IN THE SUPREME COURT OF VIRGINIA

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Record No. 090189

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ROGER W. WOODY,

Plaintiff-Petitioner,

v.

TERRY ELLEN CARTER, *et al.*,

Defendants-Respondents.

_____

BRIEF IN OPPOSITION OF RESPONDENT TERRY ELLEN CARTER

_____

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STATEMENT OF MATERIAL PROCEEDINGS

The plaintiff filed this action on May 1, 2008, alleging that the defendants had injured him by posting comments and pictures on a website and providing photographs to a newspaper. The complaint alleged that this conduct constituted (1) a business conspiracy pursuant to Va. Code § 18.2-499, *et seq.*; (2) tortious interference with a business expectancy; and (3) insulting words under Va. Code § 8.01-45. Plaintiff sought an injunction, $10 million in compensatory damages, and $350,000 in punitive damages.

Defendants demurred on the grounds that the complaint failed to state a claim, that plaintiff Woody lacked standing, that the speech complained of was protected by the First Amendment. The Circuit Court issued a letter opinion sustaining the demurrer because the complaint failed to state a claim and lacked standing, and allowed the plaintiff twenty-one days to amend his complaint. An order to that effect was entered on October 31, 2009. Rather than amending his complaint, the defendant filed a notice of appeal on November 19, 2008.

STATEMENT OF FACTS

The complaint alleged the following facts:

Plaintiff Roger Woody ("Woody") is a contractor who, trading as Showcase Home Builders, has built a number of developments in Christiansburg, Virginia. (Compl. ¶ 1.) The defendants created a website called ThinkChristiansburg.com, which has been critical of Woody, and, in particular, a large mound of dirt on one of Woody's properties. (Compl. ¶ 3.) One page on the website, entitled "Junky Yard Wars," refers to the dirt pile as "Mt. Woody," and states that it has "besmirched the landscape FOR YEARS." (Compl. ¶ 3; Ex. 8.) Another page includes photographs of unsightly views from one of Woody's developments. (Compl. ¶ 3; Ex. 9). A comment posted on the website opines that "[o]ne of the pictures may well depict the future ghetto of the NRV – Even dense European row house communities have some ambience." (Compl. ¶ 3 ; Ex. 10.)

In addition to the comments on the website, the Complaint alleges that defendant Terry Ellen Carter created a t-shirt with a photograph depicting the dirt pile with the word "Woodyville" superimposed, modeled after the famous Hollywood sign. (Compl. ¶

3.) She also provided a copy of the photograph to a local newspaper. (*Id.*)

The complaint alleges that "[a]s a proximate cause of the actions of the Defendants . . . Complainant has lost numerous contracts for the sale of townhouses and other properties, and will continue to lose sells [sic] in the future as a result of the irreparable harm to his reputation, trade, business or profession." (Compl. ¶ 10.) However, the Complaint does not list any specific contract that was lost, or any name any buyer who was deterred from buying from Woody.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE APPELLANT FAILED TO MAKE SUFFICENTLY SPECIFIC ASSIGNMENTS OF ERROR.

The "chief function" of assignments of error "is to identify those errors made by a circuit court with reasonable certainty so that this Court and opposing counsel can consider the points on which an appellant seeks a reversal of a judgment." *Friedline v. Commonwealth*, 265 Va. 273, 278, 576 S.E.2d 491, 494 (2003). Accordingly, Rule 5:17(c) requires that the "Assignments of Error" section of a petition must "list the *specific* errors in the rulings below

upon which the appellant intends to rely. . . . An assignment of error which merely states that the judgment or award is contrary to the law or the evidence is not sufficient." (emphasis added).

Here, the appellant's sole assignment of error is: "Whether the Trial Court [e]rred in sustaining the Demurrers of the Appellees, Terry Ellen Carter and Tacy L. Newell-Foutz." (Pet. App. at 1.) The assignment of error identifies the judgment appealed from, but it does not identify the reasons why the judgment was erroneous. Essentially, it "merely states that the judgment. . . is contrary to the law." This Court has repeatedly held that such a vague assignment of error is not sufficient. *Orr v. Pennington*, 93 Va. 268, 24 S.E. 928 (1896) (assignment of error stating only "that there was manifest error in dismissing said bill" was insufficient); *see also Harlow v. Commonwealth*, 195 Va. 269, 77 S.E.2d 851 (1953), and cases cited therein.

II. THE APPEAL SHOULD BE DISMISSED BECAUSE THE ORDER APPEALED FROM IS NOT FINAL.

This Court has jurisdiction to hear appeals from a final judgment in a civil case. Va. Code § 8.01-670. In this case, the Circuit Court's October 31, 2008 order sustained plaintiffs' demurrer and granted the defendant twenty-one days to file an amended

complaint. The order did not dismiss the case, nor did it provide that the case would automatically be dismissed if the defendant failed to file an amended complaint. Because the order did not finally dispose of the case, it is not an appealable final judgment. *Norris v. Mitchell*, 255 Va. 235, 495 S.E.2d 809 (1998); *Bibber v. McCreary*, 194 Va. 394, 73 S.E.2d 382 (1952). The appeal should therefore be dismissed for want of jurisdiction.

III. THE TRIAL COURT CORRECTLY SUSTAINED THE DEFENDANTS' DEMURRER BECAUSE THE COMPLAINT FAILED TO STATE A CLAIM.

A. The Complaint Failed to State a Claim for Tortious Interference.

The elements of a claim for tortious interference with a business relationship are "(1) the existence of a business relationship or expectancy, with a probability of future economic benefit to plaintiff; (2) defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and (4) damage to plaintiff." *Williams v. Dominion Technology Partners, L.L.C.*, 265 Va. 280, 289, 576 S.E.2d 752, 757 (Va. 2003). The Complaint failed to allege the first and second of these elements. Although the plaintiff claims to have lost "numerous"

contracts, he does not specify any particular contract or business expectancy with which the defendants interfered. "Failure to allege any specific, existing economic interest is fatal to the claim." *Masco Contractor Services East, Inc. v. Beals*, 279 F.Supp.2d 699, 709 (E. D. Va. 2003). *See also Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*, 189 F.Supp.2d 385, 391 (E.D. Va.2002) ("Because plaintiffs do not identify the specific business relationships with which defendant has interfered, plaintiffs' tortious interference claim fails.") Nor does the Complaint allege that the defendants had any knowledge of any such contract or business expectancy.

Moreover, "Virginia caselaw applying the tort of intentional interference with a business expectancy contains a fifth, unstated element to the prima facie case: a competitive relationship between the party interfered with and the interferor." *17th Street Associates, LLP v. Markel Intern. Ins. Co. Ltd*., 373 F.Supp.2d 584, 699 (E.D. Va. 2005). Here, no such relationship was alleged. The defendants are not in the real estate business, but are simply citizens who comment on matters of public concern. Similarly, there is no "allegation that the defendant had some contact with the source of the plaintiff's alleged business expectancy." *Id.* The defendants did not seek out

those who might purchase property from the plaintiff and dissuade them from doing so. Rather, they simply expressed themselves publicly on a matter of manifest public concern.

B. The Complaint Failed to State a Claim for Business Conspiracy Under Virginia Code §§ 18.2-499 and 500.

For similar reasons, the Complaint does not state a claim under Virginia Code §§ 18.2-499 and 500, which provide a cause of action against persons who conspire for the purpose of "willfully and maliciously injuring another in his reputation, trade, business or profession." With regard to this claim, the Complaint merely states in a conclusory fashion that the defendants publicly criticized the defendant "with the intent to intentionally and maliciously discredit and embarrass the Complainant and cause damages and financial losses to his businesses." But "business conspiracy, like fraud, must be pleaded with particularity, and with more than 'mere conclusory language.'" *GEICO v. Google, Inc.*, 330 F.Supp.2d 700, 706 (E.D. Va. 2004) (citing *Bay Tobacco, LLC v. Bell Quality Tobacco Products, LLC,* 261 F.Supp.2d 483, 499 (E.D.Va.2003)).

As with the tortious interference claim, the Complaint failed to specify any specific business or reputational interests that were harmed. Nor does the Complaint plead any facts to support the

conclusory allegation that the defendants had the malicious intent to harm the plaintiff's business. *See GEICO*, 330 F.Supp.2d at 706 (dismissing claim under Va. Code § 18.2-499 because allegations were "not sufficiently specific to support the conclusory language that the parties entered into an agreement with the purpose of injuring GEICO in its business.")

C. The Complaint Failed to State a Claim for Insulting Words Under Virginia Code § 8.01-45.

Virginia Code § 8.01-45 bears some resemblance to a claim for common-law defamation (which was not pleaded here), but it contains the additional element "that the words used must not only be insults, but they must also 'tend to violence and breach of the peace.'" *Allen & Rocks, Inc. v. Dowell*, 252 Va. 439, 441, 477 S.E.2d 741, 742 (Va. 1996). While, again, the Complaint makes the conclusory allegation that the defendants' speech "tends to violence of and breach of the peace," none of the actual language cited in the body of the Complaint or its exhibits rises anywhere near that level.

The language complained of in the Complaint includes the following: (1) an anonymous post to ThinkChristiansburg.com stating that one of the photographs on the site "may well depict the future ghetto of NRV – even dense European row house communities have

some ambience" (¶ 3b, Ex. 10); (2) descriptions of the dirt pile as "Mount Woody" (¶¶ 3b, 8); (3) a photograph of the dirt pile with the word "Woodyville" superimposed (*Id.*); (4) A website post stating that "One of Christiansburg's most notable landmarks, known in the neighborhood as Mt. Woody, has besmirched the landscape FOR YEARS" (¶9).

While these criticisms are no doubt unpleasant for the plaintiff, they are downright mild in comparison to other language that courts have held *not* to be "fighting words" that "tend to violence or breach of peace." *See*, *e.g.*, *Diehl v. State*, 451 A.2d 115 (Md. 1982) ("F--k you, Gavin" addressed to a police officer did not constitute "fighting words"); *Rozier v. State*, 231 S.E.2d 131 (Ga. App. 1976) ("How about some pussy?" addressed to a sixteen-year-old girl, in the presence of her brother, did not constitute "fighting words").

Moreover, a cause of action under Code § 8.01-45 generally requires that the insulting language be directed at the plaintiff in a face-to-face confrontation that provokes an imminent danger of violence. For example, in *Thompson v. Town of Front Royal*, 2000 WL 329237 (W.D. Va. 2000), the plaintiff, an African American, alleged that his employer "criticized the work of white employees by

saying, 'This is sloppy work. If this was a bunch of niggers I would expect this, but y'all are white.'" The court dismissed the claim, noting that the offensive language "cannot be construed as having been directed at a particular individual in a face to face confrontation and as presenting a clear and present danger of a violent physical reaction." *Id.* at *4. [1]

In short, the language complained of does not constitute the sort of "insulting words" that may be expected to result in a breach of the peace, and cannot support a claim under Code § 8.01-45.

IV. THE TRIAL COURT PROPERLY DISMISSED THE COMPLAINT BASED ON LACK OF STANDING

The Circuit Court found not only that the complaint failed to state a claim, but that Roger Woody did not have standing to sue on behalf of Showcase Home Builders, LLC. Because the Petition fails to address this alternate ground for granting the demurrer, this Court must assume that the Circuit Court properly granted the demurrer on this ground.

[1] Mississippi's "actionable words" statute, which is virtually identical to Virginia's "insulting words" statute, has similarly been interpreted to apply only to "spoken words (not written), usually where there would be a face-to-face encounter, and, more importantly, no cooling-off time before a physical altercation occurred." *Isaacks v. Reed*, 537 So.2d 409 (Miss. 1988).

V. THE DEMURRER WAS PROPERLY SUSTAINED BECAUSE THE DEFENDANTS' SPEECH WAS CONSTITUTIONALLY PROTECTED.

In her demurrer, appellant argued that the complaint must be dismissed because her speech was constitutionally protected. Although the Circuit Court declined to reach this issue, it constitutes an alternate ground for affirmance.

Virtually all of the speech on the ThinkChristiansburg.com website – the references "Mount Woody" and "Woodyville," the "new ghetto" remark – are constitutionally protected expressions of opinion and parody. "Pure expressions of opinion, not amounting to 'fighting words,' are protected by the First Amendment of the Constitution of the United States and Article 1, § 12 of the Constitution of Virginia." *Fuste v. Riverside Healthcare Ass'n, Inc*., 265 Va. 127, 132, 575 S.E.2d 858, 861 (2003). "[S]peech which does not contain a provably false factual connotation, or statements which cannot reasonably be interpreted as stating actual facts about a person cannot form the basis of a common law defamation action." *Yeagle v. Collegiate Times*, 255 Va. 293, 295, 497 S.E.2d 136, 137 (1998). "Whether an alleged defamatory statement is one of fact or opinion is a question of

law and is, therefore, properly decided by a court instead of a jury." *Fuste*, 265 Va. at 132-33, 575 S.E.2d at 861.

The only actual statement of fact mentioned in the complaint is the remark that "Mount Woody" has "besmirched the landscape FOR YEARS," which the plaintiff alleges is false because the pile of dirt has only been in existence for "a few months." (This assertion is contradicted by The *Roanoke Times* article attached to the Complaint as Exhibit 11, states that the pile "has been growing since January 2007," well over a year before the Complaint was filed.) But "[s]light inaccuracies of expression are immaterial provided the defamatory charge is true in substance, and it is sufficient to show that the imputation is 'substantially' true. . . . A plaintiff may not rely on minor or irrelevant inaccuracies to state a claim for libel." *Jordan v. Kollman*, 269 Va. 569, 576, 612 S.E.2d 203, 207 (2005).[2]

The constitutional protection of defendants' speech about the plaintiff is further heightened by the fact that the plaintiff – as

[2] The plaintiff also claims that photographs on the website "were falsely designated and published to lead the public to believe that the construction sites were a part of the site of the completed townhomes." (¶ 8.) In fact, however, the most that was said about the photographs was that they depicted views that *may* be *visible* from the townhomes. (Exhibit 9.) Similarly, the plaintiff claims that the *Roanoke Times* "depicted the ["Woodyville"] photograph as of recent origin even though the photograph was taken several months ago." (¶ 3b.) But the newspaper article (Exhibit 10) does not say anything about when the photograph was taken.

established by the allegations in the Complaint – is a public figure. *See* Complaint ¶ 1 (Plaintiff "has constructed a number of developments within the Town of Christiansburg . . . . Showcase Home Builders is a three time award winner of Builder of Integrity . . .); *Id.* ¶ 2 ("Complainant has relied on his good name and reputation for integrity in conducting his businesses. . . ") A public figure is required to prove not only that the speech at issue is false, but that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964). As noted above, the only statement alleged to be false is that the dirt pile has existed "for years"; the Complaint does not allege knowledge or reckless disregard as to the alleged falsehood.

Moreover, while most of the Virginia cases refer to defamation actions, constitutionally protected speech of type complained of here may not be the basis for any civil action. For example, in *Hustler Magazine v. Falwell*, 845 U.S. 46 (1988), the Supreme Court held that under the First Amendment, a magazine's highly offensive parody of a famous minister could not support a claim of intentional infliction of emotional distress. The same reasoning applies to

business torts. In *N. A. A. C. P. v. Claiborne Hardware Co*., 458 U.S. 886 (1982), the Supreme Court held that the defendant's organization of a boycott supported by speeches and nonviolent picketing could not be the basis for an award of damages for malicious interference with the plaintiff's business. "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." 458 U.S. at 918. *See also Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (reversing injunction against leaflets critical of real estate broker's alleged 'blockbusting' and 'panic peddling' activities); *Gaylord Entertainment Co. v. Thompson*, 958 P.2d 128 (Okla. 1998) (Newspaper editorials were pure, constitutionally protected speech, and therefore could not be the basis of tortious interference claim); *Eddy's Toyota of Wichita, Inc. v. Kmart Corp*., 945 F.Supp. 220 (D. Kan. 1996) (Expressions of opinion cannot be the basis for tortious interference claim.)

CONCLUSION

For the foregoing reasons, the Petition for Appeal should be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that on this 13th day of February, 2009, a true and correct copy of the foregoing Brief in Opposition was served by U.S. mail, postage pre-paid, addressed as follows:

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