**VIRGINIA: IN THE CIRCUIT COURT FOR ALBEMARLE COUNTY**

**EDWARD DICKINSON TAYLOE, II,**

**Plaintiff,**

**v.**

**C-VILLE HOLDINGS, LLC**

**and**

**LISA PROVENCE**

**and**

**JALANE SCHMIDT,**

**Defendants.**

**Case No. CL19-868**

**MEMORANDUM OF LAW IN SUPPORT**
**OF DEFENDANT JALANE SCHMIDT'S DEMURRER**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**

Defendant Jalane Schmidt submits this Memorandum of Law in Support of her Demurrer filed contemporaneously herewith. Defendant requests that the demurrer be sustained, Plaintiff's count against her be dismissed with prejudice, and attorney's fees be awarded to her as allowed under Va. Code Ann. § 8.01-223.2(B) for the reasons stated herein.

## INTRODUCTION

Plaintiff Edward Dickinson Tayloe, II is a central figure in an intense public debate that has erupted in the Charlottesville community over issues of race, history, and the fate of the city's Confederate statues. By becoming a named plaintiff in a lawsuit referred to in the Complaint as the "Statue Litigation,"[1] to block the removal of two of Charlottesville's Confederate monuments, Plaintiff Tayloe voluntarily injected himself squarely into the public discussion on these matters. Now, under the guise of an action for defamation, he seeks to censor the opinion of those who question both his support for the Confederate statues and his motivations for defending them. He also seeks almost two million dollars in compensatory and punitive damages for "harms" from Defendants' allegedly defamatory statements.

Defendant Dr. Jalane Schmidt is an African-American community member, activist, historian, and professor of religious studies at the University of Virginia. Her statements printed in the *C-Ville Weekly* article, taken in context, lie at the very heart of the First Amendment's protections. "It is a prized American privilege to speak one's mind," and "this opportunity is to be afforded for vigorous advocacy no less than abstract discussion." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Bridges v. California*, 314 U.S. 252, 270 (1941) and *NAACP v. Button*, 371 U.S. 415, 429 (1963)) (internal quotation marks omitted). This includes Professor Schmidt's right to express her opinion about Plaintiff Tayloe's family, their impact on the black

[1] *Payne v. City of Charlottesville*, No. CL17-145 (Va. Cir. 2017).

community, and Tayloe's potential motivations for joining a lawsuit to protect Charlottesville's Confederate monuments. In short, Professor Schmidt engaged in political speech at the very core of the First Amendment's protections.

On its face, Plaintiff's Complaint fails to state a claim upon which relief may be granted because: (1) Professor Schmidt's sole comment concerning Plaintiff is not actionable as a matter of law and (2) Plaintiff fails to plead the requisite intent beyond mere conclusory assertions. Additionally, this lawsuit represents a scornful attempt by the Plaintiff to strip a local community member and activist of her voice, stifling her ability to speak about matters of public concern. It is a standard example of what has become known as a "strategic lawsuit against public participation," or SLAPP suit. A SLAPP suit is litigation designed to silence, censor, and intimidate critics out of the marketplace of ideas by burdening them with the cost of a lawsuit they may not be able to afford. SLAPP suits violate the Commonwealth's commitment to vigorous public debate and they must be dismissed. As such, Professor Schmidt's comment should also be protected under Virginia's anti-SLAPP statute, Va. Code Ann. § 8.01-223.2(A).

Each of these grounds requires that Professor Schmidt's demurrer be sustained, and that Plaintiff Tayloe's Complaint be dismissed with prejudice.

## BACKGROUND[2]

In 2017 and 2018, the Charlottesville City Council took a series of actions intended to remove statues of two Confederate generals and rename the parks in which the statues were located. In the words of Plaintiff, these actions "spawned widespread debate and disagreement."

[2] The below facts are as pleaded in the Complaint and its Exhibits. Professor Schmidt accepts as true the factual allegations pleaded in the Complaint for purposes of this Demurrer only.

Compl. ¶ 9. On March 20, 2017, Plaintiff inserted himself into this ongoing controversy by filing a lawsuit challenging the removal of the statues and the renaming of the parks. Compl. ¶ 10.

About six months after the lawsuit was filed, on August 12, 2017, white supremacists gathered in Charlottesville allegedly to protest the statues' removal. The rally, which ultimately became violent and resulted in Heather Heyer's death and dozens of injuries, brought increased attention to the controversy surrounding Charlottesville's Confederate statues. Compl. Ex. A, at 1–2.

On March 6, 2019, *C-Ville Weekly* published a piece entitled "The plaintiffs: Who's who in the fight to keep Confederate monuments," discussing the plaintiffs involved in the Statue Litigation and their family histories. Compl. ¶ 1; Compl. Ex. A, at 1–2. The article contextualizes the debate surrounding the Confederate monuments before providing short family histories and biographies of the thirteen plaintiffs involved in the Statue Litigation.

The article quotes Professor Schmidt twice. She is first quoted in the introductory section of the article, where she references generally the various plaintiffs in the Statue Litigation, saying "You've got the bow tie, upscale people tied to the League of the South people who want to secede and are slavery apologists." Compl. Ex. A, at 2; Compl. ¶ 22. Later, in the section about Plaintiff Tayloe, Professor Schmidt is quoted as saying "For generations this family has been roiling the lives of black people, and this is what [plaintiff Tayloe] chooses to pursue." Compl. Ex. A, at 5 (brackets in original); Compl. ¶ 16(g). These are the only two quotations from Professor Schmidt in the article.

Plaintiff filed this lawsuit on May 28, 2019. Regarding Professor Schmidt, he points only to the single quotation in the section describing his family history as the alleged basis for his defamation claim.[3]

## STANDARD

A case should be dismissed on demurrer "if the pleading, considered in the light most favorable to the plaintiff, fails to state a valid cause of action." *Welding, Inc. v. Bland Cty. Serv. Auth.*, 261 Va. 218, 226 (2001); Va. Code Ann. § 8.01-273. A demurrer assumes the truth of "material facts that are properly pleaded," *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394, 397 (1991), but does "not [] admit the correctness of the pleader's conclusions of law." *Taboada v. Daly Seven, Inc.*, 271 Va. 313, 317 (2006). The demurrer should be sustained when it appears from the face of the complaint that a plaintiff cannot, as a matter of law, obtain the relief he seeks, even if all well-pleaded allegations are accepted as true and construed in the plaintiff's favor. *See Peerless Ins. Co. v. Cty. of Fairfax*, 274 Va. 236, 243 (2007).

Courts favor early disposition of defamation claims because the cost of litigation can have an irreparably chilling effect on speech. As the Supreme Court of Virginia recently explained, "ensuring that defamation suits proceed only upon statements which actually may defame a plaintiff, rather than those which merely may inflame a jury to an award of damages, is an essential gatekeeping function of the court." *Sroufe v. Waldron*, No. 181014, 2015 U.S. Dist. LEXIS 181218, at *9 (June 27, 2019) (quoting *Webb v. Virginian-Pilot Media Cos.*, 287 Va. 84, 90 (2014)) (internal quotation marks omitted).

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[3] Plaintiff does not appear to be suing over Professor Schmidt's statement in the introduction of the article. *See* Compl. ¶ 22 (describing Defendants *C-Ville Weekly* and Provence's use of that quotation). In the event Plaintiff is arguing that the first quotation is defamatory, any such claim must also fail. The first statement is also a non-actionable opinion that simply provides Professor Schmidt's general characterization of the group of plaintiffs in the Statue Litigation.

## ARGUMENT

Taking as true the factual allegations in the Complaint, Plaintiff cannot succeed on his defamation claim against Professor Schmidt.

### I. Plaintiff Tayloe has failed to adequately plead defamation.

In a defamation action, as a threshold matter, a plaintiff must plead the exact defamatory words or phrases used by the defendant with sufficient specificity in order to provide an adequate basis for the claim. *See Owens v. DRS Auto. Fantomworks, Inc.*, 87 Va. Cir. 30, 32 (Cir. Ct. 2013). To bring a successful claim for defamation by publication, a plaintiff must also show there was "(1) publication of (2) an actionable statement with (3) the requisite intent." *Schaecher v. Bouffault*, 290 Va. 83, 91 (2015) (internal quotation marks omitted).

#### A. Professor Schmidt's quotation concerning Plaintiff is not an actionable statement.

Professor Schmidt's statement in the *C-Ville Weekly* article at issue is not an actionable statement as a matter of law because (1) it lacks defamatory meaning on its face and plaintiff has not properly pled defamation by implication; (2) it is a statement of opinion; and (3) it is rhetorical hyperbole protected by the First Amendment.

##### 1. Professor Schmidt's comment does not have a defamatory meaning.

Plaintiff fails, as a threshold matter, to specify which of Professor Schmidt's words are allegedly defamatory. *See Morris v. Massingill*, 59 Va. Cir. 426, 428 (Cir. Ct. 2002) ("Good pleading requires that the exact words spoken or written must be set out in the declaration in haec verba.") (quoting *Fed. Land Bank of Baltimore*, 173 Va. 200. 215 (1839)) (internal quotation marks omitted). Rather, he states that the alleged defamation occurs in the "implications" arising from the article. Compl. ¶ 16. Regarding Professor Schmidt's comment about the Tayloe family "roiling the lives of black people," Plaintiff takes issue with the context of the quotation ("Schmidt's

assertion is offered without refutation or counterpoint") but fails to explain why the statement in and of itself is defamatory or has a defamatory implication. Compl. ¶ 16(g). Plaintiff relies on the comment's placement in the article and the words surrounding it to draw his allegedly defamatory insinuations without further explanation.

Where a plaintiff alleges defamation by implication, "the implication must be reasonably drawn from the words actually used." *Webb*, 287 Va. at 89. Here, Plaintiff fails to articulate a reasonable defamatory interpretation from the words Professor Schmidt actually used. Allegedly defamatory statements "are to be taken in their plain and natural meaning and to be understood by courts and juries as other people would understand them." *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 7 (1954). Interpreting Professor Schmidt's comment to mean that "a) Plaintiff Tayloe is a racist; b) Plaintiff Tayloe joined the Statue Litigation to antagonize people of color; [and] c) Plaintiff Tayloe intends to 'roil the lives of black people'" is plainly unreasonable. Compl. ¶ 17. Professor Schmidt's two assertions, the factual accuracy of which Plaintiff has provided no facts to dispute – that Plaintiff's ancestors "roil[ed] the lives of black people" and that Plaintiff chose to participate in the Statue Litigation – fall well short of insinuating that Plaintiff is a racist or that his intention in participating in the case was to antagonize black people. Compl. Ex. A, at 5. Professor Schmidt neither said nor implied anything about Plaintiff's personal views or intentions, and any reading of her comment otherwise is not reasonable.

**2. Even if the implications Plaintiff alleges could be reasonably drawn from Professor Schmidt's comment, it is not an actionable statement because it is an opinion.**

Under both the First Amendment to the United States Constitution and Article 1, Section 12 of the Constitution of Virginia, a statement of opinion cannot form the basis of an action for defamation. *Chaves v. Johnson*, 230 Va. 112, 119 (1985); *Lewis v. Kei*, 281 Va. 715, 725 (2011).

Determining whether a statement is an opinion or fact is a question of law for the court, not the jury, to decide. *Chaves*, 230 Va. at 119. In considering whether a comment is an expression of opinion, courts look to the statement as a whole. *Sroufe*, No. 181014 at *3. A statement is an opinion if it is "relative in nature and depends largely on a speaker's viewpoint." *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 47 (2009). Opinions cannot form the basis of defamation claims because they cannot be proven either true or false. *Jordan v. Kollman*, 269 Va. 569, 576 (2005). Only false factual statements can be defamatory – true statements are not actionable as defamation. *Id.* at 575–76.

Professor Schmidt's quotation that "[f]or generations this family has been roiling the lives of black people, and this is what [plaintiff Tayloe] chooses to pursue" is an opinion that is not actionable as a matter of law. Compl. Ex. A, at 5. Professor Schmidt has drawn a speculative connection between Plaintiff's family history and his involvement in the lawsuit; yet, that connection cannot be proven. It is simply her opinion regarding his motivation in joining the lawsuit. That is, however, just one possible interpretation of Professor Schmidt's statement. Her opinion could also be understood to mean that Plaintiff comes from a family with a legacy of slavery and that he has completely failed to sever that tie or change that narrative by choosing to pursue this litigation. Professor Schmidt's opinion could be understood or interpreted several different ways, but ultimately represents only her subjective perspective. Plaintiff's characterization of Professor Schmidt's opinion as defamatory does not change the nature of her quotation: it is a statement that articulates her personal view or judgment on this matter.

Whether Plaintiff's family "roil[ed] the lives of black people" is one individual's characterization of his family's behavior that may or may not be shared by others reviewing

Plaintiff's family's actions.[4] Plaintiff's involvement in the Statue Litigation is an act that could "roil the lives of black people." Additionally, "roil" is not a word with a precise meaning, and actions that may significantly disrupt one person's life may mildly irritate another. Without a clear meaning, it is impossible to determine whether Plaintiff Tayloe's pursuit of the Statue Litigation will in fact "roil the lives of black people." Professor Schmidt's quotation continues "and this is what [plaintiff Tayloe] chooses to pursue," appearing to refer to his involvement in the Statue Litigation. In Professor Schmidt's statement, "this" could simply mean "this litigation," but it could also mean "this perverse, racist litigation" or "this costly, ridiculous litigation." Taken as a whole, the plain and natural interpretation of this quotation is mere speculation surrounding Plaintiff's involvement in a high-profile public controversy in light of his family's history.

Plaintiff even concedes this point in his Complaint by referring to the quotation as "Defendant Schmidt's reductive and unbalanced ***view***." Compl. ¶ 16(g) (emphasis added); Compl. ¶ 18 (stating "in Jalane Schmidt's view" when describing her comments). A view is an opinion; one's perspective on an issue that cannot be proven true or false. "Reductive" and "unbalanced" are not adjectives that describe a recitation of facts, but instead subjectively characterize an opinion with which one disagrees. Moreover, in his Complaint, Plaintiff laments that "[Professor] Schmidt's assertion is offered without refutation or counterpoint." Compl. ¶ 16(g). A statement of fact does not require refutation or counterpoint. Plaintiff's own characterization of Professor Schmidt's statement as needing a rebuttal acknowledges that her perspective is one that may not be shared by others—the hallmark of an opinion.

[4] To the extent Plaintiff's claim is based on the characterization of his family's actions, Plaintiff is barred from bringing such a claim. For a statement to be actionable, the plaintiff must demonstrate the statement published was "of or concerning" him. *Gazette, Inc. v. Harris*, 229 Va. 1, 37 (1985). Plaintiff cannot sue over a statement "of or concerning" only his family's actions.

### 3. Professor Schmidt's statement is not actionable because it is protected rhetorical hyperbole.

Rhetorical hyperbole is not defamatory and is a question of law. *Cashion v. Smith*, 286 Va. 327, 336, 339 (2013). Rhetorical hyperbole are statements that are not susceptible of being proven true or false and are a form of non-actionable opinion because the ordinary reader would understand the statement to be dependent on the speaker's viewpoint. *See Schaecher*, 290 Va. at 93, 103; *Crawford v. United Steelworkers, AFL-CIO*, 230 Va. 217, 234 (1985) (holding that even words condemned by the court could not give rise to liability unless they could "reasonably be understood, under the circumstances of th[e] [] dispute, to convey a false representation of fact"); *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 301–02 (4th Cir. 2008) (finding radio commentator's statements were protected rhetorical hyperbole because it was "clear to all reasonable listeners that . . . [the statements were] exaggerated rhetoric intended to spark [] debate") (internal quotation marks and citation omitted).

Professor Schmidt's use of the phrase "roiling the lives of black people" is the type of loose language not capable of being proved true or false that protects her characterization of Plaintiff's family history. *Yeagle v. Collegiate Times*, 255 Va. 293, 296–97 (1998) (explaining that even statements that were "disgusting, offensive, and in extremely bad taste" were protected rhetorical hyperbole unless conveying a false representation of fact). "[V]igorous epithet[s]" like Professor Schmidt's statement here, are protected under the First Amendment because such "imaginative expression[s]" in public debate have "traditionally added much to the discourse of our Nation." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17, 20 (1990); *Schnare v. Ziessow*, 104 F. App'x 847, 853 (4th Cir. 2004) (characterizing "lusty and imaginative expression[s] of contempt felt toward [an] adversary . . . [as] the language of controversy rather than [] the language of defamation.") (internal quotation marks and citations omitted).

Professor Schmidt's quotation lacks defamatory meaning and is a protected opinion that cannot give rise to a defamation claim. Therefore, taking all facts pleaded as true, Plaintiff has failed to state a claim for defamation and Professor Schmidt's Demurrer should be sustained.

### B. Plaintiff has failed to plead that Professor Schmidt possessed the requisite intent for defamation.

Professor Schmidt does not possess the intent required to satisfy Plaintiff's prima facie case for defamation.

#### 1. Defamation cases involving public figures require a plaintiff to satisfy an actual malice standard.

The requisite intent a plaintiff must prove to prevail in a defamation action depends on whether he is a public or private figure and the nature of the damages sought. *Jordan*, 269 Va. at 576. If the plaintiff is a public figure or is seeking punitive damages, he must prove the statement was made with "actual malice," which requires "clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Id.* at 576–77. This holds equally for limited public figures (also referred to as limited purpose public figures), individuals who assume a role of public prominence related to a specific issue or controversy. *See Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 870 (W.D. Va. 2016) (finding university administrator was a limited purpose public figure in campus sexual assault scandal because the allegedly defamatory statements originated from the public controversy in which the plaintiff had voluntarily assumed a position of special prominence).[5] If the plaintiff is a private figure seeking only compensatory damages, he must prove negligence on

[5] Virginia law immunizes individuals against civil liability for defamation for statements made "regarding matters of public concern ... protected under the First Amendment" so long as the statements are not "made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false," which is the actual malice standard. Va. Code Ann. § 8.01-223.2(A); *infra* Section II.

the defendant's part. *Gazette, Inc. v. Harris*, 229 Va. 1, 15 (1985). However, this negligence standard "is expressly limited . . . to circumstances where the defamatory statement makes substantial danger to reputation apparent. The trial judge shall make such determination as a matter of law." *Id.*

**2. Plaintiff Tayloe is a limited public figure.**

Individuals classified "as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). In order "to determine whether the plaintiff has thrust himself into a controversy to the extent necessary to trigger limited-purpose public figure status," courts utilize a five-factor test. *Carr v. Forbes, Inc.*, 259 F.3d 273, 280 (4th Cir. 2001). Courts "consider whether (1) the plaintiff has access to channels of effective communication, (2) the plaintiff voluntarily assumed a role of special prominence in the controversy, (3) the plaintiff sought to influence the resolution of the controversy, (4) the controversy existed prior to the publication of the defamatory statements, and (5) the plaintiff retained public figure status at the time of the alleged defamation." *Id.*

First, Plaintiff Tayloe had – and still has – access to channels of effective communication to rebut or clarify the statements made regarding his participation in the Statue Litigation. Plaintiff has the "ability to obtain press coverage as to his views" and "press would have reported [his] views . . . if he had made himself available." *Id.* at 281–82 (noting that plaintiff "was a leader of the entity from which the media solicited quotes"). In this case, Plaintiff Tayloe has had and continues to have available to him channels of effective communication to respond to the allegedly defamatory statements, which he has chosen not to utilize. *Id.* at 282. This includes Plaintiff

declining to provide *C-Ville Weekly* with a quote for their story as part of the original article. Compl. ¶ 21.

At "[t]he heart" of the limited public figure analysis "is the second and third factors, which [courts] have sometimes combined into the question of whether the plaintiff has voluntarily assumed a role of special prominence in a public controversy by attempting to influence the outcome of the controversy." *Carr*, 259 F.3d at 280 (internal quotation marks omitted). Here, Plaintiff has voluntarily opted to become involved in the public controversy surrounding the Confederate statues in Charlottesville for the purpose of influencing the outcome of the public debate regarding their placement.

Under the second factor, Plaintiff has inserted himself into the public controversy by voluntarily undertaking a visible and prominent role in the Statue Litigation as a plaintiff in the case challenging the actions of Charlottesville public officials. *See, e.g.*, *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708 (4th Cir. 1991) (finding plaintiff was a limited public figure because he "voluntarily injected himself into a public controversy in order to influence the resolution of the issues involved") (internal quotation marks omitted). Here, Plaintiff "personally and affirmatively took actions that invited public attention in connection with" the public controversy surrounding the Confederate statues. *Carr*, 259 F.3d at 280. Like the president of two charitable organizations who was found to be limited public figure because the charity thrust itself into the public in its fundraising and education efforts, Plaintiff Tayloe has thrust himself into the public eye by opting into a visible role in this public controversy. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 n.4 (4th Cir. 1993).

Third, Plaintiff willingly and intentionally decided to serve as a plaintiff in litigation on a well-known issue of public importance with the goal of invalidating and reversing the

Charlottesville City Council's decision to take down two Confederate monuments. Plaintiff's involvement in the Statue Litigation seeks to have the monuments qualified as war memorials, such that their removal or alteration would be prohibited under Virginia law. *See Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 669 (4th Cir. 1982) (finding a scientist who "sought pecuniary gain through the military and non-military use of dolphin technology and sought to influence the outcome of the controversy through his brochures and public statements" was a limited public figure).

Fourth, the controversy regarding the statues existed prior to the publication of Professor Schmidt's statement, as Plaintiff's lawsuit in the Confederate monument case was filed in March 2017. Professor Schmidt's statement was made about and in response to the Statue Litigation initiated against Charlottesville city officials, which was the subject of *C-Ville Weekly*'s article, in March 2019, almost two years into the Statue Litigation. Compl. Ex. 1, at 1–2.; *see* Elizabeth Tyree, *Judge hears arguments from group fighting removal of Lee Statue in Charlottesville*, ABC 13 NEWS, May 2, 2017, https://wset.com/news/local/judge-hears-arguments-from-group-fighting-removal-of-lee-statue-in-charlottesville (referencing Plaintiff Tayloe by name as one of the parties in the monument lawsuit); *see also Carr*, 259 F.3d at 282 (finding controversy clearly existed before the dissemination of the article because the "suit had received the attention of the press" and "was publicly debated").

Finally, Plaintiff has retained his public figure status because the Statue Litigation remains an ongoing controversy. *See, e.g.*, Paul Duggan, *Charlottesville's statue defenders win partial victory in lawsuit*, WASH. POST, Apr. 30, 2019, https://www.washingtonpost.com/local/public-safety/charlottesvilles-statue-defenders-win-partial-victory-in-lawsuit/2019/04/30/18979542-6b6d-11e9-a66d-a82d3f3d96d5_story.html?utm_term=.a984ac25398e.

In this case, Plaintiff's involvement in the Statue Litigation "provokes public scrutiny of [his] activities . . . [and] [v]oluntary public figures must tolerate such examination." *Chapin*, 993 F.2d at 1094; *Gertz*, 418 U.S. at 345 (public figures who "have thrust themselves to the forefront of particular public controversies . . . invite attention and comment"). All of the aforementioned factors are satisfied in qualifying Plaintiff as a limited purpose public figure as it relates to the Statue Litigation controversy. Further, as Professor Schmidt's statement is germane to Plaintiff's participation in the public controversy, her comment should be assessed under an actual malice standard.

**3. Plaintiff Tayloe has failed to plead any facts alleging actual malice.**

Plaintiff alleges no facts in the Complaint that demonstrate that Professor Schmidt acted with actual malice. In order to show actual malice, a plaintiff must provide "clear and convincing evidence that the defendant either knew the statements he made were false at the time he made them, or that he made them with a reckless disregard for their truth." *Gov't Micro Res., Inc. v. Jackson*, 271 Va. 29, 42 (2006) (internal quotation marks, punctuation, and added emphasis omitted). In *Harte-Hanks Communication Inc. v. Connaughton*, the U.S. Supreme Court held that a "reckless disregard for the truth [] requires more than a departure from reasonably prudent conduct." 491 U.S. 657, 688 (1989) (internal quotation marks omitted). Instead, the evidence must show that "the defendant actually had a high degree of awareness of probable falsity." *Id.* Plaintiff alleges that Professor Schmidt did not "even attempt to contact Plaintiff Tayloe to verify her claim about his efforts to 'roil the lives of black people.'"[6] Compl. ¶ 21. Even taking this allegation as true (and assuming that Professor Schmidt's statement was not an opinion), Plaintiff does not

[6] It should be noted that this claim mischaracterizes Professor Schmidt's statement, which refers to the Plaintiff's family "roiling the lives of black people" and not the Plaintiff himself doing so.

allege behavior that would constitute actual malice. Indeed, an individual is more likely not to "verify [a] claim" when she believes that claim to be true. Plaintiff does not state any facts tending to show that Professor Schmidt knew that the Tayloe family did not "roil[] the lives of black people" but made her claim despite such knowledge. He also fails to show that Professor Schmidt demonstrated a "reckless disregard" for the truth. Professor Schmidt was under no obligation to reach out to any member of the Tayloe family in order to make a general statement about the family's actions, which are documented in publicly available literature. In opining about long-dead slaveowners, it is not reckless to fail to contact their descendants before concluding that they "roil[ed] the lives of black people." Plaintiff similarly alleges no facts which would permit the inference that Professor Schmidt had a high degree of awareness of the probability that her statements were false. Plaintiff's mere threadbare recitations of the words "actual malice" are insufficient for any defamation case.

**4. Plaintiff failed to plead any facts that would satisfy the negligence standard.**

Even if, *arguendo*, Plaintiff is found to be a private figure and is no longer seeking punitive damages, he has not pleaded any facts to prove the negligence standard. Plaintiff's allegation that Professor Schmidt failed to contact him before making her comment to *C-Ville Weekly*, *see* Compl. ¶ 21, fails to show that she reached her conclusions negligently. In actions seeking compensatory damages, a "plaintiff may recover upon proof by a preponderance of the evidence that the publication was false, and . . . [the defendant] acted negligently in failing to ascertain the facts upon which the publication was based." *Gazette*, 229 Va. at 15. This is an ordinary negligence standard that is "expressly limited [] to circumstances where the defamatory statement makes substantial danger to reputation apparent." *Id.*

Plaintiff alleges no facts that show Professor Schmidt did not take reasonable care in ensuring the truth of her statement. Even assuming Plaintiff can sue regarding statements made about his family, reasonable care does not dictate that Professor Schmidt must reach out to Plaintiff before characterizing the actions of his ancestors as "roiling the lives of black people." *Supra* note 4. As noted above, even if this statement is not considered an opinion, not reaching out to verify a statement is consistent with believing that statement to be true. In addition, there are many reasonable and legitimate ways to discover and draw conclusions about the actions of people now deceased that do not include speaking with their descendants. Further, Plaintiff fails to show that Professor Schmidt's statement made substantial danger to his reputation apparent. His allegation that the Defendants' publication "accuse[s] Plaintiff Tayloe of race-baiting in a political and social atmosphere in Charlottesville, Virginia where, since August 12, 2017, there is virtually no worse label" fails to state specifically why Professor Schmidt's comment – that his family participated in the slave trade and thus "roil[ed] the lives of black people" and that Plaintiff chose to be a part of the Statue Litigation – was obviously harmful to him. Compl. ¶ 25. Telling is Plaintiff's statement that "Schmidt's assertion is offered without refutation or counterpoint," as if Professor Schmidt could possibly be responsible for the context in which her comment is presented in the article. Compl. ¶ 16(g). Plaintiff fails to show why Professor Schmidt's comment, in particular, would make substantial danger to reputation apparent, in addition to his failure to demonstrate that Professor Schmidt was negligent simply for not consulting him before expressing an opinion about his family's actions.

## II. Professor Schmidt is immune from civil liability and entitled to attorney's fees pursuant to Virginia's anti-SLAPP law.

Virginia Code § 8.01-223.2(A) grants immunity from civil liability from any "claim of defamation based solely on statements [] regarding matters of public concern that would be protected under the First Amendment to the United States Constitution made by that person that are communicated to a third party." Va. Code Ann. § 8.01-223.2(A); *see Gilmore v. Jones*, 370 F. Supp. 3d 630, 682 (W.D. Va. 2019). It does not provide immunity for statements made with actual or constructive knowledge, or reckless disregard for, their falsity. Va. Code Ann. § 8.01-223.2(A); *see Gilmore*, 370 F. Supp. 3d at 682. A matter is of "public concern" if it is the "subject of legitimate news interest . . . [or] of general interest and value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004). Anti-SLAPP statutes, like Virginia Code § 8.01-223.2(A), were enacted to protect defendants against lawsuits designed to stifle speech on issues of public importance. These statutes are "enacted in many states as a protection to the First Amendment right of advocacy as a means to weed out meritless suits." *ABLV Bank v. Ctr. for Advanced Def. Studies Inc.*, No. 1:14-cv-1118, 2015 U.S. Dist. LEXIS 181218, at *4 (E.D. Va. Apr. 21, 2015).

The statute, most recently updated in 2017, reflects the Virginia General Assembly's strong support for free speech on matters of public concern in the Commonwealth. It also codifies the principle that Virginia courts should dismiss baseless lawsuits attacking freedom of expression – such as this action – swiftly and firmly. The intent to solidify these protections is reinforced by the Assembly's addition of subsection (B) in 2016, allowing any person who has a suit against them dismissed pursuant to the immunity provision to "be awarded reasonable attorney fees and costs." Va. Code Ann. § 8.01-223.2(B); *see Hearings- Privileges and Immunities- Attorney Fee*, 2016 Virginia Laws, Ch. 239 (H.B. 1117). The Assembly's addition of liability for attorney's fees

demonstrates the Assembly's strong desire to deter lawsuits designed to hinder free expression. As such, "[d]ismissal of these frivolous tort claims saves defendants the cost and burden of trial and minimizes the chilling effect of these lawsuits." *ABLV Bank*, No. 1:14-cv-1118 at *4.

Here, Professor Schmidt is immune from civil liability against Plaintiff's claim of defamation because the *C-Ville Weekly* article and Professor Schmidt's direct quotation involved matters of public concern protected by the First Amendment and it was not made with actual or constructive knowledge, or reckless disregard for any falsity. Va. Code Ann. § 8.01-223.2(A); *Gilmore*, 370 F. Supp. 3d at 682. The anti-SLAPP statute favors the exercise of an individual's First Amendment rights on a matter of public concern. *See, e.g.*, *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 658 (E.D. Va. 2019) (holding that "[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest") (internal quotation marks omitted). The litigation about the Confederate monuments is a public controversy that "has received public attention because its ramifications will be felt by persons who are not direct participants." *Carr*, 259 F.3d at 279 (internal quotation marks omitted). Professor Schmidt's quotation relates to this matter of great importance to the Charlottesville community, and to the nation at large. Her statement is regarding a public lawsuit, about public statues, located in public parks. Her statement relates to a public, multi-plaintiff lawsuit challenging the decisions made by public officials on the Charlottesville City Council. Professor Schmidt's statement about historic racism is also a matter of public concern, as ongoing discussion of these issues "is a social necessity required for the maintenance of our political system and an open society." *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 149 (1967) (internal quotation marks omitted). The First Amendment ensures "that debate on public issues should be uninhibited, robust,

and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks" on public figures. *N.Y. Times Co.*, 376 U.S. at 270.

Further, Plaintiff alleges no facts that, if proven, would establish that the statements were "made with actual or constructive knowledge that they were false or with reckless disregard for whether they were false." Va. Code Ann. § 8.01-223.2(A). Similarly, Plaintiff fails to establish malice, which is "behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was made." *Taylor v. CNA Corp.*, 782 F. Supp. 2d 182, 202 (E.D. Va. 2010) (internal quotation marks omitted). Unlike other Virginia cases, in which the defendants were found to have acted with a reckless disregard for the truth, here Professor Schmidt expressed an opinion that cannot be proven false. *See* Sec. I, *supra*; *Steele v. Goodman*, Civil Action No. 3:17cv601, 2019 U.S. Dist. LEXIS 55587, at *14 (E.D. Va. Mar. 31, 2019) (finding defamation where defendant recklessly ignored evidence that proved statements were false); *League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Interest Legal Found.*, No. 1:18-CV-00423, 2018 U.S. Dist. LEXIS 136524, at *7 (E.D. Va. Aug. 13, 2018) (same).

The coercive nature of this lawsuit is also evidenced by the relief requested in the Complaint. Without explanation or justification of the alleged harms, Plaintiff seeks $1,000,000 in compensatory damages and $350,000 from each defendant for punitive damages, in addition to attorney's fees. This extraordinarily large and unfounded damages request is itself coercive. It is intended to send a clear message to others who wish to opine on matters of public concern in which Plaintiff is involved: disagree or critique Plaintiff Tayloe, then you, too, will face the threat of a lawsuit, including extraordinary financial liability and attorney's fees. *See, e.g.*, *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 292 (4th Cir. 2015) (Wilkinson, J., and Agee, J., concurring)

(characterizing "public discussion [as] as political duty" and recognizing that "[c]ivic health requires that Americans not be fearful of their freedoms, whether in public or private venues, and especially a freedom so precious as the exercise of speech"). Professor Schmidt – a college professor, community member, and local activist – should not be afraid to express an opinion to a local publication regarding a matter of significant public concern due to the threat of unfounded, antagonistic litigation.

The Court should find that Professor Schmidt is immune from civil liability and entitled to an award of attorney's fees and costs because her statement on a matter of public concern is protected under Virginia's anti-SLAPP statute.

## CONCLUSION

For the foregoing reasons, Defendant Jalane Schmidt respectfully requests that this Court sustain her Demurrer to Plaintiff's Complaint, dismiss the claim against Professor Schmidt with prejudice, award attorney's fees under Va. Code Ann. §8.01-223.2 for having to defend this action, and grant all such general and further relief this Court deems appropriate.

Dated: July 22, 2019

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of July 2019, I caused a true and correct copy of the foregoing Memorandum of Law in Support of Defendant Jalane Schmidt's Demurrer to be served on the following persons by the indicated means:

By First-Class and Electronic Mail:

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