in the Circuit Court of the County of Albemarle suing Plaintiff Watt for the sum of $75,000.00, using his slanderous statements as a basis for said suit, which have caused Plaintiff inconvenience and expense in defending the same.

12. That Defendant McKelvie did appear in Mint Hill, North Carolina, a suburb of Charlotte, North Carolina, on Thursday, October 30, 1975, and report to the Editor of the Southeast News the fact that Plaintiff Watt was not a person of integrity or honesty and had fled the State of Virginia to avoid service of process of the two suits against said Watt aforementioned, said allegations being untrue and having caused Plaintiff public embarrassment and monetary damages.

13. That Plaintiff has sought employment in the field of sales and consulting in the hospital laboratory furniture and equipment field and has been met with untrue remarks about him spread among the pro-

fession by Defendant McKelvie prohibiting his ability to become employed and causing him to sustain damages.

14. That the words spoken by Defendants Calicott, Hogan and McKelvie in the City of Charlottesville were intended to have and did have the effect of subjecting Plaintiff to hatred, contempt and ridicule in his chosen vocation.

15. By reason of the foregoing defamatory language alleged above to have been spoken by said Defendants, Plaintiff has suffered and continues to suffer mental and emotional suffering, embarrassment and humiliation and damage to his professional reputation.

WHEREFORE, Plaintiff prays that he be awarded damages arising from said defamation as follows:

A. Judgment against Defendant McKelvie in the sum of $80,000.00 in compensatory damages and $50,000.00 in punitive damages.

B. Judgment against Defendant Calicott in the sum of $80,000.00 in compensatory damages and $50,000.00 in punitive damages.

C. Judgment against Defendant Hogan in the sum of $80,000.00 in compensatory damages and $50,000.00 in punitive damages.

CHARLES V. WATT

By Counsel

/s/ Paul M. Peatross, Jr.

Paul M. Peatross, Jr.
414 E. Jefferson Street
Charlottesville, Virginia

Counsel for Plaintiff

Date Filed
8/5/76

V I R G I N I A :

IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

CHARLES V. WATT,

Plaintiff,

v.

Case No. 1422

SPECIAL PLEAS AND MOTION TO DISMISS

WILLIAM H. McKELVIE

and

JOSEPH H. CALICOTT

and

RAYMOND E. HOGAN

Defendants.

FIRST SPECIAL PLEA

Comes now defendant, William H. McKelvie, by counsel, and for his First Special Plea states that the communications alleged at Paragraph 6 of plaintiff's Motion for Judgment, if made as alleged, which defendant does not admit, were privileged communications because they were made in good faith upon subject matter in which defendant had an interest and in reference to which he had a duty to the party to whom he allegedly communicated it, which said party had a corresponding interest and duty.

SECOND SPECIAL PLEA

Comes now defendant, William H. McKelvie, by counsel, and for his Second Special Plea states that the communications alleged at Paragraph 7 of plaintiff's Motion for Judgment, if made as alleged, which defendant does not admit, were privileged communications because they were made in good faith upon subject matter in which defendant

had an interest and in reference to which he had a duty to the party to whom he allegedly communicated it, which said party had a corresponding interest and duty.

THIRD SPECIAL PLEA

Comes now defendant, William H. McKelvie, by counsel, and for his Third Special Plea states that the communications alleged at Paragraph 9 of plaintiff's Motion for Judgment, if made as alleged, which defendant does not admit, were privileged communications, because they were made, if at all, in good faith in the course of judicial proceedings.

FOURTH SPECIAL PLEA

Comes now defendant, William H. McKelvie, by counsel, and for his Fourth Special Plea states that the communications alleged at Paragraph 11 of plaintiff's Motion for Judgment, if made as alleged, which defendant does not admit, were privileged communications, because they were made, if at all, in good faith in the course of judicial proceedings.

FIFTH SPECIAL PLEA

Comes now defendant, William H. McKelvie, by counsel, and for his Fifth Special Plea states that the communications alleged at Paragraph 12 of plaintiff's Motion for Judgment, if made as alleged, which defendant does not admit, were privileged communications, because plaintiff was then a candidate for public office and the allegations of said Paragraph 12 were made, if at all, in good faith to a newspaper editor in the public interest.

MOTION TO DISMISS

Comes now defendant, William H. McKelvie, and moves the Court

to dismiss him from the foregoing action on the grounds stated in the Special Pleas hereinabove set out.

Respectfully submitted,

WILLIAM H. McKELVIE

By Counsel

CERTIFICATE

I hereby certify that a true copy of the foregoing Special Pleas and Motion to Dismiss was mailed to Paul M. Peatross, Jr., Esquire, 414 E. Jefferson Street, Charlottesville, Virginia and John R. Alford, Esquire, 2306 Atherhold Road, Lynchburg, Virginia 24501, on this 5th day of August, 1976.

/s/ H. Robert Mayer
Of Counsel

COUNSEL:

McGUIRE, WOODS & BATTLE
Court Square Building
Post Office Box 1191
Charlottesville, Virginia 22902

Date Filed:
12/13/76

V I R G I N I A :

IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

CHARLES V. WATT,

Plaintiff,

v. CASE NO. 1422

WILLIAM H. McKELVIE

and

JOSEPH H. CALICOTT

and

RAYMOND E. HOGAN,

Defendants.

STIPULATION

It is hereby stipulated and agreed by and between the undersigned attorneys for plaintiff, Charles V. Watt, and defendant, William H. McKelvie that:

1. The statements of defendant which plaintiff alleges in paragraph 9 of his motion for judgment were slanderous, which said allegations defendant denies, were made by defendant during and in the course of the taking of his deposition before Russell P. Crannis, notary public for the Commonwealth of Virginia at large, on May 19, 1976, at the office of the said Russell P. Crannis, in Charlottesville, Virginia, which said depositions were taken during discovery proceedings pertaining to law suits filed and the pending in the Circuit Court of Albemarle County, styled Lynchburg General - Marshall Lodge Hospitals, Inc. v. C. V. Watt, trading and doing business as C. V. Watt, Associates

and William H. McKelvie v. C. V. Watt, trading and doing business as C. V. Watt, Associates.

2. The statements of defendant which plaintiff alleges were slanderous in paragraph 11 of his motion for judgment, which said allegations defendant denies, were contained in defendant's motion for judgment filed in the Circuit Court of Albemarle County on April 4, 1975, by defendant styled William H. McKelvie v. C. V. Watt, trading and doing business as C. V. Watt, Associates.

Date: 12-10-76

By /s/ Paul M. Peatross, Jr.
Paul M. Peatross, Jr., Esquire
414 E. Jefferson Street
Charlottesville, Virginia

Date: 10 Dec 76

By /s/ H. Robert Mayer
H. Robert Mayer, Esquire
McGuire, Woods & Battle
Court Square Building
Post Office Box 1191
Charlottesville, Virginia

HERBERT A. PICKFORD, JUDGE
CHARLOTTESVILLE, VIRGINIA
DAVID F. BERRY, JUDGE
MADISON, VIRGINIA

HAROLD H. PURCELL, JUDGE
LOUISA, VIRGINIA
VANCE M. FRY, JUDGE
ORANGE, VIRGINIA

SIXTEENTH JUDICIAL CIRCUIT

CIRCUIT COURTS OF THE CITY OF CHARLOTTESVILLE AND THE COUNTIES OF
ALBEMARLE, CULPEPER, FLUVANNA, GREENE, GOOCHLAND, LOUISA, MADISON AND ORANGE

January 14, 1977

Paul M. Peatross, Jr., Esq.
Attorney at Law
414 East Jefferson Street
Charlottesville, Virginia 22901

H. Robert Mayer, Esq.
McGuire, Woods and Battle
P.O. Box 1191
Charlottesville, Virginia 22902

John R. Alford, Esq.
Caskie, Frost, Hobbs and Hamblen
P.O. Box 1160
Lynchburg, Virginia 24505

In re: Watt v. McKelvie, et als
Case No. 1422

Gentlemen:

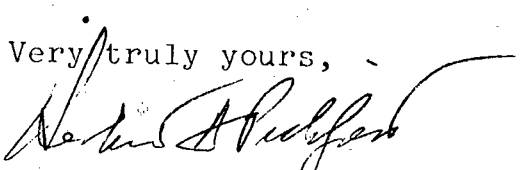
I am of the opinion that discovery deposition procedures undertaken within the purview of the Rules of Court of the Supreme Court of Virginia constitute a judicial proceeding. As such, testimony given therein is absolutely privileged if material to the subject matter involved in the action to which the discovery procedure is a part.

I do not believe the republication rule laid down in Weaver v. Beneficial Finance Co., 199 Va. 196 (1957) is applicable where the republication occurs in a judicial proceeding. If testimony is absolutely privileged, and passes the materiality requirement, how can it give rise to a new cause of action against either the original declarant or the deponents? The Derry v. Handley case, 16 Law Times Reports, cited by the plaintiff does not provide the answer. Restatement, Torts, Section 576 likewise does not address the issue in the context of there being a new cause of action.

The pleadings, the stipulation filed December 13, 1976, and the statement of "Proceedings to Date" by counsel in their memoranda clearly reflect that the allegedly slanderous statements in the depositions were relevant to the subject matter under inquiry as related to the law actions which gave rise to the discovery procedures.

The demurrer of the defendants Calicott and Hogan is sustained as are the special pleas of the defendant McKelvie. Mr. Mayer and Mr. Alford will draft the appropriate order or orders.

Very truly yours,



Herbert A. Pickford

HAP:jr

Date Filed:
2/4/77

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

CHARLES V. WATT — Plaintiff

v. — Case No: 1422

WILLIAM H. McKELVIE
and
JOSEPH H. CALICOTT
and
RAYMOND E. HOGAN — Defendants

FINAL ORDER

Came the parties to be heard upon the special pleas filed by the defendant William H. McKelvie, and the demurrer filed by the defendants Joseph H. Calicott and Raymond E. Hogan; and having duly considered the arguments and memoranda of law of counsel for all parties, the statements, concessions, and admissions at the hearing on December 13, 1976, and for the reasons stated in the court's opinion of January 14, 1977, directed to all counsel, the court is of the opinion that defendant William H. McKelvie's first, second, fourth and fifth special pleas are moot, and the third special plea should be sustained; and the court is further of the opinion that the demurrer filed by the defendants Joseph H. Calicott and Raymond E. Hogan should also be sustained;

Accordingly, it is ADJUDGED, ORDER and DECREED that the third special plea of defendant William H. McKelvie, and the demurrer of defendants Joseph H. Calicott and Raymond E. HOgan be, and they hereby are, sustained and this action is hereby dismissed as to all defendants with prejudice.

It is further ADJUDGED, ORDERED and DECREED that the Court's written opinion dated January 14, 1977 be, and the same hereby is, incorporated by reference in this order of the Court.

The plaintiff hereby notes his exceptions to the Court's decision as being contrary to the law.

DATE: 2/4/77 ENTER: S/ Herbert A. Pickford
Judge

We ask for this:

/s/ John R. Alford
John R. Alford
Counsel for defendants Calicott & Hogan

McGUIRE, WOODS & BATTLE
/s/ H. Robert Mayer
H. Robert Mayer
Counsel for defendant William H. McKelvie

Seen:

/s/ Paul M. Peatross, Jr.
Paul M. Peatross
Counsel for plaintiff

A copy, teste

Carl E. Hennrich, Clerk

/s/ Betty J. Goodwin Dep. Clerk

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

CHARLES V. WATT,
Plaintiff

v

WILLIAM H. MCKELVIE
and
JOSEPH H. CALICOTT
and
RAYMOND E. HOGAN,
Defendants

Appearances:

Mr. Edward R. Slaughter
Mr. Robert Mayer
McGuire, Woods, Battle
Court Square Building
Charlottesville, Virginia
Attorneys for Mr. McKelvie

Mr. Paul Peatross
414 E. Jefferson Street
Charlottesville, Virginia
Attorney for Mr. Watt

Mr. John R. Alford
Caskie Frost Davidson Hobbs & Hamblen
2306 Atherholt Road
Lynchburg, Virginia
Attorney for Mr. Calicott & Mr. Hogan

1 and eleven we have already entered into a stipulation which I
2 will tender to the court at this time if I may.
3 THE COURT: All right sir.
4 MR. SLAUGHTER: That should be...it points out
5 that the allegations in those paragraphs come from the deposition
6 that was taken in another case pending in the Circuit Court of
7 Albemarle County or more accurately, two other cases.
8 THE COURT: Let's see, Mr. Alford...
9 MR. ALFORD: Yes sir Judge.
10 THE COURT: You are not a party to this are you?
11 MR. ALFORD: Yes sir, I represent defendants
12 Joseph Calicotte and Raymond Holden but I am not a party to
13 the stipulation Mr. Slaughter just described.
14 THE COURT: That's right.
15 MR. SLAUGHTER: We have no objection to his
16 being a party Your Honor. In fact I will be glad to give him a
17 copy of the stipulation, which we should have done but we just
18 met really when we came in for the first hearing.
19 THE COURT: All right, we will file this
20 stipulation. Anything further, anything else stipulated?
21 MR. SLAUGHTER: May it please the court, Mr.
22 Peatross can speak for himself and this has been encompassing
23 him and Mr. Mayer so I don't want to misstate and ask that he
24 correct me but as I understand his theory may be that and we had
25 gotten to this point in our own conception, pleadings, but it may

December 13, 1976
2:30 P.M.

THE COURT: All right gentlemen, do you plan to put on any evidence.

MR. SLAUGHTER: I hope not Your Honor. We have been working on one stipulation. I understand just from conversations, they were not made as stipulations but as I understand through Mr. Peatross and Mr. Mayer that perhaps we can...there are certain other matters to be resolved by agreement or stipulation and we won't have to have any evidence. Maybe if the court please I can just give you a brief outline of the situation and then begin presenting you with documents and then we can see what we might stipulate otherwise. This, the court can read if you have not had a chance to read it.

THE COURT: I have read the file.

MR. SLAUGHTER: It's a defamation action to which we have filed a series of special pleas which I think could just have readily been one special plea although there would have been different grounds than we did in that one special plea. While the hearing was actually set up as a second hearing the counsel for the co-defendant, Mr. Alford, who is here had filed a plea abatement, I believe a demurrer, is that correct? So, really we are here on preliminary matters in one case together. As to each paragraph to which we have made special pleas I think something is necessary for the record to paragraphs nine

1 save a lot of time. That the statements in paragraphs six and
2 seven are barred by the statute of limitations that will be
3 introduced only in connection with the request for damages
4 assuming that the conversation in North Carolina can be proven...
5 MR. PEATROSS: Your Honor, what I am going on
6 is what they filed as their special plea and I don't know of any
7 allegation about the statute of limitation in any of their
8 special pleas and that's what I am here prepared today to discuss.
9 If they want to raise the statute of limitations I don't have any
10 pleadings to indicate that. You are talking about qualified
11 privileges in paragraphs six and seven. The stipulation that
12 Mr. Slaughter introduced we are in agreement on on paragraphs
13 nine and eleven. I am not in essence saying that's a cause of
14 action that I am stating for slander or defamation. It is more
15 or less a paragraph relating to damages that I don't believe by
16 law I am required to plead but I chose to do so anyway.
17 THE COURT: All right sir, there is nothing in
18 here, that I recall, about this.
19 MR. PEATROSS: No sir.
20 MR. SLAUGHTER: Nothing was filed with mention
21 of the statute of limitations. I thought we might save some
22 time if that were in fact the case. The evidence that we would
23 present through one question of Mr. McKelvie on paragraphs....
24 well, let me go back and perhaps explore this. If in fact these
25 are matters that are going to be raised simply in connection

with damages and not asserted. While we haven't pleaded the statute at this point is it necessary to go through with evidence on them?

MR. PEATROSS: Your Honor, maybe I can simplify things by stating to you what my theory of the case is. Paragraphs six and seven state what I claim to be my cause of action against Mr. McKelvie. These were statements that were made allegedly in February, 1975. In depositions, March 2, 1976 these statements were republished giving me a new cause of action as to the original slander and not having the statute of limitations bar me. In otherwords, what I am saying is that my cause of action against Mr. McKelvie, paragraphs six and seven, and the republication by defendants Hogan and Calicott revived that action, it doesn't bar me. Now, I am not saying that the legal suits in Albemarle County or what was said with respect to a newspaper or editor in North Carolina or other causes of action that I am alleging slanderous right now but paragraphs six and seven are really my only cause of action against Mr. McKelvie other than what I say in paragraph nine which is another cause of action that I am alleging against Mr. McKelvie as being slanderous. Now, that goes to a second issue that Mr. Alford is involved in. Anything said in a deposition is that of a judicial proceeding and therefore is it absolutely privileged. That's one area. The first main area though is against Mr. McKelvie in paragraphs six and seven which is the defamation on

which I am suing and then there is a separate allegation against Mr. McKelvie in paragraph nine and there are separate allegations for what defendants Hogan and Callicott said in a deposition, I have stipulated, as being another cause of action. So, there are really two areas here that I think they are raising defenses to.

THE COURT: I take it Mr. Alford...he has raised the matter of venue.

MR. PEATROSS: He has raised the matter of venue Your Honor. As I understand what he has raised, he is saying that anything said by his client in the City of Charlottesville in a deposition is absolutely privileged because it's a part of a judicial proceeding therefore there is no venue for this matter to be in this court. I think that's what his plea of abatement addresses and then he also has a demurrer but I don't mean to be speaking for him.

MR. ALFORD: That's my position if Your Honor please. In a case of Massie against Jones, 182 Virginia 200 that I referred to in my letter to Mr. Peatross, I sent a copy to you, I think completely answers the question. I have shepardized the case and I believe it's good law still in the State of Virginia.

THE COURT: Well, isn't that particular law also applicable to McKelvie? Isn't he...

MR. ALFORD: It is with respect to paragraph

1 nine in my Motion for Judgment where I said he said certain
2 things in the deposition.
3 MR. SLAUGHTER: I would say eleven also because
4 that relates to the pleadings.
5 MR. PEATROSS: Yes sir but I am not asserting
6 that as a slanderous cause of action. At the appropriate time
7 I would like to address what Mr. Alford says is his authority
8 for that.
9 THE COURT: All right. Do you want to keep on
10 with yours or do you have anything further you want...
11 MR. SLAUGHTER: Yes sir Your Honor, since...I
12 must say, maybe this is something we will have to deal with in
13 repleading but I guess I am somewhat confused as to what Mr.
14 Peatross is alleging as slanderous and what he is not. I under-
15 stand six and seven, he then says they were republished in nine,
16 that he does not allege that eleven is actionable. We, of
17 course, would take the same position as Mr. Alford, that there
18 is no republication in the deposition in a legal proceeding in
19 which the questions which elicited what are alleged to be the
20 slanderous statements were raised by counsel for plaintiff in
21 this case, by Mr. Peatross himself. I think in order to be
22 certain that the record is clear on what we now have though sir
23 I will offer a letter and I can put Mr. McKelvie on to testify
24 as to his signatures, a copy of a letter that Mr. McKelvie wrote
25 to Mr. Watt on April 6, 1972, countersigned by Mr. Watt. All

1 we have is a xerox and we do have a signed copy of a contract
2 of June 1, 1972 both of which set out the basic relationship as
3 we contend it between Mr. McKelvie and Mr. Watt. I'll tender
4 to the court the original documents we have and then ask that
5 copies be substituted.
6 MR. PEATROSS: I am going to object to this.
7 As I understand we are here challenging what's on the face of
8 my pleadings and now Mr. Slaughter is going to introduce evidence
9 to try to show some relationship between my client, Mr. Watt,
10 and Mr. McKelvie that's not in the pleadings but evidence to
11 substantiate his special plea and I don't think that's appropriate.
12 It wasn't my understanding that this was an evidentuary where we
13 come and present evidence for further things for the court to
14 consider. I thought we were talking about my pleadings and
15 whether or not they are sufficient or not.
16 MR. SLAUGHTER: Well, may it please the Court,
17 I apologize if there was a misunderstanding. As I understand
18 the term special plea and always used it it relates to effectively
19 pleading confessions and abortments but you are not limited as
20 you are in a demurrer. The statements in the plaintiffs Motion
21 for Judgment, for example, the plea of sovereign immunity ,
22 charitable immunity or the plea of workmen's compensation all
23 fall in this category and a certain basic factual record has to
24 be made and that was the basis for our stipulation and it
25 occurred to me that for our purposes, because we are not getting

1 into what he said, we, of course, don't admit the statements
2 made by Mr. McKelvie but we simply say that for our purposes
3 today they are not relevant. We feel that we have to submit
4 certain basis on which the court can decide whether there is a
5 conditional privilege or not. Assuming as to these paragraphs
6 we are not going to have them taken away by the statute of
7 limitations. Now, that is an argument that, as we see it, would
8 possibly make the introduction of these contracts unnecessary
9 but as we initially conceive our presentation today we felt
10 that we'd have to present the contracts to show the business
11 relationship to show why the conditional privilege is brought
12 about.
13 THE COURT: Well, I think you are entitled to
14 introduce evidence on your special pleading.
15 MR. PEATROSS: Well, Your Honor, maybe I mis-
16 interpreted what has been said but I was approached by Mr. Mayer
17 about the stipulation which I agreed to as to paragraphs nine
18 and eleven, as to any further realization that other evidence
19 would be presented I think in the special pleas that they have
20 asserted, the first special plea and the second special plea,
21 that the court has to have more factual information to determine
22 whether or not it has qualified their privilege as to what Mr.
23 McKelvie said but then again, it's my further understanding of
24 the law that all I have to do is allege malice and then that goes
25 to a matter whether or not it's a jury question. The court

1 would decide a qualified privilege situation and the jury might
2 go and decide whether there is malice or not. Now, I haven't
3 used the words, with malice in paragraphs six and seven but I
4 intend to ask leave to amend and make those allegations. I think
5 I have alleged in my Motion for Judgment facts which could
6 constitute malice but whether you consider what Mr. Slaughter
7 is tendering today in the way of evidence to go to the question
8 of qualified privilege or not I do intend to ask leave of the
9 court to amend and allege that these things were said with
10 malice with respect to six and seven and I think that does take
11 it out of the courts discretion as to whether or not this plea
12 should be sustained.
13 MR. SLAUGHTER: Well, may it please the Court,
14 it certainly wasn't our intention at all to in any way take Mr.
15 Peatross by surprise. This occurs to me however. Really, as I
16 see it, the most important issue to be focused on today and I
17 think Mr. Peatross would agree that this is something he had
18 anticipated is the issue that's common both to Mr. Alford's
19 clients and to mine and that is the question of whether there
20 is an absolute privilege because of the statements in the
21 depositions here in Charlottesville and if that's the case we
22 certainly contend and I feel sure Mr. Alford will join with us
23 that that does not constitute a republication even assuming an
24 earlier defamation. Now, granted there has not yet been a plea
25 of the statute of limitations, I think it's relatively clear

1 that Mr. Peatross is relying on that republication and if that
2 issue could be resolved maybe all parties would know better how
3 to approach the case from hereon.
4 THE COURT: Well, I would certainly think so.
5 What is counsels view? Do you want to speak on that from your
6 side of the coin Mr. Alford?
7 MR. ALFORD: Well, if Your Honor please, I
8 think there is no problem with respect to a republication as far
9 as Calicott and Hogan are concerned. As I understand the
10 allegation in the pleading the basis for the suit against the
11 two of them is the fact they said in depositions in Charlottes-
12 ville certain things that were defamatory as far as Mr. Watt is
13 concerned and they were quoting other people who had given the
14 information to them in the deposition.
15 MR. PEATROSS: We will concede that fact.
16 MR. ALFORD: As I see the issue as far as
17 Calicott and Hogan are concerned it's purely and simply a
18 question of whether or not a response given to a question in a
19 judicial proceeding is privileged and I think the case of Massie
20 against Jones answers that completely and I just think...I don't
21 want to appear to confident but I do feel very strongly that
22 our position is, of course, a correct one there. Of course, the
23 plea of abatement, if it is privileged...whatever they said is
24 privileged, the plea of abatement would also lie but we would
25 rather have the demurrer sustained than have the plea of abate-

1 ment sustained so...

2 THE COURT: All right. Do you want to

3 respond to that?

4 MR. PEATROSS: Yes Your Honor. We have a case

5 of first impression of whether or not a discovery deposition is

6 part of a judicial proceeding and the court might say, well,

7 that's a rather ridiculous argument but there are cases in

8 California that I found that has said that a deposition in

9 certain circumstances is not part of a judicial proceeding and

10 Virginia, even in the case that Mr. Alford cites, does not hold

11 that a discovery deposition is a part of the judicial proceeding

12 and that's precisely the issue here. Is the discovery deposition

13 taken in two cases in the Circuit Court of Albemarle County a

14 judicial proceeding therefore affording the absolute privilege

15 to defendants Calicott and Hogan. I submit to you that there is

16 no authority in Virginia specifically holding that. There are

17 several circumstances to be considered. How the depositions

18 were taken, whether they were by stipulation, by subpoena, by

19 notice or whatever and so, I think these factors have to be

20 known before the court can make a decision on whether or not

21 this deposition is truly a part of the judicial proceeding and

22 therefore that these people are absolutely privileged in what

23 they say in it. This case in 182 Virginia talks about a suit

24 in equity, bill for injunction I believe it was, etc., it had

25 nothing to do with discovery depositions and whether or not they

1 were a part of the judicial proceeding. That's basically my
2 position. I don't think there is any authority in Virginia that
3 says a deposition is part of the judicial proceeding therefore
4 what they say is privileged.
5 THE COURT: Do you wish to say anything further
6 Mr. Alford?
7 MR. ALFORD: Well sir, if Your Honor please,
8 we stand on our motion as made and the authority cited therefore.
9 MR. SLAUGHTER: May it please the court, I have
10 some authorities briefly. It's true in Virginia as far as we
11 can tell discovery depositions haven't been ruled on specifically.
12 The Virginia Supreme Court has strongly backed the theory of
13 privilege in connection with judicial proceedings. There is a
14 case, Penick vs. Ratcliffe, 149 Virginia 618 which the court
15 held that a petition filed with the court contesting an election
16 was absolutely privileged and James v Powell 154 Virginia 96 an
17 indictment was held to be absolutely privileged. Bull versus
18 Logetronics, Inc., a Federal Case, 1971, allegations and
19 pleadings were held privileged. Nationally there is an annotation,
20 23 ALR 3rd, 11/72 in which it stated, an ordinary judicial...the
21 pretrial phase of an ordinary judicial proceeding have consis-
22 tently been regarded a judicial proceeding for the purposes of
23 privilege and there are a number of out of state cases cited
24 there. I certainly think that despite some California Case, of
25 which frankly I am unaware, certainly these standard authorities

1 follow what would be logical and that is pretrial discovery, with
2 people under oath, the court has control in which I think it's
3 certainly fair to say that people are required to answer under
4 pain of a court order and perhaps contend...should receive the
5 extent of any judicial privilege or privilege extended to
6 judicial proceedings.
7 THE COURT: Is paragraph eight of the Motion
8 for Judgment the only place the testimony here is referring to?
9 MR. PEATROSS: Your Honor, those were Mr.
10 Alford's clients, yes sir. Those were the statements that I
11 allege were made by his clients in depositions.
12 THE COURT: They were made in discovery
13 depositions although this doesn't say so.
14 MR. PEATROSS: No sir but the stipulation does.
15 No, that only goes to paragraph nine it does not go to paragraph
16 eight. For the sake of saving time Your Honor I will concede
17 that they were stated in depositions. There is no question
18 about that. If you would like the California Cites of the cases
19 I would be happy to provide them.
20 THE COURT: Well, let me have them because
21 right off the top of my head here it seems to me it would be a
22 judicial proceeding.
23 MR. PEATROSS: Your Honor, the California Case
24 is Maddox v Portland Telegraph...
25 THE COURT: Do you have photocopies of them?

1 MR. PEATROSS: No sir, I just have the cites to
2 the cases.
3 THE COURT: Can you get me copies?
4 MR. PEATROSS: I can make copies available Your
5 Honor.
6 THE COURT: I would like to read them because
7 as I say, my impression is that that is a judicial proceeding.
8 I will be glad to see your authority.
9 MR. PEATROSS: Your Honor, if I could have
10 leave to give you those cites I will exchange them with opposing
11 counsel. I will do that today or as soon as the court would
12 like them. Submit copies of the cases if you like.
13 THE COURT: See what has to go further from
14 here. The claim against McKelvie, he was deposed here in
15 Charlottesville too wasn't he?
16 MR. PEATROSS: Yes Your Honor and that's
17 paragraph nine of my Motion for Judgment. That again is a
18 stipulation, that was a deposition that he was giving at that
19 time. That was at a later date than the Hogan, Calicott deposi-
20 tion but it was a deposition.
21 THE COURT: Mr. Slaughter, in your pleadings
22 you are not dealing with venue are you?
23 MR. SLAUGHTER: Not with venue Your Honor but
24 it's certainly our position that a republication in depositions,
25 since it is privileged, would not serve to bring back alive a

1 cause of action that has been closed by the statute. The
2 argument may be premature.
3 THE COURT: It seems to me that that's the
4 whole crux of this thing.
5 MR. PEATROSS: Your Honor, I would tend to
6 agree with you and I have a Virginia case right on point going
7 to that and when we want to get to that I'll address that.
8 THE COURT: As to the other matters you were
9 under the impression we were going to deal only with the nine
10 and eleven?
11 MR. PEATROSS: Yes sir, I was just going down
12 their special pleas. Their special pleas dealt with paragraphs
13 six and seven, which is the republication issue. Their third
14 special plea dealt with paragraph nine and we have covered in a
15 stipulation that this was a deposition and the question again
16 there is whether or not it's a judicial proceeding. On paragraph
17 eleven I am not alleging as a cause of action slander or defama-
18 tion, it's just merely a part of my pleading as to really
19 damages. The fifth special plea.... I am sorry, the fourth
20 special plea went to my allegations contained in the Motion for
21 Judgment in my cases in Circuit Court and I am conceding that
22 that is not a cause of action that I am suing on for slander and
23 that is part of a judicial proceeding, there is authority for
24 that. Paragraph twelve went to what was said with respect to
25 something in North Carolina when my client was running for mayor

1 down there and again, I am not asserting that as a separate cause
2 of action in this suit. It goes back to my republication of what
3 was said in depositions.
4 THE COURT: That's the meat of the whole case.
5 MR. PEATROSS: Yes sir.
6 THE COURT: That's what I want the authority
7 on. Is there anything else you all can give me on that today or
8 anything else you all want to go into.
9 MR. PEATROSS: Well, Your Honor I have my case
10 authority on republication. It's a Virginia Case, 199 Virginia,
11 I have those cases that I can cite about whether or not a
12 deposition is part of a judicial proceeding.
13 THE COURT: If you want to give me some little
14 memo that I can...
15 MR. PEATROSS: Yes sir, I'd like to give you a
16 memo.
17 THE COURT: Mainly what you all are down to is
18 just citing some authority isn't it?
19 MR. PEATROSS: I believe so Your Honor unless
20 Mr. Slaughter would disagree with that.
21 MR. SLAUGHTER: No, I just want to be certain
22 that we have been covered in the record. I think Your Honor is
23 at the issue as I understand it. Let me be certain I under-
24 stand. Paragraph twelve is also damages.
25 MR. PEATROSS: Yes sir, it is not a cause of

1 action for slander. I am not asserting it in there as a para-
2 graph, it's a separate cause of action.
3 MR. SLAUGHTER: And the law suit, you are
4 actually not...
5 MR. PEATROSS: The same would hold true for
6 paragraph eleven which are the two actions in Albemarle Circuit
7 Court.
8 MR. SLAUGHTER: Right, okay. So, that gets us
9 back to paragraph nine that we discussed. I think that's quite
10 correct sir. Now, as I understand it and since it's apparent
11 there wasn't a full meeting of the minds as to what the hearing
12 was suppose to be I don't want to go one step to far but basically
13 as I understand it if the court should rule that the depositions
14 were judicial proceedings and were not a republication it's Mr.
15 Peatross' position that the original conversations are no longer
16 viable, is that correct? In otherwords, effectively we have a
17 statute of limitations defense but granted no defense raised yet.
18 MR. PEATROSS: That is not my interpretation.
19 If I can try and explain what my interpretation is. The original
20 slander I allege took place in February, 1975 as I have pleaded
21 in paragraphs six and seven. I think it's in paragraph eight I
22 allege it was republished, not by Mr. McKelvie but by Mr. Hogan
23 and Mr. Calicott and that revived my original cause of action
24 against Mr. McKelvie for what he said in February. Whether or
25 not it's in a judicial proceeding or not I maintain makes no

1 difference, that my cause of action is alive and I do have a
2 proper cause of action. That's my position.
3 MR. SLAUGHTER: But, if I understand it's alive
4 because of the statements of Mr. Hogan and Mr. Calicott because
5 the statute had run on the original statements.
6 MR. PEATROSS: Yes sir, what they said in the
7 depositions revived it. It was a republication reviving it.
8 MR. SLAUGHTER: Your Honor, we have nothing in
9 the pleadings that raise the statute...the statutory question
10 but assuming that's the agreed position then Your Honor could
11 certainly decide it on this memorandum that we will present.
12 MR. PEATROSS: Your Honor, do I understand
13 them to say that they now want to plead the statute of limitations
14 as to paragraphs six and seven and am I to address that?
15 THE COURT: It's in the wings.
16 MR. PEATROSS: Well, it's obvious. I just want
17 to know how to handle it now because as I did indicate to you I
18 do want to make some minor revisions in my pleadings and put in
19 "with malice", etc.
20 THE COURT: You say you aren't prepared to argue
21 the matter today.
22 MR. PEATROSS: Well, I am prepared to argue the
23 matter of republication if that's what you want to hear.
24 THE COURT: No, but, you are not conceding
25 that the matter of the statute of limitations being applicable

1 to the 1974 statements?

2 MR. PEATROSS: The 1975 statements.

3 THE COURT: The 1975 statements.

4 MR. PEATROSS: Yes sir, I think I have case

5 authority to say that it is not a bar. It's in the case concern-

6 ing republication. There is one case that I feel is exactly on

7 the point.

8 MR. SLAUGHTER: I can understand...I know that

9 he will take the position that the republication takes care of

10 the statute and I think I know what his authority is and we

11 believe we have authority or perhaps the same authority going

12 the other way but I guess the real question is whether we should

13 go back and plead this statute of limitation or whether we can

14 understand that assuming the court does not believe that republi-

15 cation was one that does in fact republish because of the

16 judicial privilege then the statute of limitation bars the

17 original. That's all I am asking.

18 MR. PEATROSS: Your Honor, I have no problem

19 with requiring us to do that. I can proceed with that under-

20 standing. I would like leave to amend in some minor ways that

21 would not change these arguments or what they are preparing, to

22 amend my original Motion for Judgment just to insert "with

23 malice". It is not going to change what we are talking about,

24 the republication or anything.

25 MR. SLAUGHTER: I think I should go on record

1 Your Honor saying that we would oppose the amendment in that
2 there had been no allegation of malice so far and of course the
3 statute of limitations having run I think if I understand our
4 agreed position even at the time the original action was brought
5 it would be our position that he could not now allege malice
6 which in a sense puts an entirely new burden on Mr. McKelvie.
7 MR. PEATROSS: Well Your Honor, I think I should
8 take the opposite position and make them plead the statute of
9 limitations then.
10 THE COURT: I think today I had better focus on
11 you all getting some authority on this republication problem.
12 Get me authority on that and then we will see what transpires.
13 MR. ALFORD: Judge, I don't have the republica-
14 tion problem. Where does that leave Calicott and Hogan?
15 THE COURT: It's a question of whether that's
16 a judicial proceeding though.
17 MR. ALFORD: Yes sir, I concede that point but
18 I feel very strongly...
19 THE COURT: At the moment I feel that you
20 should but I am not going to promise you.
21 MR. ALFORD: I understand that.
22 THE COURT: I would like the authority. You
23 cited your case. Do you want to say anything further?
24 MR. ALFORD: No sir, I can go along with Mr.
25 Slaughter as far as the other cases he cited. I don't see that

they add to really or do anything other than add to this case, it surely doesn't detract anything from it because they point out that every proceeding does comes under the total cloak of a judicial proceeding once it's filed.

THE COURT: All right, that's your position and that's the position I am leaning towards but I am going to give Mr. Peatross an opportunity to file his authority. Now, I assume you want to respond?

MR. ALFORD: Yes sir, I'd like to and I don't think it would take much time. It seems to me we have all done our research and it's simply a matter of putting it to you.

MR. PEATROSS: Your Honor, do you want me to file first and give them a chance to respond or can we both file at the same time?

THE COURT: I just want a little memorandum so I can read these cases. I would like for you to file a memorandum within the next fifteen days.

MR. PEATROSS: That's fine.

THE COURT: And you reply in ten days?

MR. ALFORD: Fine.

THE COURT: Ned, does ten days suit you too?

MR. SLAUGHTER: I think so.

MR. PEATROSS: You want me to address the judicial proceeding and the republication within fifteen days?

THE COURT: Yes, I would like that. Is that

1 all right?

2 MR. SLAUGHTER: Yes Your Honor. Thank you very

3 much.

4 THE COURT: Okay, thank you all.

5 COURT ADJOURNED

6

7 STATE OF VIRGINIA AT LARGE:

8 I, Ruth K. Barker, Notary Public in and for

9 the State of Virginia at Large having been so duly commissioned

10 and qualified do certify that the foregoing hearing was duly

11 taken by me at the time and place specified in the caption here-

12 of.

13 I do further certify that said hearing was

14 correctly taken by me by mechanical methods and the same was

15 accurately written out in full and transcribed into the English

16 language and that said hearing is, to the best of my ability, a

17 true, accurate and correct record.

18 I further certify that I am neither attorney nor

19 counsel for or related to or employed by any of the parties to

20 the action in which this transcript was taken and further that

21 I am not a relative or employee of any attorney or counsel

22 employed by the parties hereto or financially interested in

23 this action.

24 My Commission expires March 21, 1979.

25 Given under my hand and seal this 5th day of

January, 1977.

/s/ Ruth K. Barker
Notary Public

Date Filed
2/22/77

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

CHARLES V. WATT — Plaintiff

v. — Case No: 1422

WILLIAM H. McKELVIE
and
JOSEPH H. CALICOTT
and
RAYMOND E. HOGAN — Defendants

O R D E R

In accordance with Rule 5:9(a) of the Rules of the Supreme Court of Virginia, the transcript of the hearing held before this Court on Decmeber 13, 1976, referred to in the final order of this Court and which said transcript has heretofore been filed with the Clerk of this Court, is hereby ORDERED to be made a part of the record on appeal from this Court. The Clerk is hereby directed to include this transcript in the record.

ENTER: /s/ Herbert A. Pickford
Judge

DATE: 2/22/77

We ask for this

McGUIRE, WOODS & BATTLE
By /s/ H. Robert Mayer
Counsel for defendant William H. McKelvie

/s/ John R. Alford
John R. Alford
Counsel for defendants Calicott & Hogan

SEEN:

/s/ Paul M. Peatross, Jr.
Paul M. Peatross
Counsel for plaintiff

Date Filed:
2/11/77

VIRGINIA:
IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

CHARLES V. WATT,
Plaintiff

v.

NOTICE OF APPEAL

Case Number 1422

WILLIAM H. McKELVIE

and

JOSEPH H. CALICOTT

and

RAYMOND E. HOGAN,
Defendants

Comes now the plaintiff, Charles v. Watt, by counsel, and files this his Notice of Appeal to a judgment order entered by this Court on February 4, 1977.

A Statement of Facts will be filed in this matter in accordance with Rule 5:9 (c).

CHARLES V. WATT

By Counsel

/s/ Paul M. Peatross, Jr.
Paul M. Peatross, Jr.
414 East Jefferson Street
Charlottesville, Virginia 22901
Counsel for Plaintiff

CERTIFICATE

I certify that I mailed a true copy of the foregoing Notice of Appeal to John R. Alford, Esq., Caskie, Frost, Hobbs and Hamblen,

2306 Atherhold Road, P.O. Box 1160, Lynchburg, Virginia 24505, counsel for defendants Hogan and Calicott and to H. Robert Mayer, Esq., McGuire, Woods and Battle, Court Square Building, P.O. Box 1191, Charlottesville, Virginia 22902, counsel for Defendant McKelvie, this 10th day of February, 1977.

/s/ Paul M. Peatross, Jr.

Date Filed:
6/3/77

ASSIGNMENT OF ERROR

The trial court erred in sustaining the special pleas and motion to dismiss of McKelvie and ruling that the republication by Hogan and Calicott on March 2, 1976 of McKelvie's alleged slanderous statements do not create a cause of action for slander against McKelvie.