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Re: Angela S. Allen v. Karen R. Horn, et als
Goochland County Circuit Court Case CL23-669

Dear Counsel:

The purpose of this letter is to provide the Court's rulings with respect to the demurrer filed by the Defendants to Plaintiff's complaint alleging defamation of her by the Defendants as well as their alleged engaging in a common law civil conspiracy against her. The Court has carefully reviewed the complaint, the demurrer, your briefs, and appreciates your oral arguments, as well, which the Court found to be quite helpful.

While various arguments were made during the course of oral arguments which relate to the demurrer, the Court finds that the matter can essentially be reduced to two issues: 1. Are the Defendants immune from liability for their actions based upon the principle of legislative immunity; 2. Do the allegations concern defamatory statements of fact, which are actionable, or expressions of opinion, which are not. Counsel are well familiar with the allegations set forth in the complaint as well as the backdrop for this litigation; consequently, the Court is not going to delve into the details of the pleading in any great detail, except to the extent it is necessary to do so with respect to the resolution of the fact/opinion issue.

Beginning with the legislative immunity issue, the Court will note first that this is an affirmative defense. Normally, an affirmative defense is not addressable by demurrer. Givago Growth, LLC v. Itech AG, LLC, 300 Va. 260, (2021). In this case, however, the parties have agreed the Court may address the issue on demurrer and thus have made it essentially the law of the case. Consequently, the Court has consented to do so.

There is no disagreement about the legal standard which must be applied in ruling on a demurrer. "In any suit in equity or action at law, the contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer." Virginia Code §8.01-273. A demurrer admits the allegations of fact in the complaint and all attached exhibits, but does not admit conclusions of law. Wards Equipment, Inc. v. New Holland, 254 Va. 379 (1997). In ruling on a demurrer, the Court may not evaluate and decide the merits of a claim. The Court is limited to determining whether the facts as alleged state a cause of action. Fun v. Virginia Military Institute, 245 Va. 249 (1993). On a demurrer, a Court may examine not only the substance of the allegations of the pleadings attacked but also any accompanying exhibit mentioned in the pleading. Flippo v. F & L Land Company, 241 Va. 15 (1991).

The initial question is whether the Defendants are protected from the suit based upon the privilege of legislative immunity. The Court has found the case of Isle of Wight County v. Nogiec, 281 Va. 140 (2011) to be helpful with respect to resolution of this issue. It notes initially that proceedings of legislative bodies may enjoy absolute immunity. Isle of Wight County, at 154. The Court also proceeded to assume for sake of argument that absolute legislative immunity would be afforded also to subordinate legislative bodies to which the General Assembly has delegated legislative power, such as boards of supervisors. Pursuant to Virginia Code Sections §22.1-78 and §22.1-79, the General Assembly has delegated the power to local school boards to adopt legislation as well. Consequently, the Court would assume for sake of argument that a school board and its members would be entities which conceivably would be protected by legislative immunity.

The Court went on to note, however, that with respect to absolute privilege being afforded to subordinate legislative bodies, "the creation of legislation is the nexus that supports the application of the privilege. Absolute privilege therefore does not attach to communications made by participants in proceedings conducted by a board of supervisors that do not concern the creation of legislation." Isle of Wight County, at 155. The Court went on to further note

that the board in the Isle of Wight County case was not acting in a legislative capacity, but rather in a supervisory or administrative capacity that did not relate to the creation of legislation. Given that, the Court did not find that the board was entitled to absolute immunity.

The Court finds the facts in our case to be comparatively similar. The censure resolution adopted by the board does not appear to the Court to be what could properly be described as an act of legislation, but rather a supervisory or administrative act seemingly aimed at disciplining Ms. Allen. As a result, the Court does not find that the Defendants are entitled to absolute immunity.

The Court notes that as set forth in the case of Harless v. Nicely, et al, at 80 Va. App. 678 (2024) that the Defendants may theoretically be entitled to qualified immunity as well; in contrast to that case, however, where the Plaintiff did not plead any facts in his complaint that would show the Defendants acted with common law malice, the Court finds that such allegations are sufficiently present in the complaint in our case which would preclude the Court from deciding that issue on demurrer.

That brings the Court to the second issue as to whether the statements made in the censure resolution are actionable allegations of fact or mere expressions of opinion.

An actionable statement is both false and defamatory. Tharpe v. Saunders, 285 Va. 476, 481 (2013). Defamatory words are those "tending to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Chapin v. Knight-Ridder, Inc. 993 F. 2d 1087, 1092 (4th Cir. 1993). The Supreme Court of Virginia has described the requisite defamatory "sting" for an actionable claim as containing language that: "Tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous." Schaecher v. Bouffault, 290 Va. 83, 92 (2015). The trial court must perform a gatekeeping function to determine as a threshold matter of law whether a statement is reasonably capable of defamatory meaning before allowing a matter to be presented to a finder of fact. Schaecher, 290 Va. at 94.

Furthermore, for a statement to be actionable as defamation, it must have a provably false factual connotation and thus be capable of being proven true or false. Schaecher, 290 Va. at 98. Pure expressions of opinion are constitutionally protected and cannot form the basis of a defamatory action. Schaecher, 290 Va. at 102, 103. These standards set forth above are easy enough to articulate and understand; however, their applications in a given case may be much more challenging.

The statements in question are as set forth in paragraph 44 paragraphs A-J as follows: (a) In the 1st whereas clause, claiming that Ms. Allen made the Post based on or by "acting on hearsay information" alone, thereby imputing to Ms. Allen a lack of integrity, or reckless actions taken based on unsound information.; (b) In the 6th whereas clause, claiming that Ms. Allen's issuance

of the Post was unethical, done "in direct violation of the [GCSB's] code of Ethics"; (c) In the 7th whereas clause, claiming or implying that Ms. Allen's Post "was divisive and threatening to parents of students with unique needs,"; (d) Again in the 7th whereas , claiming or implying that Ms. Allen's Post "encouraged the Board to violate the 'Equal Protection Clause [of the U.S. Constitution] and Title IX of the U.S. Education Amendments of 1972, a federal law prohibiting sex discrimination by schools,"; (e) In the 8th whereas clause, claiming or implying that Ms. Allen herself "encourage[d]" the violation of the laws mentioned in the 7th whereas clause, for which they believed her to be "in direct violation of Articles 1 and 2 of the Code of Ethics."; (f) In the 9th whereas clause, claiming or implying that Ms. Allen's Post "violated Article 7 of the Code of Ethics"; (g) In the 10th whereas clause, claiming that Ms. Allen issued the Post "in direct conflict with Goochland County School Board adherence to the 'Equal Protection Clause and Title IX of the U.S. Education Amendments of 1972, a federal law prohibiting sex discrimination in schools and, thereby, was in violation of Article 20 of the Code of Ethics and School Board Policy of 'no discrimination'"; (h) Claiming or implying that Ms. Allen's Post constituted sex discrimination or encouraged sex discrimination in the school system, both being implied by Defendants' statements listed in subparts d, e, and g above.; (i) In the 11th whereas clause, claiming or implying that through her Post, Ms. Allen acted without integrity, had encouraged violation of constitutional and federal law, and had harmed the Board's reputation by alleging that she had "been accountable for disrupting the integrity of the Board, encouraging violation of the law and blemishing the reputation of the Board"; and (j) In the "THEREFORE" clause, claiming that through her Post, Ms. Allen had shown a "lack of adherence to the Goochland County School Board Code of Ethics."

Having reviewed the statements in question, the Court finds that including language such as "in our opinion" does not necessarily render such statements opinion if such statements are otherwise capable of being proven true or false. In reviewing the allegations, the Court finds allegations that the Plaintiff's actions were unethical, divisive, and threatening, without integrity, are certainly expressions of opinion. Expressing the view that the post encouraged the board to violate the Equal Protective Clause, Title IX, or its Code of Ethics, or School Board Policy, the Court finds equally to be expressions of opinion.

The only statement of fact the Court finds contained among the allegations is the contention that the plaintiff, "was acting on hearsay information". While factual, the Court does not find that that provides the requisite defamatory "sting". Consequently, the Court does not find that any of the alleged defamatory allegations are in fact such, and will therefore grant the demurrer to count 1 of the complaint. The Court understood from oral argument that each side conceded that resolution of the demurrer with count 1 would resolve the issue as to the appropriateness of the civil conspiracy count as well and thus the Court will grant the demurrer to Count 2 of the complaint as well, dismissing both counts with prejudice.

The Court will direct that counsel for the Defendants prepare an order consistent with these rulings, and submit it to counsel for Plaintiff, whose exceptions are noted to the Court's rulings.

Thank you for your attention to these matters.

Very truly yours,

Timothy K. Sanner, Judge
Sixteenth Judicial Circuit
TKS/dl