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JURISDICTIONAL STATEMENT

Plaintiff appeals the decision of the U.S. District Court for the Eastern District of Virginia (Hilton, C.J.), dismissing his complaint for defamation and intentional infliction of emotional distress. Plaintiff alleges that he was defamed in a series of articles by Nicholas Kristof, which appeared in *The New York Times* in mid-2002. The articles described plaintiff as "a likely culprit" in the 2001 anthrax attacks, and used false statements and argumentative questions to communicate the message that there are grounds for suspecting Dr. Hatfill's complicity. This overall message was and is false, as are many of the factual statements on which it was based.

The district court's jurisdiction was based on diversity of citizenship, 28 U.S.C. § 1332. The district court rendered its decision November 24, 2004, 2004 WL 3023003, JA 103, and entered an Order dismissing the complaint that day. JA 102. A timely notice of appeal was filed December 15, 2004. JA 113. This Court has jurisdiction based on 28 U.S.C. § 1291, the judgment below having finally disposed of all parties' claims.

ISSUES PRESENTED FOR REVIEW

1. Could a jury reasonably find that the articles in question convey defamatory meaning, by falsely portraying Dr. Hatfill as the culprit or "likely culprit" in the 2001 anthrax attacks?

2. Was Dr. Hatfill's defamation claim timely as to both the overall thesis of the articles and the discrete false statements that were alleged to be independently defamatory?

3. Did the district court err by purporting to find in the First Amendment some reason to apply the Fed. R. Civ. Proc. 12(b)(6) standard with heightened scrutiny in defamation cases?

4. Could a jury find that the publication of false grounds to suspect Dr. Hatfill in the anthrax attacks was outrageous enough to support a claim for intentional infliction of emotional distress?

STATEMENT OF THE CASE

Plaintiff Steven J. Hatfill, M.D., is likely always to be known as the man whom the press named as a suspect in the anthrax attacks of 2001. This case, however, has its origins at a time when almost nobody knew Dr. Hatfill's name.

In May 2002, defendant The New York Times Company ("The Times") published the first of a series of articles designed not to *report* investigative interest in Dr. Hatfill, but to *create* some. Among other things, the articles called Dr. Hatfill "a likely culprit" in the attacks, and stated falsely that he "had the ability, access, and motive to send the anthrax," that he "failed 3 successive polygraph examinations," that he "was upset at the United States government in

the period preceding the anthrax attack," that he had access to an "isolated residence" in the fall of 2001 when the letters were sent, that he "gave Cipro" – *i.e.*, Ciprofloxacin, the powerful antibiotic famously used to treat anthrax infections in the fall of 2001 – to people who visited the "isolated residence," and that he had engaged in unprofessional conduct (getting "caught" with a girlfriend in the lab) while working at the Army bioweapons lab at Ft. Detrick. The articles used direct assertions and argumentative questions to paint Dr. Hatfill as a suspicious character, and portrayed the FBI's failure to investigate Hatfill more aggressively as an instance of "lackadaisical ineptitude." The author, Nicholas Kristof (who was voluntarily dismissed below and is not a party to this appeal), had the avowed purpose of "lighting a fire" under the FBI. He succeeded, and in the process ruined Dr. Hatfill's life.

If the factual assertions in the articles were all true, then of course no action for defamation would lie. But the factual assertions were false. Dr. Hatfill was *not* involved in the anthrax attacks, did *not* have the "ability, access, and motive" to send anthrax through the mails, did *not* fail three successive polygraph examinations, *etc.* Nevertheless, Dr. Hatfill was badly burned in the fire Kristof and The Times lit.

The district court reached the surprising conclusion that the articles could not reasonably be read to convey any defamatory meaning. This marked a

radical departure from the common-law standard for defamation, which holds that "defamatory meaning" is present whenever a statement has the potential to injure the plaintiff's reputation. Articles that say there are grounds for believing Smith is a bioterrorist certainly have the potential to harm Smith's reputation. Nor is it necessary for the defamatory gist of the publication to be stated explicitly; defamatory meaning can arise even where it is not stated in so many words. Moreover, in the course of its rulings on defamatory meaning, the court strayed into common-law defenses like the "substantial truth" defense and the "fair report" privilege, which were not properly before the court. Because the district court departed from settled law on these matters, the ruling below must be reversed.

As if often the case, however, the district court's error regarding defamatory meaning depended on subtler errors that disguised the implausibility of the ultimate conclusion. The court erred in applying the statute of limitations, holding not only that recovery was time-barred as to some phrases in the articles (but not others), but also apparently that the time-barred phrases were not to be considered as clues to the meaning of the rest of the articles. This was wrong both substantively and procedurally. Worse, the court seems to have been misled into thinking that the first amendment converted the 12(b)(6) inquiry into

a search for *any* grounds on which the lawsuit might be terminated, rather than an evaluation of the sufficiency of the complaint.

Finally, the district court erred in dismissing Dr. Hatfill's emotional distress claim. The court held that publication of an article can *never* be considered "outrageous and intolerable" conduct for purposes of an emotional distress claim, and that the complaint did not adequately describe Dr. Hatfill's emotional distress. The court also dismissed this claim as duplicative, instead of recognizing it as an instance of pleading in the alternative. Even assuming that the complaint contained the pleading defects of which the district court complained, there is no indication here that amendment would be futile, and dismissal was therefore improper.

For all of these reasons, the decision of the District Court should be reversed and remanded for further proceedings.

STATEMENT OF FACTS

In the fall of 2001, anthrax-laced letters were sent through the United States mail to a variety of private and public parties, including two United States senators. The mailing and distribution of these letters killed five people, disrupted the nation's postal service, emptied office buildings throughout the country, and terrorized the population. The federal government immediately

began a criminal investigation, but the perpetrator has never been identified. JA 8-9.

In the months following the anthrax attacks, columnist Nicholas Kristof came to believe the government's investigation was grossly deficient. Kristof therefore began writing articles that criticized the FBI's failure to crack the case. JA 9.

A. The "Mr. Z" Columns

On May 24, 2002, The Times published a column in which Kristof attempted to "light a fire under the F.B.I. in its investigation of the anthrax case" by noting that "[e]xperts in the bioterror field are already buzzing about a handful of individuals who had the ability, access and motive to send the anthrax." JA 22. As his only "example," Kristof mentioned "one middle-aged American who has worked for the United States military bio-defense program and had access to the labs at Fort Detrick, Md. His anthrax vaccinations are up to date, he unquestionably had the ability to make first-rate anthrax, and he was upset at the United States government in the period preceding the attack." JA 22.

Kristof described his May 24 "example" generally, and it was not apparent then that he was describing Dr. Hatfill. However, on July 2, The Times

published another Kristof column about the anthrax investigation, in which the "middle-aged American" came into sharper focus with additional biographical details that unquestionably referred to Dr. Hatfill. JA 10. However, instead of using Dr. Hatfill's name, the July 2 column called him "Mr. Z." The July 2 column stated that "Mr. Z" was the "middle-aged American" who had been described in the May 24 column. JA 23.[1]

The July 2 column (JA 23) complained that the FBI had "not placed [Mr. Z] under surveillance or asked its outside handwriting expert to compare his writing to that on the anthrax letters," and asserted that this was "part of a larger pattern" of FBI incompetence. The column alleged that if Hatfill "were an Arab national, he would have been imprisoned long ago." Referring to a "cloud of suspicion" surrounding Dr. Hatfill, the column concluded with a series of argumentative questions that either asserted or implied (1) that Hatfill had suspicious travel habits and used at least one alias; (2) that Hatfill's top security clearance was "suspended in August [2001], less than a month before the anthrax attacks began"; (3) that Hatfill "had access to" an "isolated residence" in

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[1] Additional biographical details about Mr. Z emerged in the July 19, 2002 column, and in the August 13 column Kristof openly and admitted that his "Mr. Z" was Dr. Hatfill. JA 27-28. For purposes of their motion to dismiss, defendants conceded below that all the "Mr. Z" articles were understood to be "of and concerning" Dr. Hatfill even though he was given a pseudonym. *See generally Gazette, Inc. v. Harris,* 325 S.E.2d 713, 738 (Va. 1985).

the fall of 2001, and that he "gave Cipro [the antibiotic famously used to treat anthrax infections in the fall of 2001] to people who visited it"; (4) that Hatfill had "claimed that he participated in the white [Rhodesian] army's much-feared Selous Scouts" at a time when "[t]here is evidence that . . . anthrax was released by the white Rhodesian Army fighting against black guerillas." JA 23.

The Times published another "Mr. Z" column on July 12, 2002 (JA 24-25). The July 12 column began with the premise that "someone expert in bio-warfare mailed anthrax last fall," and speculated that "it may not have been the first time he had struck." The column described an anthrax hoax that hit the Washington, D.C. office of B'nai B'rith in April 1997, and highlighted similarities (but not differences) between this hoax and the real attacks of 2001. The column then drew connections between the B'nai B'rith incident and the contemporaneous whereabouts and behavior of Dr. Hatfill. The column gave the same basic treatment to "another round of intriguing anthrax hoaxes in February 1999," noting in one strangely gratuitous parenthetical phrase that one of the 1999 hoax letters had gone to "the Old Executive Office Building in Washington (where Mr. Z had given a briefing three months earlier)." (The article did not indicate how many other people had given "briefings" at the Old Executive Office Building during that three-month period.) The column argued that technological differences between the 1997 hoax and the 1999 hoaxes

paralleled a change in the "state of the art" from "wet anthrax" to "dry anthrax," and that this scientific development was also reflected on Hatfill's résumé. JA 24-25.

On July 19, 2002, the Times published yet another "Mr. Z" column by Kristof, focusing on a history of security lapses at Ft. Detrick where Mr. Z worked. Four paragraphs from the end, Kristof focused on the hiring of Mr. Z:

> In truth, many microbiology labs are pretty chaotic, and ultimately labs have to pick reliable people and then trust them. But that's what piqued my interest in [the U.S. Army Medical Research Institute of Infectious Diseases, or "USAMRIID," as the Ft. Detrick facility is known] in the first place – my research about a man I've called "Mr. Z," who has been interviewed four times by the F.B.I. and whose home has been searched twice in connection with the anthrax investigation. [USAMRIID] hired Mr. Z in 1997 to work with Ebola and Marburg viruses, although he had spent years in the armed forces of Rhodesia and apartheid South Africa.

JA 27. The clear implication was that Dr. Hatfill was "reliable" enough to work in a bioweapons lab.

The fire kindled by Kristof and The Times began to blaze as the summer passed. The FBI, stung by public criticism of its failure to make progress in the case, obtained Dr. Hatfill's consent for a search of his apartment on June 25, 2002, and then leaked the time and place of the search to the news media.[2]

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[2] The defendants asked the court below to take judicial notice of a dozen press reports on investigative activity over the summer. Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint (Sept. 10, 2004),

Another search of Dr. Hatfill's apartment occurred on August 1, and on the morning of August 6 Attorney General Ashcroft himself appeared on two network news shows and identified Dr. Hatfill as a "person of interest" in the anthrax investigation. JA 57-58. The media coverage grew so intense and so distorted that on August 11, 2002, Dr. Hatfill went before the press himself in order to deny rampant speculation about his guilt – the sort of speculation that had run throughout the "Mr. Z" columns.[3]

The final "Mr. Z" column appeared on August 13, 2002, two days after Dr. Hatfill proclaimed his innocence to the national press. Stating that it was time "to come clean on 'Mr. Z,'" Kristof confirmed that he had been writing about Dr. Hatfill since May. After allowing that Dr. Hatfill was entitled to a presumption of innocence, the column stated,

> Still, Dr. Hatfill is wrong to suggest that the F.B.I. has casually designated him the anthrax "fall guy." The authorities' interest in Dr. Hatfill arises from a range of factors, including his expertise in dry biological warfare agents, his access to Fort Detrick labs where anthrax spores were kept (although he did not work with anthrax there) and the animus to some federal agencies that shows up in his private writings. He has also failed three successive polygraph examinations since January, and canceled plans for another polygraph exam two weeks ago.

Continued . . .

at 5 n.1 ("Times Memorandum").

[3] *Id.* at 6 n.2.

> So far, the only physical evidence is obscure: smell. Specially trained bloodhounds were given scent packets preserved from the anthrax letters and were introduced to a variety of people and locations. This month, they responded strongly to Dr. Hatfill, to his apartment, to his girlfriend's apartment and even to his former girlfriend's apartment, as well as to restaurants that he had recently entered (he is under constant surveillance). The dogs did not respond to other people, apartments or restaurants.

JA 28. Kristof continued to criticize the FBI for taking so long to investigate certain details of Dr. Hatfill's life, and continued to imply his unfitness for government bioweapons research ("[W]hat was a man like Dr. Hatfill who had served in the armed forces of two white racist governments (Rhodesia and South Africa) doing in a U.S. Army lab working with Ebola?"). JA 28-29. He did, however, commend the FBI for "pick[ing] up its pace" and "belatedly examining anthrax hoax letters sent in 1997 and 1999 that bear fascinating resemblance to the real anthrax letters. Investigators are looking at another anthrax hoax letter with intriguing parallels to the real one; that hoax was sent to Senator Tom Daschle from London in mid-November, when Dr. Hatfill was visiting a biodefense center in England." JA 29.

B. The Proceedings Below

On June 18, 2003, Dr. Hatfill sued Kristof and The Times in the Circuit Court of Fairfax County, alleging claims for defamation and intentional

infliction of emotional distress based on the "Mr. Z" articles from July and August 2002. JA 80. That action, which tolled the statute of limitations, ended in a voluntary nonsuit on March 9, 2004. Dr. Hatfill's complaint in the Eastern District of Virginia, asserting the same claims for relief, was filed on July 13, 2004, well within the six months prescribed by Virginia statute for refiling. JA 2.

Although the state-court action contained just one count for defamation, it set forth two different theories of defamation liability, alleging both that the "Mr. Z" columns had "accus[ed] [Hatfill] of having likely sent the anthrax letters," JA 82, and also that the articles contained "discrete defamatory statements about [Hatfill]," JA 84. When the federal complaint was filed, these theories were pleaded in two separate counts. JA 19. In addition, the federal complaint listed some of the "discrete false statements" contained in the articles, including assertions that Dr. Hatfill (a) "unquestionably had the ability to make first-rate anthrax"; (b) had the "ability" to send the anthrax; (c) had the "access" required to send the anthrax; (d) had a "motive" to send the anthrax; (e) was one of a "handful" of individuals who had the "ability, access and motive to send the anthrax"; (f) "had access" to an "isolated residence" in the fall of 2001, when the anthrax letters were sent; (g) "gave Cipro to people who visited [the 'isolated residence']"; (h) had up-to-date anthrax vaccinations as of May 24, 2002; (*i*)

"failed 3 successive polygraph examinations" between January 2002 and August 13, 2002; (j) "was upset at the United States government in the period preceding the anthrax attack"; and (k) "was once caught with a girlfriend in a biohazard 'hot suite' at Fort Detrick surrounded only by blushing germs." JA 12-13.

The defendants moved to dismiss the complaint for failure to state a claim under rule 12(b)(6), arguing that the articles in question could not reasonably be read to convey defamatory meaning, that Count II of the complaint was time-barred, and that plaintiff did not and could not plead certain elements of a claim for intentional infliction of emotional distress. JA 33.[4] Kristof also moved to dismiss for lack of personal jurisdiction. The parties agreed to dismiss Kristof voluntarily, and Judge Hilton signed a Stipulated Order of Dismissal as to Kristof on October 5, 2004. JA 4. On November 24, 2004, Judge Hilton granted all defendants' motions.[5] Plaintiff filed a timely notice of appeal on December 15, 2004. JA 113.

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[4] For purposes of the motion, The Times conceded the applicability of Virginia law. Times Memorandum at 11 n.5.

[5] Surprisingly, the district court addressed the question of personal jurisdiction over Kristof, JA 111-12, even though Kristof had been dismissed before the motion was even argued. Technically, this portion of the opinion was purely advisory, though the oversight is somewhat disquieting.

SUMMARY OF THE ARGUMENT

The district court was wrong to find that the "Mr. Z" articles could not reasonably be read as defamatory. The test for defamatory meaning is not whether a publication expressly accuses the plaintiff of mass murder; the test is whether the publication conveys, explicitly or implicitly, a message capable of injuring the plaintiff's reputation. The defamatory message in the "Mr. Z" articles arises from many textual signals: particular words and phrases (like "likely culprit"), recitations of spurious "evidence" (like failed polygraphs and imagined "isolated residences"), an overarching theme of FBI incompetence (which implicitly treats a lack of FBI interest in Dr. Hatfill as evidence of FBI ineptitude rather than of Dr. Hatfill's innocence), and the exclusive focus on Dr. Hatfill (implying he is the only "likely culprit" worth mentioning). Moreover, at least some of the misstated facts were independently defamatory. The Times cannot escape liability for the defamatory messages here on linguistic technicalities that the average reader would see right through. Furthermore, the district court erred by allowing its "defamatory meaning" inquiry to be tainted by elements of the "substantial truth" or "fair report" defenses, for in so doing the district court assumed certain facts that are not supported by the record and, indeed, could not be supported prior to discovery.

The district court also erred in its application of the Virginia statute of limitations. Statutes of limitations apply to claims, not to pleadings; and Dr. Hatfill has but one defamation claim for each publication, no matter how many "counts" a lawyer uses to describe that claim. Plaintiff's prior state-court action clearly encompassed the entire claim, not just part of it, and therefore the tolling effect of that action under Virginia law applies to all of the current defamation claim, not just part. Furthermore, even if Dr. Hatfill were barred from recovering independently for the "discrete false statements" in the "Mr. Z" articles, the district court was still wrong not to consider those statements as part of the overall interpretation of the articles.

The district court also erred by adopting a heightened standard of scrutiny for defamation claims. The authorities cited by the court do not support such a standard, and the Supreme Court has made clear that it violates the Federal Rules. Nor is there any constitutional warrant for such a radical departure from settled law.

Finally, the district court was wrong to dismiss Dr. Hatfill's emotional distress claim. The conduct alleged here is at least as outrageous as the conduct that has been found sufficient in Virginia cases, and there is no support for the unexamined assumption that publication of words can *never* be considered outrageous. The plaintiff's allegation of "extreme" emotional distress was

sufficient under the Federal Rules, but even if it were not, the omission could be easily cured by amendment so the complaint should not have been dismissed. In addition, the plaintiff's simultaneous prosecution of defamation and emotional distress claims is a run-of-the-mill example of alternative pleading; on the facts of this case, it is not difficult to identify elements of damage that could be recovered under this theory that would not be duplicative of the defamation claim and would not be an "end run" around any first-amendment principles.

ARGUMENT

This Court reviews the district court's order of dismissal *de novo*, *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 183 (4th Cir. 1998), and "must accept as true all the factual allegations in the complaint," *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993). Dismissal of the complaint is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

I
DEFENDANT'S PUBLICATIONS CONVEYED DEFAMATORY MEANING

The district court held that the columns at issue were not defamatory because they could not be "reasonably read as accusing Hatfill of actually being the anthrax mailer." JA 107. With respect to the "discrete false statements" in the "Mr. Z" articles – regarding failed polygraph examinations, "isolated residences" where Cipro was dispensed, *etc.* – the court held that these were incapable of supporting an action for defamation, both because they were not "independently defamatory" and because any action on those statements was barred by Virginia's one-year statute of limitations. JA 108-09. The court's various rulings on these matters present a knot of mutually reinforcing legal mistakes about defamatory meaning and how it relates to the rest of the law of defamation. When the knot is untangled, it is clear that Dr. Hatfill's complaint states a claim for defamation.

A. The Common Law of Defamation Does Not Require an Express Accusation of Major Bioterrorist Activity.

For a statement to be considered defamatory in Virginia, "it is not necessary that the writing should impute an offence which may be indicted and punished. It is sufficient if the language tends to injure the reputation of the

party, to throw contumely, or to reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule or contempt." *Adams v. Lawson*, 58 Va. 250, 250 (Va. 1867). *See also Wells v. Liddy*, 186 F.3d 505, 523 (4th Cir. 1999) (question is "whether the words have the potential to hurt the plaintiff's reputation among the 'important and respectable' parts of the community").

> In order to render words defamatory and actionable it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory. Accordingly, a defamatory charge may be made by inference, implication, or insinuation.

Carwile v. Richmond Newspapers, Inc., 82 S.E.2d 588, 592 (Va. 1954).

Ultimately, the question of defamatory meaning is to be decided by a jury, "taking into consideration the entire background of the case and the context in which those statements were made." *Richmond Newspapers, Inc. v. Lipscomb*, 362 S.E.2d 32, 43 (Va. 1987). Strictly speaking, therefore, the question for the court is not whether the language *is* defamatory, but whether a reasonable jury *could find it* defamatory. In carrying out this limited inquiry, "every fair inference that may be drawn from the pleadings must be resolved in the plaintiff's favor." *Carwile*, 82 S.E.2d at 592. The "Mr. Z" articles easily satisfy this rather low standard, and The Times's various attempts to run away from the clear import of the publications are all unavailing.

In discerning the meaning of these articles, a reasonable jury would start with particular words and phrases, such as the reference to Dr. Hatfill as "a likely culprit" in the anthrax mailings, or the statement that "[i]f Mr. Z were an Arab national, he would have been imprisoned long ago." JA 23. The jury might focus on the statement that "Dr. Hatfill is wrong to suggest that the F.B.I. has casually designated him the anthrax 'fall guy,'" JA 28 – a statement which presumably means either that the FBI is *right* to designate Dr. Hatfill as the anthrax "fall guy," or at a minimum that there is enough evidence against him to make such a designation more than "casual." Plainly, the author of these phrases is tiptoeing around any direct accusation, but just as plainly he is implying the existence of some basis on which Dr. Hatfill's guilt should be suspected. This implication almost becomes explicit when Kristof *criticizes the FBI* on the ground that "it has not placed [Hatfill] under surveillance or asked its outside handwriting expert to compare his writing to that on the anthrax letters." JA 23. Unless Kristof thinks that the FBI should place *everyone* under surveillance and conduct handwriting analyses on the whole country, there is simply no way to understand his criticism of the FBI that does not imply some basis for suspecting Hatfill's guilt.

Furthermore, the columns describe exactly what the basis for Kristof's suspicion is. In the July 2 column alone, we are told that "[s]ome of [Hatfill's]

polygraphs show evasion," which implies that he is not telling the truth about *something;* it is a fair inference that the "something" is whether he committed the anthrax attacks. We are told further that Dr. Hatfill has multiple passports and "at least one alias," and travels abroad on government assignments, "even to Central Asia"; that his "top security clearance [was] suspended in August, less than a month before the anthrax attacks began," leaving him "infuriated"; that he "had access to" an "isolated residence" at the time of the attacks and "gave Cipro to people who visited it"; and that he "served in the armed forces of two white-racist regimes" in Rhodesia and South Africa, at the time of a Rhodesian anthrax outbreak that conspiracy theorists have tried to pin on the (by-that-time-multi-racial) Rhodesian military. JA 23. The July 12 article embraces the controversial hypothesis that whoever sent the 2001 real-anthrax letters probably sent earlier fake-anthrax letters, and associates two such hoaxes with Dr. Hatfill's whereabouts at the time. JA 24-25. The August 13 column adds a third hoax incident, JA 29, and also expands on the "polygraph" claim, stating that he has "failed three successive polygraph examinations since January, and canceled plans for another polygraph exam two weeks ago." JA 28. If Kristof is not adducing these "facts" as evidence of Hatfill's guilt, why are they being mentioned at all? A jury would certainly not be acting irrationally in determining that these factual assertions were designed first to support the (July)

thesis that the FBI was paying too little attention to Dr. Hatfill, and later to support the (August) thesis that Dr. Hatfill deserved the attention he was receiving.

The overall context of the articles is also important. The early articles frame the issue as one of FBI incompetence, and that context adds color to all the particulars. Thus, a jury might be unable as a matter of law to find defamatory meaning in the assertion that "the FBI is not investigating Hatfill" – but a jury certainly *could* find defamatory meaning in the assertion that "the FBI is *incompetent* for not investigating Hatfill," which is exactly what the articles say. In addition, a rational jury might find that the creation of the "Mr. Z" pseudonym itself evidences awareness that the columns might injure Mr. Z's reputation if his real name were used.

Finally, a reasonable jury might find it significant that there is a Mr. Z, but there is no Mr. X or Mr. Y. In other words, while the intent of the columns was to "light a fire" under the FBI, the tenor of the articles was not *merely* that the FBI was moving too slowly in general; the gist was rather that there was *one particular man* who looked like "a likely culprit" and the FBI's failure to investigate *that man* thoroughly was inexplicable except as evidence of "lackadaisical ineptitude." This certainly had a tendency to injure the reputation of the man in question. *Cf. Lipscomb,* 362 S.E.2d at 37 ("Although the article

purports to raise the general question of what redress parents of a public school student may have when faced with an allegedly incompetent teacher, it named only one allegedly incompetent teacher and charged specific instances of that teacher's incompetence.").

The foregoing analysis explains how a reasonable jury might interpret these articles to suggest that Dr. Hatfill was involved with the anthrax mailings of 2001. That was not, however, plaintiff's only theory of defamation. Plaintiff also alleged defamation by several of the "discrete false statements" in the articles, but the court below ruled that "none of these statements, *standing alone*, imparts any independent defamatory sting. It simply is not harmful to reputation to suggest, *in isolation*, that someone's anthrax vaccinations are up to date." JA 109 (emphasis added).

Allegedly defamatory words are supposed to be read in context rather than "standing alone" or "in isolation," but even putting that aside, the court's example about anthrax vaccinations does not address the defamatory nature of the other "discrete false statements." Whatever one thinks about up-to-date anthrax vaccinations, failed polygraph exams are another thing altogether. Most of us, if we picked up *The New York Times* and saw it reported (falsely) that we had failed three polygraph examinations in a mass murder investigation, might reasonably fear reputational harm. Most doctors would feel that a propensity to

dispense a powerful antibiotic for social guests upon their arrival at a lodging necessarily reflects badly either on the lodging or on the doctor's standards for prescription-writing. Most scientists would think it discreditable to be "caught with a girlfriend in a biohazard 'hot suite' at Fort Detrick . . . surrounded only by blushing germs" – and Kristof thought so too, or he would not have used the word "caught." Thus, while some of the "discrete false statements" may contribute more to the overall suggestion of Hatfill's criminality than they do to any *independent* defamatory "sting," at least the three mentioned above should be held sufficiently defamatory in their own right.[6]

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[6] The discrete false statements also render inapplicable this Court's statement in *Chapin v. Knight-Ridder, Inc.* that "a libel-by-implication plaintiff must make an especially rigorous showing *where the expressed facts are literally true.*" 993 F.2d 1087, 1092-93 (4th Cir. 1993) (emphasis added). *See Lamb v. Weiss*, 2003 WL 23162338 (Va. Cir. Ct. 2003) at *2. Here, the defamatory gist of the "Mr. Z" columns arises largely from the false factual statements Kristof adduced in support of his thesis – and the falsity of those statements is assumed for purposes of rule 12(b)(6), as The Times concedes.

Furthermore, even if *Chapin* required "an especially rigorous showing" in this case, the *Chapin* court's demand for "language" that "affirmatively suggest[s] that the author intends or endorses" the defamatory implication, 993 F.2d at 1093, would be easily satisfied. The Mr. Z columns do not merely report that *other* people think Mr. Z is the anthrax mailer; they *criticize the FBI for not following leads that allegedly all lead to Mr. Z.* This thesis, though wrong, was clearly the author's own, and the author's selection of particular factual propositions to buttress his thesis is the strongest endorsement any writer can give.

B. <u>The Times Cannot Escape Liability Through Linguistic Cleverness.</u>

Neither The Times nor the district court explained how the words and phrases cited above are consistent with any non-defamatory meaning. That is, no one has set forth the *non-defamatory* meaning of the assertion that Hatfill failed three polygraph examinations, or that he gave Cipro to social guests at an "isolated residence. *A fortiori*, no one has explained why any innocent interpretation is so compelling that the assertions do not even create a jury question. Instead of explaining how the factual assertions in the articles can possibly be construed innocently, The Times and the court below have consistently invoked purely formalistic arguments based on (1) the absence of express accusations; (2) the pretense that The Times was merely "raising questions" about Mr. Z; and (3) language admitting that Hatfill might be innocent. These arguments do not suffice to drain the Mr. Z columns of their defamatory meaning.

First, the absence of express accusation is entirely beside the point. In *Carwile*, for example, the defamatory publication was a news report stating that two city officials refused to say whether they were considering making a State Bar complaint against Carwile, an attorney who had leveled charges of corruption at the officials. The article then noted that the State Bar had the authority to seek disbarment of an attorney "for violation of the ethical code

governing the professional conduct of attorneys." *Carwile,* 82 S.E.2d at 589-90. Despite the absence of any accusation of unprofessional conduct "in express terms," the court held that the article did "impute conduct tending to injure [Carwile] in his profession." *Id.* at 592. *See also Schnupp v. Smith*, 457 S.E.2d 42, 44 (Va. 1995) (imputation of a criminal offense found where police officer called private employer to "check and see" whether operators of employer's truck were authorized to drive it in an area known for high levels of drug-related crime); *Wells v. Liddy,* 186 F.3d 505, 523 (4th Cir. 1999) (under Virginia law, statement that "some members of the DNC" were running a call girl service and kept photos in plaintiff secretary's desk would normally be understood as an allegation that plaintiff "was a participant in a scheme to procure prostitutes"); *Cianci v. New Times Pub. Co.,* 639 F.2d 54, 59 (2d Cir. 1980) (publication suggesting that plaintiff *might* have committed a rape may be defamatory even though it "carefully refrains from stating that [plaintiff] was indicted, officially charged, or guilty of the crime of rape").

Second, The Times claims that its articles were merely raising questions about a matter of public concern, and that "[q]uestions are not necessarily accusations." Times Memorandum at 15 (quoting *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1098 (4th Cir. 1993), which was in turn quoting the district court decision under review). This argument is also specious. Questions are not

necessarily accusations, but they *can* be, as the *Chapin* court itself recognized, 993 F.2d at 1094 (question defamatory where it can be "reasonably read as an *assertion* of a false *fact*"). At the "Army-McCarthy" hearings of 1954, when Joseph Welch famously asked Senator McCarthy, "Have you no sense of decency sir, at long last? Have you left no sense of decency?"[7] neither McCarthy nor the rest of the country thought Welch was asking for information. This was rather an *assertion* that McCarthy did *not* have any sense of decency left, and it was extraordinarily persuasive. The open questions in Kristof's July 2 column are just as factually freighted, and the implied factual assertions were false. Thus, while The Times may argue that the questions raised in the "Mr. Z" columns did not imply grounds for suspecting Hatfill's guilt, that suggestion is certainly not so compelling as to prevent Dr. Hatfill from reaching a jury.

The Times's third attempt to escape the defamatory meaning of the "Mr. Z" articles is based on scattered language of disavowal that appears in some of the articles. Reply Memorandum in Support of Defendant's Motion to Dismiss the Complaint (Oct. 12, 2004) at 5-6 ("Times Reply Memorandum"). The district court accepted this argument without cavil and made it an alternative ground of decision: "Because the columns specifically and repeatedly disavow

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[7] A transcript of this famous exchange, with audio, is available at http://www.americanrhetoric.com/speeches/welch-mccarthy.html.

any conclusion of guilt, no such intent [*i.e.*, intent to impute guilt for the anthrax letters to Dr. Hatfill] can possibly be found, and the claim of libel fails as a matter of law for this reason as well." JA 108; *cf.* Times Memorandum at 16 (identical). This badly misstated governing law.

While language of disavowal is obviously *relevant* to the interpretation of the publications, it is not dispositive. The articles must be read as a whole and in context. *Yeagle v. Collegiate Times,* 497 S.E.2d 136, 138 (Va. 1998). Courts are not to conduct a quasi-*Chevron*-ish analysis in which they first look for language of disavowal and then give the question to the jury only if the author was not smart enough to say somewhere that so-and-so "denies any wrongdoing." In this case, whatever perfunctory language Kristof might have included to concede the theoretical possibility of Dr. Hatfill's innocence, his *thesis* was that various leads were *so promising* that the FBI's failure to place Dr. Hatfill under surveillance, analyze his handwriting, scrutinize his foreign travel, and search his "isolated residence" amounted to "lackadaisical ineptitude." JA 23. Somehow, the statement that Dr. Hatfill's "friends are heartsick at suspicions directed against a man they regard as a patriot" is just not a very impressive defense of Dr. Hatfill's presumed innocence when laid next to the false assertions that he failed three polygraph examinations and gave Cipro to anyone who visited his "isolated residence."

In fact, none of the disavowals are very impressive. The strongest of them came in the August 13 column, which stated that Hatfill should be presumed to be "an innocent man caught in a nightmare," that "[t]here is not a shred of traditional physical evidence linking him to the attacks," and that the FBI should "end this unseemly limbo by either exculpating Dr. Hatfill or arresting him." JA 28-29. This was fairly weak brew next to the unequivocal assertion that "Dr. Hatfill is wrong to suggest that the F.B.I. has casually designated him the anthrax fall guy," – a statement followed immediately by a two-paragraph litany of all the reasons Dr. Hatfill *should* be a suspect in the attacks. Even the statement about the lack of "traditional physical evidence" is pregnant with the implication that there are *other* kinds of evidence against Hatfill. Moreover, even if these August 13 disavowals had been stronger, it was a bit late by then, for by then Dr. Hatfill *was* "an innocent man caught in a nightmare" – a nightmare for which The Times is largely responsible.

The point, however, is not that the disavowals mean nothing; it is simply that disavowals are not tantamount to a get-out-of-jail-free card, and cannot be used by sophisticated defamers to shield their most reckless misstatements of fact from legal accountability. The full text of these articles should be placed before a jury, disavowals and all.

C. <u>Questions of "Substantial Truth" and "Fair Report" Play No Role in the Defamatory Meaning Inquiry and Were Not Before the Court.</u>

To support an action for defamation, the "Mr. Z" columns must be false as well as defamatory. *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 724-25 (Va. 1985). Accordingly, Dr. Hatfill alleged that The Times's identification of him "as the likely anthrax mailer was baseless and false," JA 11, and that the "Mr. Z" columns also contained at least eleven other "discrete false statements," "among others," JA 12-13. The Times acknowledged to the district court that it was bound to accept, at the pleading stage, these allegations of falsity. Times Reply Memorandum at 4. Nonetheless, The Times lured the district court into error by quoting liberally from cases where courts found the published facts to be true, or at least to be true reports of official actions or allegations. Although these "substantial truth" and "fair report" defenses were not properly before the district court, many of these arguments wound up in the district court's opinion, fatally tainting its "defamatory meaning" analysis.

Four critical paragraphs provide telling insight into the extent to which the district court's ruling was compromised in this way:

> The principle that an *accurate report of an ongoing investigation or an allegation of wrongdoing* does not carry the implication of guilt has long been recognized at the common law, and it is mandated by the First Amendment. Indeed, for this reason, courts routinely dismiss libel claims against defendants who *accurately report on investigations or charges made by others*. [Citations.]

> Applying this principle, it is evident that the Op-Ed pieces highlighting the perceived shortcomings of the FBI are not reasonably read as accusing Hatfill of actually being the anthrax mailer. Plaintiff is *accurately described as someone who experts in the field have identified as deserving scrutiny by the FBI* . . . . The last column *accurately describes Hatfill as the overwhelming focus of the [FBI's] investigation* into the anthrax attacks last fall. . . .
>
> [. . .]
>
> The decision in *Green v. CBS, Inc.* is to the same effect. . . . Affirming the dismissal of this libel claim, the Fifth Circuit held that statements *accurately reporting allegations* do not support a claim for libel: "In cases involving media defendants, such as this, the defendant need not show the allegations are true, but [must] only demonstrate that the allegations were made and accurately reported." [Citation.]
>
> The columns at issue in this case . . . *accurately report questions being raised* in the context of an ongoing public controversy.

JA 106-108 (emphasis added); *cf.* Times Memorandum at 12-15.

This analysis suffers from a number of defects, but two are particularly pertinent here. First, there is no legal support for conducting this sort of inquiry under rule 12(b)(6); the court should have "accept[ed] as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002). The court cited two federal appellate decisions for the proposition that "courts routinely dismiss libel claims against defendants who accurately report on investigations or charges made by others," but both of these cases involved *summary judgment* rather than dismissal under rule 12(b)(6).

Green v. CBS, Inc., 286 F.3d 281, 283 (5th Cir. 2002) (affirming summary judgment under Texas law "because the Greens presented *insufficient evidence* showing that the statements aired were false and defamatory," emphasis added); *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 648 (8th Cir. 1985) (rejecting defamation claim based on reported allegations of rape, because on *motion for summary judgment* the district court determined that the *evidence* showed "the report published by Newsweek concerning the rape allegation was materially true"). *See also Basilius v. Honolulu Publishing Co.,* 711 F. Supp. 548, 550 (D. Hawaii 1989)(summary judgment); *Foley v. Lowell Sun Pub. Co.,* 533 N.E.2d 196, 196 (Mass. 1989)(same).

Only *Jewell v. NYP Holdings*, 23 F. Supp. 2d 348 (S.D.N.Y. 1998), was decided under rule 12(b)(6), and even there the holding was that the otherwise-defamatory phrase was substantially true *based on the allegations of Jewell's own complaint.* 23 F. Supp. 2d at 367 (describing allegations of complaint) & 369 (holding that "statements that Jewell was the 'main' or 'prime' suspect are substantially true in light of his admission that he was 'a' suspect"). Indeed, the *Jewell* court rightly recognized that "being identified as someone who fits the profile of the perpetrator of a 'major act of terrorism'" is inherently defamatory even though it falls short of direct accusation of guilt. 23 F. Supp. 2d at 364. *See also Global Relief Foundation v. New York Times Co.,* 390 F.3d 973, 981

(7th Cir. 2004) (affirming summary judgment on grounds of substantial truth after recognizing that there was "no real argument" whether reports that someone is being investigated for ties to terrorists are defamatory).

Second, even if the court were to look beyond the four corners of Dr. Hatfill's complaint, there is simply no basis for the various assertions that the "Mr. Z" columns were "accurate." There is nothing in the record to establish that they were "accurate report[s] of [an] ongoing investigation (JA 106); on the contrary, Dr. Hatfill has claimed that the reports were inaccurate in material respects. Nothing in the complaint or anywhere else in the record substantiates the district court's statement that "Plaintiff is accurately described as someone who experts in the field have identified as deserving scrutiny by the FBI," JA 107. There is surely nothing in the record establishing that the August 13 column "accurately describes Hatfill as the overwhelming focus of the [FBI's] investigation into the anthrax attacks," JA 107. If The Times wants to defend itself by arguing that its misstatements were substantially true, it must make a properly supported motion for summary judgment instead of leading the district court down the garden path into serious legal error.

There are intensely practical reasons to be wary of media defendants' attempts to infuse the "defamatory meaning" inquiry with factual argumentation. In this case, for example, the defendants argued below that "Hatfill

acknowledges the accuracy of Kristof's statements in the complaint [Hatfill] has filed against the government, which avows among other things that '[g]overnment sources provided the basis for Mr. Kristof's claim [that Hatfill failed three successive polygraph examinations]'" Times Memorandum at 14 n.8. The argument is fatuous because government sources can obviously give false information as well as true information; they may have done so in this case, but that is a matter to be explored in discovery. Similarly, there are a number of passages in the Mr. Z articles that have a grain a truth mixed with mounds of error; the passages about bloodhounds and Rhodesia come to mind. The fact that the errors were not pleaded as "discrete false statements" does not make them established facts that can support judgments about substantial truth on the pleadings alone.

The issue before the district court was whether the "Mr. Z" articles could reasonably be read in a way that might injure Dr. Hatfill's reputation. There was no occasion to consider whether they were "accurate report[s] of an ongoing investigation," or whether they "accurately described" the level of investigative interest in Dr. Hatfill. Because the district court confused defamatory meaning with issues more appropriate for trial or summary judgment, this Court must reverse.

II
THE STATUTE OF LIMITATIONS DOES NOT BAR ANY PORTION OF DR. HATFILL'S CLAIM FOR DEFAMATION

In the court below, The Times attempted to capitalize on the fact that Dr. Hatfill's federal complaint pleaded two "counts" of defamation while his state-court motion for judgment pleaded only one. Using a "divide and conquer" strategy, The Times persuaded the district court to hold that Dr. Hatfill could not proceed on Count II of his federal complaint (which alleges that certain "discrete false statements" are independently defamatory) because no such count was in the motion for judgment, and accordingly the tolling effect of the motion for judgment under Virginia law was limited to what became Counts I and III of the federal complaint. JA 108-09. In addition, this application of the statute of limitations seems to have led the district court to believe that the "discrete false statements" alleged by Dr. Hatfill were not to be considered in determining whether the article as a whole could be construed as defamatory. Both conclusions were erroneous.

A. The Statute of Limitations Does Not Bar Recovery for the "Discrete False Statements" Under "Count II" of the Complaint.

The court's determination that Dr. Hatfill cannot recover for reputational injuries caused by the "discrete false statements" described in his complaint is

wrong on a number of different levels. First, the court's analysis depends on the implicit assumption that Counts I and II of the federal complaint are distinct causes of action, such that one can be time-barred while the other is not. Yet this assumption is not true under either state or federal law. This Court has found that Virginia, like most jurisdictions, follows the "single publication rule," according to which there is but one cause of action per publication, accruing once and for all on the date of first publication. *Morrissey v. William Morrow & Co.*, 739 F.2d 962, 967 (4th Cir. 1984). *See also* Restatement (Second) of Torts § 577A(3) ("Any one edition of a . . . newspaper . . . is a single publication") & (4) ("As to any single publication, . . . only one action for damages can be maintained"). Thus, while Dr. Hatfill might be said to have one cause of action for each of the "Mr. Z" articles, he would never be said to have one cause of action for the "overall meaning" of all five articles and a second cause of action for the individual misstatements in all five articles. Similarly, under Fed. R. Civ. Proc. 10(b), whether a plaintiff divides his claims into separate "counts" is supposed to depend only on "clear presentation of the matters set forth." The forms appended to the Federal Rules do not make use of counts, even when more than one legal theory is presented (*see* Form 17), and these forms "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Fed. R. Civ. Proc. 84. Thus, neither

state nor federal law supports the proposition that the scope of Dr. Hatfill's defamation claim can possibly depend on whether it is pleaded in one count or two.

Second, the district court's conclusion implicitly assumes that the state-court motion for judgment would not have been sufficient to allow recovery for "discrete false statements" in the "Mr. Z" articles. This again is false. Paragraph 13 of the motion for judgment clearly states, "In addition to identifying Dr. Hatfill wrongfully and baselessly as the likely anthrax mailer, defendant Kristof published discrete defamatory statements about him . . . ." JA 84. Although the motion for judgment lists just one such statement, it is listed as an example (introduced with "*e.g.*,"), and the rejected letter to the editor that Dr. Hatfill's counsel attached to the complaint discussed others. JA 96-97. The district court seems to have supposed that the motion for judgment was inadequate under *Fuste v. Riverside Healthcare Ass'n*, 575 S.E.2d 858 (Va. 2003). JA 109. But *Fuste* is better read as a *refusal* to insist on rigid pleading technicalities, refusing to extend a 1939 case requiring "*in haec verba*" pleading to require the inclusion of "details such as the time and place of the alleged communication, the name of a defendant's agent, and the names of the individuals to whom the defamatory statement was purportedly communicated." 575 S.E.2d at 862. Because the "Mr. Z" columns were attached, Dr. Hatfill's

motion for judgment was sufficient to give the defendants notice of "the exact words spoken or written," as required by *Fuste.* Indeed, The Times (if it had been served with the motion for judgment) would have been better able to begin its defense than the defendants in *Fuste* were. It cannot seriously be contended that Dr. Hatfill's substantive rights would be different if counsel had retyped the articles in the body of the motion for judgment instead of attaching copies.

Third, the district court's analysis also depends on the implicit assumption that Virginia would not have allowed any amendment of the motion for judgment, or that the amendment would not have related back to the date of filing. This also is false. Under *Schnupp v. Smith*, 457 S.E.2d 42, 47 (Va. 1995), Dr. Hatfill would clearly have been permitted to amend his original motion for judgment to add *additional defamatory statements*, even if they were made in a different form or on a different occasion; *a fortiori,* he could have specified additional ways in which the *same* statement was false and defamatory. In *Schnupp,* for example, the plaintiff's original motion for judgment complained of defamation in a phone call, but at trial the plaintiff was permitted to prove the defamatory nature of the communication by reference to a written report sent four days later, notwithstanding the defendant's claim that this was "an entirely different instance of defamation" not covered by the motion for judgment. *Id. See also Lewin v. Medical College of Hampton*

Roads, 910 F. Supp. 1161, 1172 (E.D. Va. 1996) (defamation action filed in state court against *three* defendants was sufficient to toll the cause of action against *four* defendants in later federal action).

Fourth, we ought not forget that the motion for judgment was never served. Whatever the outcome of a demurrer in state court would have been, we are not in state court and The Times cannot conceivably have suffered any prejudicial lack of notice from the fact that the motion for judgment alleged multiple "discrete defamatory statements" but specified only one in the body of the complaint. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957). If Dr. Hatfill's federal complaint had been identical to the state-court motion for judgment except for the caption, he would clearly be permitted now to amend the complaint in order to specify precisely which "discrete false statements" were independently actionable. The fact that Dr. Hatfill's counsel provided the additional detail on his own initiative at the time of re-filing should not adversely affect the plaintiff's substantive rights. Indeed, such a result would be difficult to square either with Fed. R. Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice") or with the U.S. Supreme Court's

unbroken line of decisions holding that dismissal of the complaint under rule 12(b)(6) is proper "only if it is clear that no relief could be granted under *any set of facts that could be proved* consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (emphasis added). The statute of limitations does not preclude Dr. Hatfill's recovery for the "discrete false statements" in his complaint.

B. Even If Recovery Were Time-Barred, the "Discrete False Statements" Would Have Interpretive Significance.

The district court never ruled explicitly that the "discrete false statements" were irrelevant to the question of whether the article as a whole communicates the defamatory assertion that there are grounds for believing that Dr. Hatfill was a likely culprit in the anthrax mailings. Nonetheless, it is a striking fact that not one of the eleven "discrete false statements" pleaded in the complaint is ever mentioned by the district court in its textual analysis of whether the columns reasonably conveyed grounds for suspecting Dr. Hatfill's complicity in the anthrax attacks. Whether this was a consequence of the district court's view that Count II was time-barred is impossible to say, but it was in any event erroneous.

As noted above, defamation law requires that the entire article be read as a whole and in context, *Yeagle v. Collegiate Times,* 497 S.E.2d 136, 138 (Va.

1998). Regardless of whether they are independently actionable, the "discrete false statements" in the Mr. Z columns provide important clues to the meaning of the article that contains them. To address the question of whether the articles convey a *general* accusation of guilt without addressing the *particular* evidence that the author gave for his overall thesis is as impossible as evaluating a melody without listening to any notes.

Indeed, discovery will undoubtedly uncover many facts that shed light on the meaning of these articles without being independently actionable. For example, if on January 4, 2002, The Times published a Kristof column that began, "I think I know who sent out the anthrax last fall," then that fact would surely be relevant to the question whether, six months later, Kristof was just asking questions or was instead hinting at answers. This statement would not necessarily be included in Dr. Hatfill's federal complaint, nor would it be in his state-court motion for judgment, because it caused Dr. Hatfill no damage and if it had the claim would be time-barred. Nonetheless, it would clearly be appropriate for Dr. Hatfill to use this article to impeach Kristof to the extent that he claims that he never intended to convey the impression that he personally believed in Mr. Z's guilt.

Thus, while Dr. Hatfill believes he should be permitted to pursue his defamation claim based on the various "discrete false statements" as well as the

overall implication of complicity in the anthrax attacks, he asks this Court to rule in any event that the "discrete false statements" should have been considered in determining whether the overall thesis of the articles was defamatory. It would be particularly inappropriate to ignore the discrete statements on a rule 12(b)(6) motion because dismissal depends not only on whether a claim *has been* stated, but on whether a claim *can be* stated.

III
THE DISTRICT COURT MISAPPLIED RULE 12(b)(6).

It is well established that a complaint should be dismissed under rule 12(b)(6) only "if, after accepting all well-pleaded allegations in the plaintiff's complaint as true . . . it appears certain that the plaintiff cannot prove any set of facts in support of [the] claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). The district court cited this rule, but then abruptly departed from it. The court held that the rule 12(b)(6) standard was "to be applied with *particular care* in assessing a claim for libel." JA 105 (emphasis added). To illustrate this "particular care" standard, the court quoted Wright & Miller's *Federal Practice and Procedure* for the proposition that courts are more inclined to grant motions to dismiss under rule 12(b)(6) in defamation actions – apparently on the ground that defamation actions are "disfavored," and that "the burden of defending a baseless defamation action is

itself a threat to the First Amendment." The court even suggested that this "particular care" standard was a matter of constitutional protection for the speech in question. JA 105-06. Thus, in practice, "particular care" amounts to a heightened pleading standard for defamation actions, one designed for the express purpose of reducing the burden on media defendants.

This radical departure from the settled understanding of rule 12(b)(6) originated with The Times. *See* Times Memorandum at 10. As with The Times's earlier attempt to smuggle portions of the "substantial truth" and "fair report" defenses into the court's "defamatory meaning" analysis, the authorities The Times offered in support of the "particular care" standard do not support anything of the sort. On the contrary, the approach recommended by The Times is inconsistent with the Federal Rules of Civil Procedure and inconsistent with the Supreme Court's repeated refusal to hyperconstitutionalize the predominantly common-law nature of defamation.

A. The Heightened Scrutiny of the "Particular Care" Standard Is Inconsistent with the Federal Rules of Civil Procedure.

The Times and the district court based the "particular care" standard on a treatise and a few cases, but neither the treatise nor the cases support The Times's position. On the contrary, the cases indicate unequivocally that *any*

heightened pleading standard under rule 12(b)(6) is inconsistent with rule 8, and therefore invalid under controlling authority from the U.S. Supreme Court.

First, as the cited section of *Federal Practice and Procedure* makes clear,

> The notion that a federal court can use a stricter pleading standard on a motion to dismiss a disfavored action has been cast in serious doubt – indeed, it may well have been rendered invalid by the Supreme Court's 1993 decision in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, which struck down a stringent pleading standard in civil rights cases alleging municipal liability under Section 1983 of Title 42, and its 2002 decision in Swierkiewicz v. Sorema, N.A., which struck down another special pleading rule applied in some employment discrimination cases. In both cases the Court makes it clear that Rule 8 announces a pleading standard that is applicable to all cases except those governed by Rule 9(b) or a heightened pleading requirement in a federal statute.

5B Wright & Miller, *Federal Practice and Procedure 2d* § 1357.

Examination of the *Leatherman* and *Swierkiewicz* decisions shows this observation to be entirely true. In *Leatherman*, the Supreme Court considered the Fifth Circuit's application of a heightened pleading standard for actions against municipalities under 42 U.S.C. § 1983. 507 U.S. 163, 165-66. Just as the court here invoked the standard to protect media defendants from the burdens of litigation, the lower courts in *Leatherman* had held that the heightened scrutiny was necessary to effectuate the municipalities' freedom from *respondeat superior* liability under section 1983. The Supreme Court reversed:

> We think that it is impossible to square the "heightened pleading standard" applied by the Fifth Circuit in this case with the liberal system of "notice pleading" set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief."

507 U.S. at 168. After quoting the familiar words of *Conley v. Gibson,* 355 U.S. 41, 47 (1957), the Court continued:

> Rule 9(b) does impose a particularity requirement in two specific instances. It provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*

Id.

Despite the unusually short and categorical 9-0 opinion in *Leatherman,* the issue arose again in *Swierkiewicz.* There the issue was whether a Title VII complaint could be dismissed under rule 12(b)(6) if it did not include "specific facts establishing a prima facie case of discrimination." 534 U.S. at 508. In another unanimous opinion, the Court reversed the Second Circuit's attempt to impose the heightened pleading standard, using language every bit as emphatic as in *Leatherman*:

> [T]he Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that

> the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." [*Conley*, 355 U.S. at 47.] This simplified notice pleading standard relies on *liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.*

534 U.S. at 512 (emphasis added). The Court closed by making clear that a desire to discourage certain types of litigation could not justify heightened scrutiny in derogation of the Federal Rules: "Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits." 534 U.S. at 514-15. After *Leatherman* and *Swierkiewicz,* there is no doubt that the heightened pleading standard that The Times urged upon the district court is unwarranted.[8]

Neither The Times nor the district court cited *Leatherman* or *Swierkiewicz.* Instead, they cited *Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 30 (D.D.C. 1995), *aff'd*, 88 F.3d 1278 (D.C. Cir. 1996), for the proposition that "it is particularly appropriate for courts to scrutinize [defamation] actions at an early stage of the proceedings to determine whether dismissal is warranted." Although the district court in *Coles* did use these words, it used them with respect to *summary judgment* – not a motion to dismiss

[8] Even before *Swierkiewicz*, this Court reached the same conclusion in *Wuchenich v. Shenandoah Memorial Hospital*, 215 F.3d 1324, 2000 WL 665663 (4th Cir. 2000), at *14. *Wuchenich*, which was unpublished, is attached as an addendum to this brief.

under rule 12(b)(6). Even in that context, the proposition is questionable, since the Supreme Court has described its decision in *Hutchinson v. Proxmire* as "implying that no special rules apply for summary judgment" in defamation cases. *Calder v. Jones*, 465 U.S. 783, 790 (1984) (citing *Hutchinson*, 443 U.S. 111, 120 n.9 (1979)). But in any event, *Coles* says nothing about how rule 12(b)(6) should be applied; and if it did, it would no longer be good law in light of *Leatherman* and *Swierkiewicz*.

B. The First Amendment Does Not Require Heightened Scrutiny of Defamation Complaints Under Rule 12(b)(6).

Although the "particular care" standard is obviously incompatible with *Leatherman*, *Swierkiewicz*, and the Federal Rules themselves, The Times invited the district court to adopt it as a matter of *constitutional* principle JA 106; Times Memorandum at 10. According to the Times, "Courts in Virginia and the Fourth Circuit . . . routinely give close scrutiny to libel claims in order to protect free speech, and they regularly dismiss at the outset libel actions against the press that are based on constitutionally protected speech." Times Memorandum at 10; *cf.* JA 106 (modified version of same).

This Court has recognized that despite the development of a truly constitutional defamation jurisprudence, "[t]he primary framework of a

defamation claim . . . continues to be a state law tort claim." *Wells v. Liddy,* 186 F.3d 505, 521 (4th Cir. 1999). Thus, the Constitution imposes a fault requirement on defamation plaintiffs who are public officials or public figures, but not in other cases. *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 342-43 (1974). Similarly, the Constitution requires plaintiffs to prove falsity only when media defendants publish about matters of public concern, *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 777 (1986). Indeed, the Supreme Court has recognized that defamation cases advance the "'basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty.'" *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 22 (1990) (*quoting Rosenblatt v. Baer,* 383 U.S. 75, 92 (1966)). The Court has characterized the balance as one "between the public's interest in an uninhibited press and its *equally compelling* need for judicial redress of libelous utterances." *Time, Inc. v. Firestone,* 424 U.S. 448, 456 (1976) (emphasis added). The Court has "regularly acknowledged the 'important social values which underlie the law of defamation,' and recognized that '[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation.'" *Milkovich.,* 497 U.S. at 22 (*quoting Rosenblatt,* 383 U.S. at 86).

Accordingly, the Court has repeatedly rejected suggestions that the first amendment requires the application of special constitutional protections in *all*

defamation actions. The *Firestone* Court refused to extend the rule of *Times v. Sullivan* to all reports of judicial proceedings because so doing "would effect substantial depreciation of the individual's interest in protection from such harm." 424 U.S. at 456. Similarly, in *Herbert v. Lando*, the Court rejected the suggestion that the first amendment modifies the normal discovery process so as to bar inquiry into editorial decisions in defamation cases. 441 U.S. 153, 169-72 (1979). *Calder* rejected (and denigrated as "double counting") the suggestion that first-amendment concerns should affect the jurisdictional analysis in defamation cases. 465 U.S. at 790-91. *Milkovich* refused to recognize "First-Amendment-based protection for defamatory statements which are categorized as 'opinion' as opposed to 'fact,'" 497 U.S. 1, 17 (1990), thus refusing to constitutionalize the common-law fact/opinion dichotomy. *Masson v. New Yorker Magazine* "reject[ed] any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech." 501 U.S. 496, 523 (1991).

These decisions show that, despite the success The Times enjoyed in the district court, there is no merit whatsoever to the suggestion that the first amendment requires a plaintiff in a defamation case to bear any special burden on a 12(b)(6) motion. As the Court stated in *Calder*, 465 U.S. at 790, *Hutchinson v. Proxmire* strongly implied that there were no special,

constitutionally-ordained rules about summary judgment in defamation cases, 443 U.S. 111, 120 n.9 (1979). It follows that no such rules are appropriate at the pleading state, where the Federal Rules merely require a short and plain statement sufficient to apprise the defendant of the grounds for the claim. If special rules were appropriate, they would be more appropriate once the facts were developed – and yet the Court has rejected them even there.

This case illustrates how the "particular care" standard suggested by The Times and adopted by the district court can undermine the important interests advanced by defamation cases. The Times published a sustained campaign of misinformed calls for rigorous investigation of Dr. Hatfill, based on numerous false assertions, including *inter alia* that he had the ability and motive to make and send anthrax through the mail; that he gave an antibiotic used to treat anthrax infections to visitors to his "isolated residence"; and that he failed three polygraph examinations. Nonetheless, applying the "particular care" standard, the district court concluded that those allegations could not reasonably be read to convey defamatory meaning, even though almost anyone subject to such accusations would reasonably feel that he had been accused of bioterrorism. Any pleading standard that leads to *that* implausible conclusion is necessarily the wrong standard, and will be as long as the Commonwealth of Virginia continues to recognize the tort of defamation.

IV
THE COMPLAINT STATED A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The district court dismissed Dr. Hatfill's claim for intentional infliction of emotional distress on three grounds: First, that "[p]ublishing news or commentary on matters of public concern simply cannot be deemed conduct so 'outrageous and intolerable' as to support a claim for intentional infliction of emotional distress," JA 110; second, that the complaint failed to plead "extreme" emotional distress, JA 110-11; and third, that Dr. Hatfill's emotional distress claim was "an impermissible effort to evade the constitutional limits on damage claims arising solely out of an act of publication," JA 111. Dismissal was not justified on any of these grounds.

A. A Jury Could Find It "Outrageous and Intolerable" to Make False Statements to Get Someone Prosecuted for Mass Murder.

Under *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974), a plaintiff seeking to recover for intentional infliction of emotional distress must allege, among other things, that "the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality. This requirement is aimed at limiting frivolous suits and avoiding litigation in

situations where only bad manners and mere hurt feelings are involved." That standard is satisfied here.

Womack is usually cited only for the elements of this tort, with little or no discussion of its facts; that is how it was cited by the district court in this case. However, the facts of *Womack* are quite instructive. The defendant in *Womack* was a private investigator who went to plaintiff's house and, posing as a reporter, took a photograph of the plaintiff that was ostensibly for an article about a skating rink where plaintiff coached. The real purpose of the photograph, however, was for defense counsel in a child molestation prosecution to show to the young victims. Upon seeing the picture, the victims denied that plaintiff molested them, but in follow-up questioning, the plaintiff's name and address came out in open court, and plaintiff himself was eventually obliged to testify in the molestation trial. Plaintiff understandably "suffered great anxiety as to what people would think of him and feared that he would be accused." 210 S.E.2d at 147. On these facts, the lower court set aside a verdict for the plaintiff, but the Virginia Supreme Court reversed. "In the case at bar, reasonable men may disagree as to whether defendant's conduct was extreme and outrageous and whether plaintiff's emotional distress was severe. Thus, the questions presented were for a jury to determine." 210 S.E.2d at 148.

Many of these factual elements are present in Dr. Hatfill's case as well: an innocent man, used by the defendant for an ulterior motive ("lighting a fire") in the investigation of a particularly odious crime, first anonymously and then by degrees in full view of the public. This is clearly not a "frivolous" suit about "bad manners" or "hurt feelings," and therefore presents, at the very least, a claim that should proceed past the pleading stage. *See also Graham v. Oppenheimer,* 2000 WL 33381418 (E.D. Va. 2000) at *1 (willingness to destroy a stranger's reputation to vindicate some personal interest is sufficiently outrageous under Virginia law).

The court below simply asserted, without explanation or argument, that "[p]ublishing news or commentary on matters of public concern simply cannot be deemed conduct so 'outrageous and intolerable' as to support a claim for intentional infliction of emotional distress." JA 110. The district court did not address the factual similarity with *Womack,* nor did the court offer any other authority or argument for the view that publishing is *per se* incapable of being outrageous. To the extent that this represented yet another instance of "double-counting" the first amendment, the court's reasoning should be reversed for the reasons discussed in Part III *supra. See also Graham*, 2000 WL 33381418 at *1 (internet posting was sufficiently outrageous).

The district court did refer obliquely to three cases, but two of them actually support Dr. Hatfill's position and the third is inapposite. In *Russo v. White*, 400 S.E.2d 160, 163 (Va. 1991), the Virginia Supreme Court assumed without deciding that a pattern of making "hang-up calls" could qualify as outrageous. And in *Baird v. Rose*, 192 F.3d 462, 472-73 (4th Cir. 1999), this Court held that a teacher's intentional, in-class humiliation of a child who suffered from clinical depression might qualify as outrageous. If either case involved conduct more outrageous than publishing accusations of bioterrorist activity, the district court did not explain why. The district court also cited *Warner v. Buck Creek Nursery, Inc.*, 149 F. Supp. 2d 246, 252 (W.D. Va. 2001), but the conduct alleged in that case was the firing of the plaintiff on the false pretext that he used company money to purchase an auto part for personal use – which is not a nice thing to say about someone but is far from an accusation of mass murder in the nation's newspaper of record.

B. **The Severity of Dr. Hatfill's Emotional Distress Either Was Adequately Pleaded, Or It Can Be.**

The district court also held that Dr. Hatfill was "required to *allege and prove* 'extreme' emotional distress," JA 110 (emphasis added), and failed to do so, JA 111. The italicized words reveal the district court's error on this element of the tort, for they show that the district court conflated two separate questions:

the evidence necessary to sustain a verdict, and the facts that must be alleged to proceed past the pleading stage. The former is a matter of state substantive law that is binding on the federal courts under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); the other is a matter of state procedural law which, in the event of any conflict, is displaced by the Federal Rules. *See Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *Wuchenich*, 2000 WL 665633 at *14.

As a matter of substantive Virginia law, Dr. Hatfill must *prove* that the emotional distress he suffered "is so severe that no reasonable person could be expected to endure it." *Russo*, 400 S.E.2d at 163. The *Russo* court implied that such a showing requires either objective physical injury, or medical attention, or hospitalization or confinement, or lost income. *Id.* As a matter of procedural law, *Russo* seems to require that these objective facts also be *pleaded* as well, or else the motion for judgment may be subject to demurrer. Whether such particularized pleading of plaintiff's *prima facie* case is actually required in Virginia courts may be doubted in light of *McCall v. Dickson*, 1993 WL 946016 (Va. Cir. Ct. 1993), and *Almy v. Grisham*, 2001 WL 34037324 (Va. Cir. Ct. 2001).

However, this Court need not decide the extent to which Virginia courts actually follow the strict pleading standard of *Russo*, because Virginia's pleading requirements are not applicable in federal court. On the contrary, this

case is governed by the "notice pleading" standards of Fed. R. Civ. Proc. 8, which requires only "a short and plain statement of the claim." Discovery will show the indicia of severity that Virginia's substantive law requires, including not only lost income but also objective physical injury and medical attention. *See Swierkiewicz,* 534 U.S. at 512; *Wuchenich*, 2000 WL 665633 at *14. If The Times wishes to challenge the severity of the injury it inflicted, it may do so on summary judgment, as in *Dixon v. Denny's, Inc.*, 957 F. Supp. 792 (E.D. Va. 1996).[9]

Furthermore, at the risk of stating the obvious, dismissal was not proper here unless it was "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz,* 534 U.S. at 514. This is true regardless of whether the specificity required in the pleadings is determined by the relatively exacting Virginia standard of *Russo,* the relatively relaxed Virginia standard of *McCall* and *Almy,* or the familiar "short and plain statement" standard.

[9] Even if Virginia pleading requirements prevailed here, Dr. Hatfill has arguably satisfied the *Russo* standard by pleading not only "severe emotional distress and other injury" but also "loss of employment" in particular. JA 18.

C. <u>The Emotional Distress Claim Is Neither Evasive Nor Duplicative.</u>

The district court's final reason for dismissing Dr. Hatfill's emotional distress claim was that "it constitutes an impermissible effort to evade the constitutional limits on damage claims arising solely out of an act of publication." JA 111. The court did not identify which constitutional limitations were in danger of being evaded, and the lone Virginia case it cited for this proposition is almost certainly not good law.

In *Smith v. Dameron*, a Virginia circuit court reasoned that since emotional distress is an allowable element of damages in a defamation case, it is therefore duplicative to allow an emotional distress claim to proceed along with a defamation claim wherever the former is based solely on the utterance of defamatory words. 1987 WL 488719 at *4. This reasoning was dubious from the start, as it failed to take account of the Virginia Supreme Court's decision in *Chaves v. Johnson*, 335 S.E.2d 97, 121-22 (Va. 1985) (allowing defamation and tortious interference claims to proceed together, and noting that defendant's "freedom-of-speech argument . . . would apply to any verbal conduct, however tortious, and would completely destroy the right of action universally recognized"). In addition, after *Smith v. Dameron* was decided, the U.S. Supreme Court took a very different approach to the constitutional issue in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Rather than declaring

emotional distress claims to be duplicative, the *Falwell* Court – applying Virginia law – held that the better way to prevent constitutional end-runs was to preclude public figures and public officials from recovering for emotional distress from published works unless they prove "that the publication contains a false statement of fact which was made with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true." 485 U.S. at 56.

But even if *Smith v. Dameron* represents the law of Virginia, there is a deeper logical flaw that the district court seems not to have appreciated. The Times is arguing simultaneously that the Mr. Z articles are *not* actionable on a defamation theory, and that they are *only* actionable on a defamation theory. If both halves of the argument succeed, then Dr. Hatfill winds up with no claims at all, even though one of his claims is being dismissed as "duplicative." Something is gravely wrong with any argument that ends this way.

The corrective is to recognize that while it is *possible* for the two torts to be duplicative (and *Dameron* may have been such a case), the two legal theories are analytically distinct and can lead to different results. In the context of this case, for example:

- The statute of limitations on emotional distress claims in Virginia seems to be two years rather than one. *Bright v. First Virginia*

Bank, 2002 WL 32001425 at *1 (Va. Cir. Ct. 2002) (applying two-year statute); *see Jordan v. Shands*, 500 S.E.2d 215, 218 (Va. 1998) (leaving the question open.) If this Court determines that some elements of the plaintiff's defamation claim are time-barred on the theory that they were not included in the state-court motion for judgment, the emotional distress claim might still permit recovery for some or all of those same elements of harm.

- For purposes of this motion, The Times concedes that the "Mr. Z" columns were "of and concerning" Dr. Hatfill. But The Times may later argue that Dr. Hatfill's reputation was not harmed by any of the Mr. Z columns because no one knew that Mr. Z and Dr. Hatfill were the same person. A jury could accept The Times's argument on that point, but still award damages to Dr. Hatfill on the theory that *he* knew that Kristof was writing about him, and suffered severe emotional distress upon reading in *The New York Times* that he was "a likely culprit" in the anthrax murders.
- The Times may argue at trial either that Dr. Hatfill had a poor reputation at the time of the publications, or that the reputational harm was inflicted by many news organizations besides The Times, and that the injury to reputation that can be proven in this case is

> therefore small. A jury could accept those arguments, even finding that Dr. Hatfill was a "libel-proof plaintiff," while simultaneously finding that even a "libel-proof plaintiff" would experience severe emotional distress upon opening *The New York Times* to find himself falsely accused of bioterrorism.

Note that none of these scenarios involves any "end run" around a constitutional protection for the press.

Under no circumstances can Dr. Hatfill be permitted to recover the same element of damages twice, but in each of the scenarios above, early dismissal of his emotional distress claim would prevent him from recovering some elements of damage even once. It is precisely for this reason that the Federal Rules of Civil Procedure authorize alternative pleading, Fed. R. Civ. Proc. 8(e)(2), an important procedural right to which Dr. Hatfill is entitled. If The Times waives any reliance on the statute of limitations, stipulates that the Mr. Z articles were "of and concerning" Dr. Hatfill, and agrees not to put on any evidence on the questions of causation or reputational harm, then perhaps Dr. Hatfill can drop his appeal of the dismissal of his emotional distress claim. However, if The Times intends to go forward in this case armed with alternative and overlapping defenses, then Dr. Hatfill must insist on going forward with alternative and overlapping claims.

CONCLUSION

For the reasons stated, the judgment of the district court should be REVERSED and the case remanded for further proceedings.

Respectfully submitted,

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Certificate of Compliance With Rule 32(a)

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,953 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Addendum:

Wuchenich v. Shenandoah Memorial Hospital, 215 F.3d 1324, 2000 WL 665663 (4th Cir. 2000)

H

Briefs and Other Related Documents

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.
John D. WUCHENICH, M.D., Plaintiff-Appellant,
v.
SHENANDOAH MEMORIAL HOSPITAL; Robert Karmy, M.D.; David Ciochetty, M.D.; George Phillips, M.D., Defendants-Appellees.
No. 99-1273.

Argued Jan. 28, 2000.
Decided May 22, 2000.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. James H. Michael, Jr., Senior District Judge. (CA-98-41-5).

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Before NIEMEYER, Circuit Judge, HAMILTON, Senior Circuit Judge, and SMALKIN, United States District Judge for the District of Maryland, sitting by designation.

OPINION

PER CURIAM.

****1** Pursuant to Federal Rule of Civil Procedure **12(b)(6)** (Rule **12(b)(6)**), the district court dismissed the complaint of Dr. John Wuchenich, M.D. (Dr. Wuchenich), a professionally licensed anesthesiologist, alleging numerous causes of action under Virginia law, premised upon diversity jurisdiction, against Shenandoah Memorial Hospital (SMH) and/or three fellow physicians in connection with the lack of patient volume in his anesthesiology practice and SMH's revocation of his medical staff privileges. Dr. Wuchenich appeals the district court's dismissal of his complaint. For the reasons that follow, we affirm in part, vacate in part, and remand for further proceedings.

I

Because this case is before us on appeal from a Rule **12(b)(6)** dismissal, we must accept all of the factual allegations contained in Dr. Wuchenich's complaint as true and draw all reasonable factual inferences therefrom in his favor. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir.1999). In light of this mandate, the facts for purposes of this appeal are as follows.

In April 1995, SMH, located in Woodstock, Virginia, recruited Dr. Wuchenich as an anesthesiologist to provide services to its patients. At that time, Dr. Wuchenich was practicing anesthesiology in his well-established private medical practice in California. In August 1995, Dr. Wuchenich and SMH entered into a written twelve-month agreement (the Physician Guarantee Agreement or the Agreement), which guaranteed Dr. Wuchenich an income of $15,000 per month for the first four months after he obtained medical staff privileges at SMH. The Physician Guarantee Agreement also called for Dr. Wuchenich to repay any monies received from the income guarantee over the ensuing eight-month period to the extent he earned an income over $15,000 a month. Dr. Wuchenich alleges that SMH induced him to sign the Physician Guarantee Agreement by orally assuring him that it would be hiring more surgeons, updating its equipment, and making other changes that would ensure his success in establishing an anesthesiology

practice at SMH.

Of relevance to the issues on appeal, Article I of the Physician Guarantee Agreement provided as follows:

> [Dr. Wuchenich], in consideration of the covenants and agreements made by [SMH] contained herein, covenants and agrees to practice medicine in the specialty of *Anesthesia* at [SMH] and upon the effective date hereof to immediately apply, become upon commencement of this medical practice at [SMH] and remain continuously during the term of this Agreement, a member of [SMH's] Active Medical Staff as defined in its Medical Staff Bylaws subject, however, to said Bylaws.

(J.A. 34-35). Also of relevance to the issues on appeal, Article XVII of the Physician Guarantee Agreement contained the following merger clause:

> This writing constitutes the entire agreement between [Dr. Wuchenich] and [SMH]. No oral or written prior or contemporaneous agreements shall have any force or effect, nor shall any subsequent agreements have any force or affect [sic], unless signed and embodied in writing.

****2** (J.A. 41).

By its terms, the Physician Guarantee Agreement was not terminable at will. Specifically, Article IV provided for an effective duration of twelve months from the date Dr. Wuchenich began practice in Woodstock, Virginia, unless earlier terminated as provided in the Agreement. For example, Article VIII provided that the Agreement would terminate if Dr. Wuchenich became mentally ill in the opinion of a panel of three independent health practioners so that he became unable to carry on the practice of anesthesiology for a period of three months.

In accord with the terms of the Physician Guarantee Agreement, upon the effective date of that Agreement, Dr. Wuchenich immediately applied for medical staff privileges at SMH. SMH in turn granted him medical staff privileges.

After setting up his practice in Woodstock, Dr. Wuchenich did not receive a warm reception from several of the physicians who practiced at SMH. For example, Dr. George Phillips (Dr. Phillips), the only other physician practicing anesthesiology at SMH prior to Dr. David Ciochetty (Dr. Ciochetty) arriving to fill the position of Chief of Anesthesiology in the early spring of 1996, engaged in several actions in an effort to quell competition from Dr. Wuchenich. First, although Dr. Wuchenich postponed two surgeries for medical reasons on patients of Dr. Baumunk, an orthopedic surgeon, Dr. Phillips falsely told Dr. Baumunk that the postponements were unnecessary, and that Dr. Wuchenich "was not a very good anesthesiologist." (J.A. 13). Thereafter, Dr. Baumunk refused to use Dr. Wuchenich's services for a period of three months. Second, in his capacity as senior anesthesiologist at SMH, Dr. Phillips instigated the implementation of a new policy causing all operating room cases to be assigned to anesthesiologists according to surgeon request. He then asked all surgeons to request him for their anesthesia needs, indicating to them that Dr. Wuchenich was less than competent. Third, prior to the time the surgeon request policy was in place, Dr. Phillips, in his capacity as senior anesthesiologist assigned the vast majority of cases to himself and to Certified Registered Nurse Anesthetists (CRNA) performing services under his supervision, for which he was compensated.

Another example of hostility encountered by Dr. Wuchenich at SMH related to SMH's appointment of a Chief of Anesthesiology. Prior to Dr. Ciochetty's appointment to the position of Chief of Anesthesiology, CRNA Clark held the position. After CRNA Clark resigned, Dr. Wuchenich inquired regarding the availability of the position of Chief of Anesthesiology at SMH and requested a job description. SMH refused to provide him with a job description and shortly thereafter told him in a letter dated January 17, 1996, that it intended to continue to fill the position with a CRNA. SMH then approved a thirty-day appointment of CRNA Hubbard pending completion of her application. CRNA Hubbard is the wife of Dr. C. Hubbard, an orthopedic surgeon who practiced at SMH. By hiring CRNA Hubbard in this fashion, SMH facilitated and participated in a plan to allow Dr. Phillips to maintain control of two operating rooms thereby ensuring that Dr. Wuchenich would not succeed financially.

****3** Approximately six weeks later, in March 1996, without consulting Dr. Wuchenich or Dr. Phillips, SMH circulated a memorandum announcing that it had contracted with Dr. Ciochetty to become Chief of Anesthesiology. SMH did not ask for Dr. Wuchenich's opinion regarding what effect the hiring of a third anesthesiologist would have on his ability to earn a living, nor did SMH pay any attention to the fact that there was an insufficient number of anesthesiology patients to support the practices of two or more anesthesiologists and several CRNAs.

Upon his appointment as Chief of Anesthesiology, Dr. Ciochetty stated that he would be assigning all anesthesia cases. Concerned about the effect a third anesthesiologist would have on his practice, Dr. Wuchenich asked Dr. Ciochetty how he planned to deal with the apparent lack of work to support three anesthesiologists and expressed his concern that there was insufficient work for two anesthesiologists. Dr. Ciochetty responded that Dr. Wuchenich would not need to work full time and that whatever SMH had promised him was " 'old news' " because he (Dr. Ciochetty) was in charge, and SMH had hired him to do things his way. (J.A. 15). In his capacity as Chief of Anesthesiology, acting for his own independent benefit and acting in conspiracy with SMH, Dr. Ciochetty picked up where Dr. Phillips left off, assigning the vast majority of cases to himself and the CRNAs whom he was paid to supervise.

On or about March 20, 1996, Dr. Phillips and Linda Aleska, the Co-Chief Operating Officer of SMH, had a conversation during which Linda Aleska stated that "they would have to get rid of Dr. Wuchenich because he won't work with us." (J.A. 15) (internal quotation marks omitted). On or about April 15, 1996, SMH unexpectedly forced Dr. Phillips to resign his medical staff privileges at SMH.

After Dr. Phillips resigned, SMH, in consultation with Dr. Ciochetty, once again began recruiting another anesthesiologist, despite the fact that Dr. Wuchenich had voiced his concerns over the lack of sufficient cases for two, let alone three, anesthesiologists. As part of SMH's recruiting efforts, in May 1996, Dr. Ciochetty sent a note to Jim Greer stating that he (Dr. Ciochetty) would need a partner for his pain clinic, even though Dr. Ciochetty had not discussed personnel needs with Dr. Wuchenich. [FN1] In sending this letter, Dr. Ciochetty acted in his capacity as Chief of Anesthesiology, for his own economic benefit, as well as in conspiracy with SMH to injure Dr. Wuchenich.

> FN1. The complaint does not allege any facts describing the identity of Jim Greer.

In addition to Dr. Phillips and Dr. Ciochetty's hostile actions towards Dr. Wuchenich, Dr. Wuchenich was subjected to hostile conduct by Dr. Robert Karmy (Dr. Karmy). At the same time SMH engaged in efforts to recruit Dr. Wuchenich, and after Dr. Wuchenich accepted SMH's offer, SMH engaged in efforts to recruit Dr. Wuchenich's sister, Dr. Nanette Wuchenich. Dr. Nanette Wuchenich maintained a successful medical practice in obstetrics and gynecology (OB/GYN) in California. As an experienced, practicing OB/GYN physician, Dr. Nanette Wuchenich posed a financial threat to Dr. Karmy, who at the time was the only OB/GYN physician on staff at SMH, and in the City of Woodstock. As a result of this financial threat, Dr. Karmy had an openly hostile attitude toward Dr. Wuchenich in hopes of scaring off Dr. Wuchenich's sister from accepting medical staff privileges at SMH. Out of the dozens of cases performed by Dr. Karmy during Dr. Wuchenich's time at SMH, Dr. Wuchenich was only assigned four of them and none at the request of Dr. Karmy. Dr. Karmy falsely reported to Dr. Ciochetty, the Chief of Anesthesiology at SMH, that Dr. Wuchenich possibly committed malpractice with respect to two cases. These two cases ultimately came before the Peer Review Committee for evaluation of Dr. Wuchenich's professional performance.

****4** On or about May 28, 1996, at a regularly scheduled Peer Review Committee meeting, four cases in which Dr. Wuchenich was involved, including the two instigated by Dr. Karmy, were reviewed. None of the patients involved in the four cases suffered any adverse consequences as a result of the care provided by Dr. Wuchenich. Nor did the Peer Review Committee obtain an opinion from an anesthesiologist with respect to the actions of Dr. Wuchenich in the four cases. Furthermore, the Peer Review Committee did not give Dr. Wuchenich an opportunity to respond to any allegations made against him. In spite of these facts and the fact that the actions of Dr. Wuchenich were within the relevant standard of care for anesthesiologists in each of the four cases, the Peer Review Committee recommended to the Executive Committee of SMH that Dr. Wuchenich's privileges to practice at SMH be revoked.

Dr. Wuchenich then received a letter dated May 31, 1996 (the Suspension Letter), which stated, *inter alia:*

> Based upon the results of the Peer Review, the Executive Committee of the General Medical Staff has recommended that your privileges be suspended at Shenandoah Memorial Hospital. Based upon this recommendation and the fact that the allegations pertain to matters that could endanger the safety and well-being of patients, the acting Chief Executive Officers have directed that you be removed from On Call status until further notice. This action is deemed necessary based upon

the results of the Peer Review and the facts surrounding the cases that were submitted for review.

(J.A. 49). SMH then promptly reported Dr. Wuchenich's suspension to the State Board of Medical Examiners. SMH knew the State Board of Medical Examiners would in turn report the suspension to the National Practitioner's Data Bank, which would operate as a bar to Dr. Wuchenich obtaining medical staff privileges at any other hospital in the United States.

On September 12, 1996, SMH held a hearing to review Dr. Wuchenich's suspension. SMH appointed attorney Paul Neal as the hearing officer. Paul Neal also serves as legal counsel to SMH. Paul Neal along with six members of SMH's medical staff not previously mentioned constituted the hearing committee (the Hearing Committee). The Hearing Committee heard opinions from anesthesiologists relating to Dr. Wuchenich's four cases. None stated they believed suspension of Dr. Wuchenich's medical staff privileges was appropriate. Indeed, the only two outside expert anesthesiologists to testify were brought by Dr. Wuchenich. These two experts testified without contradiction that Dr. Wuchenich did not depart from the appropriate standard of care for anesthesiologists with respect to the four cases at issue.

On September 24, 1996, the Hearing Committee issued its report. In its report, the Hearing Committee recommended that Dr. Wuchenich's medical staff privileges be reinstated, but that he undergo proctoring, education, and training as follows: (1)"Observation by Staff Anesthesiologist of not less than five inductions including at least two obstetric inductions"; (2) "In service training in the troubleshooting and repair of the specific pieces of anesthesia equipment in use at SMH"; and (3) "In service training as to the location of anesthesia related equipment and resuscitation equipment in the Operating Room at SMH." (J.A. 20). The Hearing Committee forwarded its report to SMH's Medical Staff Executive Committee, which in turn recommended to the Board of Directors of SMH that: (1) Dr. Wuchenich's medical staff privileges be reinstated; (2) prior to engaging in further work at SMH, Dr. Wuchenich should be observed by a Director of Anesthesiology at a health care facility on not less than twenty-five inductions, including at least five obstetric inductions; (3) prior to engaging in further work at SMH, Dr. Wuchenich should participate in an in service training program on the trouble shooting and repair of four particular pieces of anesthesia equipment; and (4) prior to performing further independent work at SMH, Dr. Wuchenich should undergo in service training with regard to the specific location of anesthesia-related equipment and resuscitation equipment in the operating room at SMH. Subsequently, on December 6, 1996, the Executive Committee offered to lift the suspension of Dr. Wuchenich's medical staff privileges if Dr. Wuchenich would submit his immediate resignation from the SMH Associate General Medical Staff.

****5** On December 12, 1996, Dr. Wuchenich met with the Board of Appeals Committee who inquired regarding the circumstances of the cases in question. Then on January 28, 1997, SMH offered to reinstate Dr. Wuchenich's medical staff privileges without conditions in exchange for Dr. Wuchenich agreeing in writing to waive any claims against SMH, its employees, directors, or agents. Dr. Wuchenich refused; yet, on April 16, 1997, nearly one year after SMH suspended Dr. Wuchenich's medical staff privileges, SMH's Board of Director's passed a resolution voiding the suspension of Dr. Wuchenich.

On or about May 2, 1997, SMH purported to send information regarding the voided suspension to the National Practitioner's Data Bank but failed to properly address the envelope causing it to be returned and causing further delays in clearing Dr. Wuchenich's name. Subsequently, SMH sent the information to the correct address, but sent an improperly completed form. Therefore, the National Practioner's Data Bank returned the form to SMH for proper completion. Finally, on or about June 10, 1997, the National Practioner's Data Bank removed all mention of Dr. Wuchenich's suspension from its records, approximately one year after SMH suspended his medical staff privileges.

On May 21, 1998, following a detailed investigation, a hearing was conducted by the Informal Conference Committee of the Commonwealth of Virginia Board of Medicine to determine if the allegations against Dr. Wuchenich with respect to the four cases at issue were supported by evidence. After thoroughly reviewing the record, which included the transcript of the hearing before the Hearing Committee, the Informal Conference Committee voted to dismiss all charges against Dr. Wuchenich and instructed its staff to note on the notice of action that Dr. Wuchenich was completely exonerated of all wrongdoing.

The following sections of SMH's bylaws setting forth the procedures SMH should follow when considering the suspension of a physician's medical staff privileges are at issue in this case: SMH Bylaws § § 6.1(a), (c)-(e) and 6.2(a). SMH Bylaws § 6.1(a) states that once a case alleging professional misconduct has been reviewed by the Peer Review Committee, the Peer Review Committee should refer it to the Informal Review Committee in accordance with SMH Bylaws § 6.1(c). SMH Bylaws § 6.1(c) provides that "before curtailment or suspension of clinical privileges is implemented, the Executive Committee shall immediately appoint an ad hoc committee for a preliminary review of the matter (the Informal Review Committee)." (J.A. 17) (internal quotation marks omitted). SMH Bylaws § 6.1(d) provides, *inter alia*, that prior to the Informal Review Committee making its report and recommendations for corrective action to the Executive Committee, "the practitioner against whom corrective action has been requested shall have an opportunity for an interview with the [Informal] Review Committee. At such interview, he/she shall be informed of the general nature of the charges against him/her, and shall be invited to discuss, explain or refute them." (J.A. 17) (internal quotation marks omitted). SMH Bylaws § 6.1(e) provides that upon receipt of a report and recommendation of the Informal Review Committee requesting reduction or suspension of clinical privileges, SMH's "President/CEO shall notify the affected practitioner that he/she shall be permitted to make an appearance before the Executive Committee prior to its taking action on such request." (J.A. 17-18) (internal quotation marks omitted). SMH Bylaws § 6.2(a) provides that a "Summary Suspension," *i.e.*, suspension of medical staff privileges without following the procedures required in SMH Bylaws § 6.1, "may only be imposed whenever action must be taken immediately, to protect the life of any patient or to reduce the substantial likelihood of immediate injury or damage to the health o[r] safety of any patient, employee, or other person present in SMH." (J.A. 18-19) (internal quotation marks omitted).

****6** According to Dr. Wuchenich's complaint, SMH did not suspend Dr. Wuchenich's medical staff privileges pursuant to SMH Bylaws § 6.2(a). Therefore, under SMH's Bylaws, SMH was required to comply with the procedures set forth in SMH Bylaws § 6.1 in suspending Dr. Wuchenich's medical staff privileges. [FN2] SMH failed to comply with several of the procedures. First, SMH failed to appoint an Informal Review Committee prior to suspending Dr. Wuchenich's medical staff privileges as required by SMH Bylaws § 6.1(c). Second, SMH failed to allow Dr. Wuchenich the opportunity for an interview with the Informal Review Committee prior to suspending his medical staff privileges as required by SMH Bylaws § 6.1(d). Third, neither of SMH's Co-Chief Executive Officers notified Dr. Wuchenich that he was permitted to make an appearance before the Executive Committee prior to the Executive Committee suspending his medical staff privileges as required by SMH Bylaws § 6.1(e).

> FN2. We note that SMH argues in its brief and asserted at oral argument that liberally construing the factual allegations of Dr. Wuchenich's complaint reveals that it suspended Dr. Wuchenich's medical staff privileges pursuant to SMH Bylaws § 6.2(a). SMH Bylaws § 6.2(a) allows for the summary suspension of a physician's medical staff privileges (*i.e.*, suspension without prior notice to the physician or an opportunity to be heard) "whenever action must be taken immediately, to protect the life of any patient or to reduce the substantial likelihood of immediate injury or damage to health o[r] safety of any patient." (J.A. 19). In support of its assertion, SMH relies upon the following language found in its May 31, 1996 letter to Dr. Wuchenich, which is attached as Exhibit G to the complaint: "Based upon the results of the Peer Review, the Executive Committee of the General Medical Staff has recommended that your privileges be suspended at Shenandoah Memorial Hospital. Based upon this recommendation and the fact that the allegations pertain to matters *that could endanger the safety and well-being of patients*, the acting Chief Executive Officers have directed that you be removed from On Call status until further notice." (J.A. 49) (emphasis added). Liberally viewing this language in the light most favorable to Dr. Wuchenich reveals that SMH did not necessarily suspend Dr. Wuchenich's medical staff privileges pursuant to SMH Bylaws § 6.2(a). The language in SMH's letter is simply not as definitive as that required by SMH Bylaws § 6.2(a).

On June 1, 1998, Dr. Wuchenich filed a six-count complaint in the United States District Court for the Western District of Virginia based upon diversity

jurisdiction. *See* 28 U.S.C. § 1332. The complaint asserts claims alleging breach of contract by SMH; negligent breach of contract by SMH; statutory conspiracy to injure a person in his reputation, business or profession against SMH, Dr. Karmy, Dr. Ciochetty, and Dr. Phillips (collectively the Defendants); common law conspiracy to breach a contract against the Defendants; defamation against SMH, Dr. Karmy, and Dr. Phillips; and tortious interference with an existing contract and business expectancies against the Defendants. The complaint alleged that as a result of the actions complained about, Dr. Wuchenich suffered $1,121,000 in economic damages and $500,000 in damages for emotional distress and loss of reputation. His complaint also sought punitive damages.

The Defendants timely filed Rule **12(b)(6)** motions to dismiss. A magistrate judge considered the motions and reported and recommended dismissal of the claims alleging breach of contract, negligent breach of contract, and common law conspiracy to breach a contract. However, the magistrate judge recommended refusing dismissal with respect to the claims alleging statutory conspiracy to injure a person in his reputation, business, trade or profession and tortious interference with an existing contract and business expectancies. With respect to the claim alleging defamation, the magistrate judge granted Dr. Wuchenich ten days to supplement and amend his complaint to state the precise words of the alleged defamation, but Dr. Wuchenich elected not to do so.

On January 29, 1999, in a memorandum opinion, the district court adopted the magistrate judge's report and recommendations with respect to the claims alleging breach of contract, negligent breach of contract, and common law conspiracy to breach a contract. The district court, however, declined to adopt the magistrate judge's recommendations with respect to the claims alleging statutory conspiracy to injure a person in his reputation, business, trade or profession and tortious interference with an existing contract and business expectancies. Thus, the district court dismissed those claims as well. The district court also dismissed the claim alleging defamation. Thus, the district court dismissed all counts of Dr. Wuchenich's complaint pursuant to Rule **12(b)(6)**.

****7** On February 12, 1999, Dr. Wuchenich made a motion for reconsideration, which the district court denied on March 24, 1999. This timely appeal followed. On appeal, Dr. Wuchenich challenges the district court's dismissal of all of his claims.

II

Dr. Wuchenich first contends the district court erred in granting the Defendants' Rule **12(b)(6)** motion with respect to his breach of contract claim. In that claim, Dr. Wuchenich alleges, *inter alia:* (1) SMH violated SMH Bylaws § 6.1(c) by failing to appoint an Informal Review Committee prior to suspending his medical staff privileges; (2) SMH violated SMH Bylaws § 6.1(d) by failing to allow him the opportunity for an interview with the Informal Review Committee to discuss, explain or refute the allegations against him prior to suspending his medical staff privileges; and (3) SMH violated SMH Bylaws § 6.1(e) when neither of SMH's Co-Chief Executive Officers notified Dr. Wuchenich that he was permitted to make an appearance before the Executive Committee prior to the Executive Committee suspending his medical staff privileges. In a somewhat different vein, Dr. Wuchenich alleges that SMH breached its oral assurances made *before and after* the execution of the Physician Guarantee Agreement that it would assign him an adequate number of patients to assure his ability to establish his practice within the Woodstock, Virginia area.

We agree with Dr. Wuchenich that he has stated a breach of contract claim against SMH with respect to SMH's Bylaws. However, we disagree with Dr. Wuchenich that he has stated a claim for breach of SMH's alleged oral assurances.

Rule **12(b)(6)** provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. **12(b)(6)**. The purpose of a Rule **12(b)(6)** motion is to test the sufficiency of a complaint; "importantly, [a Rule **12(b)(6)** motion] does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir.1992). Rather, a Rule **12(b)(6)** motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief. *See id.* For purposes of a Rule **12(b)(6)** motion, we are not required to accept as true the legal conclusions set forth in a plaintiff's complaint. *See District 28, United Mine Workers of Am., Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085 (4th Cir.1979).

A. *SMH's Alleged Breach of its Bylaws.*

The parties agree that the law of Virginia controls all substantive legal issues in this case. Under Virginia law, "[t]he essential elements of a cause of action for breach of contract are: (1) a legal obligation of a defendant to the plaintiff, (2) a violation or breach of that right or duty, and (3) a consequential injury or damage to the plaintiff." *Westminster Investing Corp. v.. Lamps Unlimited, Inc.*, 379 S.E.2d 316, 317 (Va.1989) (internal quotation marks and footnote omitted).

****8** Dr. Wuchenich first argues that the following language constituting Article I in the Physician Guarantee Agreement expressly incorporated SMH's Bylaws as binding obligations on both himself and SMH:

> [Dr. Wuchenich], in consideration of the covenants and agreements made by [SMH] contained herein, covenants and agrees to practice medicine in the specialty of *Anesthesia* at [SMH] and upon the effective date hereof to immediately apply, become upon commencement of this medical practice at [SMH] and remain continuously during the term of this Agreement, a member of [SMH's] Active Medical Staff *as defined in its Medical Staff Bylaws subject, however, to said Bylaws.*

(J.A. 34-35) (emphasis added). Alternatively, Dr. Wuchenich argues that because SMH made his medical staff privileges subject to and governed by its bylaws, SMH had a corresponding obligation implied by law to abide by its bylaws in any attempt to suspend or revoke his medical staff privileges. The merger clause in the Physician Guarantee Agreement, Dr. Wuchenich contends, does not preclude him from alleging the existence of such an implied legal obligation because an exception to the parol evidence rule known as the collateral contract doctrine applies.

SMH vigorously denies that by agreeing to the terms of Article I of the Physician Guarantee Agreement it intended to be legally obligated to Dr. Wuchenich to follow its bylaws in suspending his medical staff privileges. Furthermore, SMH argues that the merger clause in the Physician Guarantee Agreement precludes Dr. Wuchenich from relying upon parol evidence to establish such an obligation. Finally, SMH argues that even if we determine that it had an obligation (under the Physician Guarantee Agreement or implied by law) to follow its bylaws in suspending Dr. Wuchenich's medical staff privileges, the facts as alleged in the complaint establish that it fully complied with its bylaws in suspending Dr. Wuchenich's medical staff privileges.

In our review of the district court's decision to dismiss Dr. Wuchenich's breach of contract claim alleging SMH breached its bylaws in suspending Dr. Wuchenich's medical staff privileges, we are guided by the following principles:

> If the terms of the parties' agreement are contained in a clear explicit writing, that writing is the sole memorial of the contract and the sole evidence of the agreement. In that event, ... parol evidence ... could not be used to explain the written contractual terms.
>
> Conversely, the rule excluding parol evidence has no application where the writing on its face is ambiguous, vague, or indefinite. In such a case, the proper construction of the contract is an issue for the trier of fact, and the court should receive extrinsic evidence to ascertain the intention of the parties and to establish the real contract between them.

Cascades N. Venture v. PRC, Inc., 457 S.E.2d 370, 373 (Va.1995) (internal citations omitted). The language of a written contract is ambiguous if it is reasonably susceptible to more than one interpretation or makes reference to two or more things at the same time. *See Tuomala v. Regent Univ.*, 477 S.E.2d 501, 505 (Va .1996). "The question of whether a writing is ambiguous is one of law, not of fact." *Id.* at 505.

****9** Below, the district court concluded that the language contained in Article I "cannot be construed under a fair reading as giving rise to an incorporation by reference of the provision of the Bylaws as provisions of the contract binding on SMH as well as plaintiff." (J.A. 158). We disagree with this conclusion. In our view, the language contained in Article I referring to SMH's Bylaws (*i.e.*, "subject ... to said Bylaws," (J.A. 35)), is reasonably susceptible to two interpretations, and is, therefore, ambiguous. One reasonable interpretation is that only Dr. Wuchenich was obligated to abide by SMH's Bylaws. The other is that both Dr. Wuchenich and SMH had a legal obligation in favor of each other to abide by SMH's Bylaws. In this regard, the trier of fact could reasonably construe the language "subject ... to said Bylaws," *id.*, as implying that SMH intended to follow its bylaws with respect to its conduct toward Dr. Wuchenich.

Given our conclusion that the terms of the Physician Guarantee Agreement are ambiguous regarding whether SMH had a legal obligation to abide by its

bylaws with respect to its conduct toward Dr. Wuchenich, the merger clause does not bar Dr. Wuchenich from offering parol evidence to establish that he and SMH intended such an obligation to exist on the part of SMH at the time they executed the Physician Guarantee Agreement. In light of this conclusion, we need not and do not address Dr. Wuchenich's alternative argument that SMH has an obligation implied by law to abide by its bylaws with respect to Dr. Wuchenich.

We next address SMH's argument that in any event, it fully complied with its bylaws in suspending Dr. Wuchenich's medical staff privileges. Specifically, SMH asserts the facts as alleged in the complaint and contained in Exhibit H to the complaint establish that it gave Dr. Wuchenich sufficient notice to appear before the Peer Review Committee at its regularly scheduled meeting on May 28, 1996. In this regard, SMH is referring to Dr. Wuchenich's allegation in the complaint that a regularly scheduled Peer Review Committee meeting was held on or about May 28, 1996, and to the following statements in Exhibit H to the complaint: (1) "Cases 2 and 4 were placed in Dr. Wuchenich's mailbox for review on May 22, 1996," (J.A. 57); and (2) "Case 3 was placed in Dr. Wuchenich's mailbox for review on May 22, 1996," (J.A. 58). [FN3] SMH argues that, collectively, the allegation about the meeting on May 28, 1996, and these statements contained in Exhibit H conclusively establish that Dr. Wuchenich received sufficient notice to appear in his defense before the Peer Review Committee on May 28, 1996.

> FN3. Exhibit H is the Written Statement of the Executive Committee, issued on December 6, 1996, regarding the professional misconduct charges against Dr. Wuchenich. The Written Statement of the Executive Committee contains a sequence of events that the Executive Committee opines demonstrate that SMH took the charges against Dr. Wuchenich very seriously and adhered to its bylaws throughout the review process.

We disagree. First, the complaint in no way incorporates by reference, as factual allegations of the complaint, the statements in Exhibit H relied upon by SMH. Indeed, as is clear from simply reading the complaint, the complaint only includes Exhibit H as an attachment for the limited purpose of providing direct support for the allegation that "on December 6, 1996, the [Executive Committee] offered to lift the Summary Suspension of Dr. Wuchenich's privileges if Dr. Wuchenich would 'submit his immediate resignation from the Shenandoah Memorial Hospital Associate General Medical Staff.' " (J .A. 21) (quoting Ex. H at p. 6). Alternatively, even considering, for purposes of argument, that the statements in Exhibit H at issue are factual allegations of the complaint, they do not allege sufficient notice to Dr. Wuchenich to appear before the Peer Review Committee on May 28, 1996, even when coupled with the allegation that" [o]n or about May 28, 1996, at a regularly scheduled Peer Review Committee meeting four cases in which Dr. Wuchenich was involved were reviewed," (J.A. 16). Critically, nothing in this combination of allegations suggests that SMH alerted Dr. Wuchenich that it would be reviewing his four cases at the regularly scheduled Peer Review Committee meeting on May 28, 1996. [FN4]

> FN4. SMH also argues that the following statement in Exhibit H shows that it gave Dr. Wuchenich sufficient notice under its bylaws to appear before the Executive Committee: "Attempts to reach Dr. Wuchenich on Thursday, May 30, 1996 to inform him of the pending [Executive Committee meeting] at which time Dr. Wuchenich would have been invited to attend were further explained. All attempts were unsuccessful and messages left had no response." (J.A. 59). SMH's argument is without merit, because, as we have already explained, these statements are not incorporated as allegations in the complaint. Furthermore, assuming *arguendo* they are, viewing them in the light most favorable to Dr. Wuchenich, they do not establish that SMH gave Dr. Wuchenich sufficient notice under its bylaws to appear before the Executive Committee to defend himself.

****10** In sum, we hold the complaint sufficiently alleges that SMH owed Dr. Wuchenich the legal obligation to follow its bylaws, SMH breached that obligation, and Dr. Wuchenich suffered damages as a result. Thus, the district court erred by dismissing Dr. Wuchenich's breach of contract claim alleging breach of SMH's Bylaws. We, therefore, vacate the district court's dismissal of this portion of Dr. Wuchenich's breach of contract claim and remand for further proceedings.

B. *Oral Assurances Regarding Assigning Patients.*

We next consider Dr. Wuchenich's challenge to the district court's dismissal of the portion of his breach of contract claim attempting to enforce oral assurances on the part of SMH made prior and subsequent to execution of the Physician Guarantee Agreement to the effect that it would assign him a sufficient volume of patients to establish a full-time practice in the Woodstock, Virginia area. Applying Virginia substantive law, we uphold the district court's dismissal as it relates to these alleged oral assurances.

The parol evidence rule is a basic principle of contract law providing that parol evidence is not admissible if offered to vary or contradict the terms of a complete and unambiguous written instrument. *See* *Amos v. Coffey*, 320 S.E.2d 335, 337 (Va.1984). Under Virginia law, the parol evidence rule is not applicable if either the partial integration doctrine or the collateral contract doctrine is applicable. *See* *Jim Carpenter Co. v. Potts*, 495 S.E .2d 828, 833 (Va.1998). Under the partial integration doctrine "[w]here the entire agreement has not been reduced to writing, parol evidence is admissible, not to contradict or vary its terms but to show additional independent facts contemporaneously agreed upon, in order to establish the entire contract between the parties." *Renner Plumbing, Heating & Air Conditioning, Inc. v. Renner*, 303 S.E.2d 894, 898 (Va.1983) (internal quotation marks omitted). Under the collateral contract doctrine, parol evidence is admissible to establish a "prior or contemporaneous oral agreement that is independent of, collateral to and not inconsistent with the written contract, and which would not ordinarily be expected to be embodied in the writing." *Jim Carpenter Co.*, 495 S.E.2d at 833 (internal quotation marks omitted).

The language of the Physician Guarantee Agreement makes clear that its purpose was to assist Dr. Wuchenich in establishing an anesthesiology practice in the Woodstock, Virginia area. The merger clause states that the Physician Guarantee Agreement is the entire agreement between the parties. Thus, to the extent the Physician Guarantee Agreement addresses efforts on the part of SMH to assist Dr. Wuchenich in establishing an anesthesiology practice in the Woodstock, Virginia area, it represents the entire agreement between the parties.

Under the parol evidence rule, Dr. Wuchenich cannot introduce evidence that prior to execution of the Physician Guarantee Agreement, SMH assured him of a sufficient patient volume to establish an anesthesiology practice in the Woodstock, Virginia area, because to do so would clearly contradict the unambiguous language of the Physician Guarantee Agreement limiting SMH's obligation to assist Dr. Wuchenich in establishing his anesthesiology practice to providing him a salary guarantee under the terms specified. *See* *Amos*, 320 S.E.2d at 337. Hand in glove with this conclusion is the conclusion that the partial integration doctrine is not applicable here given the fact that the Physician Guarantee Agreement is a complete integration of the parties' agreement with respect to SMH's obligations to assist Dr. Wuchenich in establishing his anesthesiology practice. *See* *Renner Plumbing*, 303 S.E.2d at 898. Furthermore, because assurances by a hospital to assign a new physician a sufficient number of patients to establish a practice in the area in which the hospital is located would ordinarily be expected to be included in an agreement between the physician and the hospital whereby the hospital guarantees the physician a salary for a specified period of time, the collateral contract doctrine is also inapplicable. *See* *Jim Carpenter Co.*, 495 S.E.2d at 833.

****11** Finally, to the extent Dr. Wuchenich alleges an oral modification of the Physician Guarantee Agreement with respect to SMH's oral assurances of patient volume allegedly made subsequent to execution of the Physician Guarantee Agreement, his argument is foreclosed by Virginia case law requiring a mutual intention to modify the existing contract. *See* *Cardinal Dev. v. Stanley Const. Co.*, 497 S.E.2d 847, 850-51 (Va.1998). Even viewing the allegations in the complaint in the light most favorable to Dr. Wuchenich, one cannot reasonably conclude that SMH intended to modify any terms of the Physician Guarantee Agreement.

For these reasons, we affirm the district court's dismissal of the portion of Dr. Wuchenich's breach of contract claim seeking to enforce oral assurances allegedly made by SMH to assign him a sufficient volume of patients to establish an anesthesiology practice in the Woodstock, Virginia area. [FN5]

> FN5. Dr. Wuchenich also contends the district court erred in dismissing his claim alleging negligent breach of contract, which claim he admits in his Reply Brief is identical in substance to his claim alleging breach of contract. Because Dr. Wuchenich's claim alleging negligent breach of contract is duplicative of his claim alleging breach of

> contract, and because Virginia substantive law does not recognize a tort cause of action based solely on the negligent breach of a contractual duty with no corresponding common law duty, we hold the district court properly dismissed Dr. Wuchenich's claim alleging negligent breach of contract. *See Foreign Mission Bd. v. Wade*, 409 S.E.2d 144, 148 (Va.1991) (rejecting plaintiff's attempt to establish a tort action based solely on the negligent breach of a contractual duty with no corresponding common law duty).

III

Dr. Wuchenich next challenges the district court's dismissal of his claim alleging the Defendants committed civil conspiracy in violation of Virginia Code § 18.2-499 to 500 by conspiring to injure him in his reputation, business, trade and profession. Before addressing the merits of Dr. Wuchenich's challenge, it is necessary to set forth the terms of Virginia's civil conspiracy statute and the relevant case law.

Virginia's civil conspiracy statute states, in pertinent part, that "[a]ny two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of ... willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever" shall be liable civilly for treble damages. Va.Code Ann. § 18.2-499 to 500 (Michie 1996). The Virginia Supreme Court has made clear that this statute does not require proof that a conspirator's primary and overriding purpose is to injure another in his reputation, business, trade or profession. *See Commercial Bus. Sys., Inc. v. BellSouth Servs. Inc.*, 453 S.E.2d 261, 267 (Va.1995). Instead, only legal malice is required, *i.e.*, proof that the defendant acted intentionally, purposely, and without lawful justification. *See id.*

Furthermore, the "two or more persons" requirement is not satisfied by proof that a principal conspired with one of its agents acting within the scope of his agency. *See Charles E. Brauer Co. v. Nationsbank*, 466 S.E.2d 382, 386-87 (Va.1996); *Fox v. Deese*, 362 S.E.2d 699, 708 (Va.1987). Under such a circumstance, a conspiracy is a legal impossibility because a principal and an agent are not separate persons for purposes of the conspiracy statute. *See id.*

Virginia has thus far not recognized an exception to the general rule that a principal cannot conspire with one of its agents to form a conspiracy, a rule sometimes referred to as the intracorporate immunity rule. However, in *Greenville Publ'g Co. v. Daily Reflector, Inc.*, 496 F.2d 391 (4th Cir.1974), we observed that an exception to the general rule "may be justified when the officer has an independent personal stake in achieving the corporation's illegal objective." *Id.* at 399. In that case, we held that the president of the defendant company could conspire with it for purposes of an antitrust claim under the Sherman Act, *see* 15 U.S .C. § 1, where he had a financial interest in another company that competed with the plaintiff company and he would directly benefit if the plaintiff company was eliminated as a competitor. *See id.* at 400.

****12** In an *en banc* case seventeen years later, we revisited the personal stake exception in a case somewhat similar to the facts in the case before us. *See Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696 (4th Cir.1991) (*en banc*). In *Oksanen*, a physician brought an antitrust claim under the Sherman Act against a hospital and several other physicians who were members of its medical staff as a result of his medical staff privileges being revoked. *See id* . at 702. The plaintiff physician alleged that the hospital and the other physicians violated the Sherman Act by conspiring to revoke his medical staff privileges. *See id.* The hospital and the other physicians argued that they were legally incapable of conspiring. *See id.* The plaintiff physician argued in response that the personal stake exception applied. *See id.* at 702-03.

We held that under the circumstances of that case, the exception did not apply. First, we recognized that only one of the individual defendants stood to directly gain from the revocation of the plaintiff physician's medical staff privileges. *See id.* at 705. That physician was the only defendant physician who could be said to have been in competition with the plaintiff physician. *See id.* We explained that in any event, the

> more important aspect of *Greenville* for the purposes of peer review is the degree of control the officer or agent with the independent interest exercised over the defendant firm's decision making process. *If the officer cannot cause a restraint to be imposed and his firm would have taken the action anyway, then any independent interest is largely irrelevant to the antitrust analysis* .

Id. (emphasis added). In *Oksanen*, the hospital board retained authority in the end over staff

privilege decisions. *See id.* at 705-06. Because revocation of the plaintiff physician's medical staff privileges was subject to review by the hospital, and because decision making authority in the plaintiff physician's case was dispersed among a number of individuals, we held the personal stake exception did not apply. *See id.* at 706.

Liberally construed, Dr. Wuchenich's complaint alleges that Drs. Phillips, Ciochetty, and Karmy, on the one hand and SMH on the other hand conspired to injure Dr. Wuchenich in his reputation, business, trade, and profession by: (1) Dr. Phillips and Dr. Ciochetty failing to assign Dr. Wuchenich a fair share of the patient load; (2) Dr. Karmy instigating peer review of two of Dr. Wuchenich's cases without just cause; and (3) SMH suspending Dr. Wuchenich's medical staff privileges without just cause. Initially, the rule that a principal cannot conspire with one of its agents appears to resolve this claim in favor of the Defendants. Clearly, the actions of the individual physicians of which Dr. Wuchenich complains fell within the scope of their agency authority from SMH. Thus, the question arises as to whether the personal stake exception applies. [FN6]

> FN6. The Defendants do not dispute that under the appropriate set of facts, Virginia law would recognize the applicability of the personal stake exception to the intracorporate immunity rule as developed by our court with respect to the Sherman Act.

****13** Our careful review of the allegations in the complaint reveals that the exception applies in part. The personal stake exception does not apply to the extent Dr. Wuchenich alleges a conspiracy to suspend his medical staff privileges, including Dr. Karmy's action in recommending that two of Dr. Wuchenich's cases be subject to peer review. This is because the facts alleged in Dr. Wuchenich's complaint parallel the facts of *Oksanen:* SMH's Board of Directors, its governing body, retained decision making authority over decisions involving medical staff privileges and review was disbursed among various committees that did not include the defendant physicians. *See id.* at 705-06. The personal stake exception does apply, however, to the allegation that SMH conspired with Dr. Phillips and Dr. Ciochetty to injure Dr. Wuchenich in his reputation, business, trade and profession by failing to assign Dr. Wuchenich a fair number of patients. Dr. Wuchenich's complaint plainly alleges that in so doing these physicians were acting for their own independent financial benefit by reducing direct competition. Therefore, we affirm the district court's dismissal of Dr. Wuchenich's claim alleging civil statutory conspiracy against the Defendants except to the extent it alleges a conspiracy by SMH, Dr. Phillips, and Dr. Ciochetty to injure Dr. Wuchenich in his reputation and to injure his ability to engage in his business, trade, and profession by failing to assign him a fair number of patients. On that point, we vacate the district court's dismissal and remand for further proceedings.

IV

Next, Dr. Wuchenich contends the district court erred in dismissing his claim against the Defendants alleging common law conspiracy to breach contractual obligations.

Applying Virginia substantive law, we hold the district court acted properly in dismissing Dr. Wuchenich's claim alleging common law conspiracy to breach contractual obligations. Virginia "common law recognizes a cause of action against those who conspire to induce the breach of a contract, even when one of the alleged conspirators is a party to the contract." *Catercorp, Inc. v. Catering Concepts, Inc.*, 431 S.E.2d 277, 281 (Va.1993). The "foundation" of an action alleging common law conspiracy "is the damage caused by the acts committed in furtherance of the conspiracy ." *Commercial Bus. Sys., Inc.*, 453 S.E.2d at 267.

Here, the only contractual obligation that Dr. Wuchenich sufficiently alleges SMH breached is the obligation to abide by its bylaws in suspending his medical staff privileges. Thus, we must consider whether the allegations in the complaint sufficiently allege a cause of action with respect to each defendant for common law conspiracy to cause SMH to breach its bylaws with respect to suspending Dr. Wuchenich's medical staff privileges.

The complaint does not allege that Dr. Phillips or Dr. Ciochetty had any hand in any of the proceedings leading to the suspension of Dr. Wuchenich's medical staff privileges; indeed, the allegations in the complaint suggest no involvement. With respect to Dr. Phillips, the complaint alleges that he was "[u]nexpectedly ... forced to resign his medical staff privileges at SMH on or about April 15, 1996," (J.A. 15), which is a month and a half before the first meeting in the review process took place on May 28,

1996. With respect to Dr. Ciochetty, the complaint alleges that even though Dr. Ciochetty was Chief of Anesthesiology, he was not interviewed by the Peer Review Committee or asked to give an opinion before the Peer Review Committee regarding Dr. Wuchenich's cases. In sum, the complaint fails to allege sufficient facts, viewed in the light most favorable to Dr. Wuchenich, from which a reasonable jury could find that Dr. Phillips or Dr. Ciochetty conspired with any other defendant to cause SMH to breach its contractual obligation to Dr. Wuchenich to abide by its bylaws.

****14** The only allegation pertaining to Dr. Karmy and the proceedings leading to Dr. Wuchenich's suspension is that Dr. Karmy instigated, without just cause, two of the four cases reviewed by the Peer Review Committee. We are at a loss to see how this allegation supports a claim for conspiracy to cause SMH to breach its obligation to Dr. Wuchenich to abide by the procedural protections in its bylaws in suspending Dr. Wuchenich's medical staff privileges. Finally, without a party with whom to conspire, Dr. Wuchenich's claim alleging common law conspiracy against SMH necessarily fails. In sum, we affirm the district court's dismissal of Dr. Wuchenich's claim alleging common law conspiracy to breach contractual obligations. [FN7]

> FN7. Given our reasons for affirming the district court's dismissal of this claim, we need not address the Defendants' alternative argument that the claim fails under the general rule that a principal cannot legally conspire with its agents.

V

Dr. Wuchenich next challenges the district court's dismissal of his claim against SMH, Dr. Karmy, and Dr. Phillips alleging common law defamation.

The district court dismissed Dr. Wuchenich's defamation claim because, according to the district court, Dr. Wuchenich failed to plead the "exact words allegedly defaming plaintiff, or the precise occasions on which those statements were made, or to whom they were made." (J.A. 166). In so doing, the district court relied upon *Federal Land Bank v. Birchfield*, 3 S.E.2d 405 (Va.1939), which requires a plaintiff asserting a defamation claim in Virginia state court to plead the exact words that the plaintiff alleges are defamatory in order to survive a motion to dismiss. *See id.* at 410.

The district court's analysis is erroneous because the sufficiency of Dr. Wuchenich's complaint to properly state a claim for relief should be tested under Federal Rule of Civil Procedure 8 (Rule 8), which specifies the general rules of pleading in federal court. *See* ***Hanna v. Plumer,*** 380 U.S. 460, 465 (1965) (holding that federal courts sitting in diversity must apply state substantive law and federal procedural law). Rule 8 does not contain a special pleading requirement for defamation. Thus, according to Rule 8(a), we should test the sufficiency of Dr. Wuchenich's claim alleging defamation to determine whether it meets Rule 8(a)'s liberal pleading requirement of a **short** and **plain statement** showing that he is entitled to relief. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil 2d* § 1245 (1990).

In general, defamation consists of the publication of an injurious falsehood. *See Gazette, Inc. v. Harris*, 325 S.E.2d 713, 724-25 (Va.1985). Unlike other jurisdictions, Virginia makes no distinction between slander (spoken words) and libel (written words) in actions for common law defamation. *See Fleming v. Moore*, 275 S.E.2d 632, 635 (Va.1981). Virginia recognizes two general varieties of defamation: (1) words that are defamatory *per se;* and (2) all other defamatory words which, though not in themselves actionable, occasion a person special damage. *See Wells v. Liddy*, 186 F.3d 505, 522 (4th Cir.1999), *cert. denied*, 120 S.Ct. 939 (2000). Words that are defamatory *per se* are words that: (1) impute the commission of a criminal offense involving moral turpitude; (2) impute infection of a contagious disease, where if true, would exclude the plaintiff from society; (3) impute unfitness to perform the offices or duties of employment, or lack of integrity in the discharge of those duties; or, (4) prejudice a person in his or her profession or trade. *See id.* Furthermore, "the author or originator of a defamation is liable for a republication or repetition thereof by third persons, provided it is the natural and probable consequence of his act, or he has presumptively or actually authorized or directed its republication." *Weaver v. Beneficial Fin. Co.*, 98 S.E.2d 687, 690 (Va.1957); *see also Blue Ridge Bank v. Veribanc, Inc.*, 866 F .2d 681, 689 (4th Cir.1989).

****15** Effective July 1, 1995, a cause of action for defamation under Virginia law has been governed by a one-year statute of limitation prescribed by Virginia Code § 8.01-247.1. *See* Va.Code Ann. § 8.01-247.1 (Michie 1999 Supp.). A cause of action for defamation accrues for statute of limitation purposes

on the date the defamatory acts allegedly occurred. *See* *Jordan v. Shands*, 500 S .E.2d 215, 218 (Va.1998).

Construing the allegations in the complaint in the light most favorable to Dr. Wuchenich, and drawing all reasonable inferences in his favor, Dr. Wuchenich's defamation claim seeks redress for the following alleged conduct: (1) Dr. Phillips falsely stating to Dr. Baumunk and all surgeons practicing at SMH, at some point in time prior to April 6, 1996, that Dr. Wuchenich "was not a very good anesthesiologist," (J.A. 13), and that he was less than competent; (2) Dr. Karmy instigating two peer review cases of Dr. Wuchenich by falsely reporting, at some point in time prior to May 28, 1996, that Dr. Wuchenich did not meet the standard of care with respect to two patients; (3) SMH falsely reporting on May 31, 1996, to various persons, including staff members and administrators of SMH, that Dr. Wuchenich is not competent to practice anesthesiology; (4) SMH reporting shortly after May 31, 1996, to the State Board of Medicine, which in turn reported to the National Practioner Data Bank, that it (SMH) suspended Dr. Wuchenich's medical staff privileges for lack of professional competence; (5) SMH continuing to publish the false statement that Dr. Wuchenich is professionally incompetent in hearings held by SMH after SMH suspended Dr. Wuchenich's medical staff privileges, the last of which occurred on December 12, 1996; (6) SMH publishing the false statement that Dr. Wuchenich is professionally incompetent through conversations within SMH and the community at large and through written correspondence with its staff and administrators until SMH reinstated his medical staff privileges on April 16, 1997; (7) SMH knowingly allowing the National Practioner Data Bank to continue to report until June 10, 1997 that SMH had suspended Dr. Wuchenich for professional incompetence; and (8) SMH publishing the false statement that Dr. Wuchenich is professionally incompetent during the post June 1, 1997 portion of the State Board of Medicine's investigation of the allegations that lead to the suspension of Dr. Wuchenich's medical staff privileges at SMH. We conclude that all of the alleged conduct just listed constitutes defamation *per se*, because each statement, whether oral or written, falsely imputed unfitness on the part of Dr. Wuchenich to perform his duties as an anesthesiologist and prejudiced him in his profession. *See* *Wells*, 186 F.3d at 522. Furthermore, each statement was either published originally by the specified defendant or was republished by a third party as the natural and probable consequence of the specified defendant's original publication. *See* *Weaver*, 98 S.E.2d at 690.

****16** We now consider whether each of these instances of defamatory conduct is actionable under Virginia's one-year statute of limitation for defamation claims. [FN8] Our review of each of these instances of defamatory conduct leads us to conclude that only two are alleged to have occurred within one year of the filing of Dr. Wuchenich's complaint on June 1, 1998:(1) the ongoing publication (knowingly allowed and expected by SMH) in the National Practitioner's Data Bank that SMH had suspended Dr. Wuchenich's medical staff privileges for professional incompetency; and (2) SMH publishing the false statement that Dr. Wuchenich is professionally incompetent during the post June 1, 1997 portion of the Board of Medicine's investigation of the allegations that lead to the suspension of Dr. Wuchenich's medical staff privileges at SMH. According to SMH, Virginia Code § 54.1-2906(C) provides it with immunity from suit with respect to both of these instances of alleged defamatory conduct. Virginia Code § 54.1-2906(C) provides any person immunity from civil liability for making a report to the State Board of Medicine regarding disciplinary action resulting from professional incompetence or testifying in a judicial or administrative proceeding as a result of such a report *unless such person acted in bad faith or with malicious intent. See* Va.Code Ann. § 54.1- 2906(C) (Michie 1998). Assuming *arguendo* that § 54.1-2906(C) would otherwise provide SMH with immunity from suit with respect to the two instances of defamatory conduct on its part not barred by the statute of limitations, we conclude it does not provide SMH with immunity at the early dismissal stage of litigation because the complaint clearly alleges that SMH engaged in the defamatory conduct in bad faith and with malicious intent.

> FN8. SMH, Dr. Karmy, and Dr. Phillips raised the statute of limitations defense below in support of their Rule **12(b)(6)** motions.

In sum, we hold the district court properly dismissed all portions of Dr. Wuchenich's claim alleging defamation except for the portion seeking redress against SMH for the ongoing publication (knowingly allowed and expected by SMH) in the National Practitioner's Data Bank that SMH had suspended Dr. Wuchenich's medical staff privileges for professional

incompetency, and for SMH's publication of the false statement that Dr. Wuchenich is professionally incompetent during the post June 1, 1997 portion of the Board of Medicine's investigation of the allegations that lead to the suspension of Dr. Wuchenich's medical staff privileges at SMH. We, accordingly, vacate the district court's dismissal of these specified allegations, remand them for further proceedings, and affirm the district court's dismissal of the balance.

VI

Dr. Wuchenich lastly challenges the district court's dismissal of his claims alleging tortious interference with an existing contract and tortious interference with his business expectancies. Liberally construed, the complaint alleges that the actions and statements of the Defendants tortiously interfered with SMH's Bylaws as contractual provisions of the Physicians Guarantee Agreement and as an implied contract between Dr. Wuchenich and SMH. Furthermore, the complaint alleges that the Defendants tortiously interfered with Dr. Wuchenich's business expectancy of continued referrals of patients for his care and treatment from SMH and the physicians who had medical staff privileges at SMH.

****17** Under Virginia law, a cause of action for tortious interference by a third party with a contract that is not terminable at will, such as the Physician Guarantee Agreement, is comprised of the following elements: "(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted." *Duggin v. Adams*, 360 S.E.2d 832, 835 (Va.1987) (internal quotation marks omitted). If the contract at issue is terminable at will, the plaintiff must also allege and prove that the defendant interfered with the contract by employing improper methods. *See id.* at 836.

Under Virginia law, a cause of action for tortious interference with a contractual or business expectancy is comprised of the following elements: (1) the existence of a contractual or business expectancy, (2) knowledge on the part of the third-party of the expectancy; (3) intentional interference with the expectancy; (4) the third-party's use of improper methods to interfere with the expectancy; and (5) damage to the party making the claim proximately resulting from the third-party's conduct. *See Maximus, Inc. v. Lockheed Info. Management Sys. Co.*, 493 S.E.2d 375, 378 (Va.1997). Independently tortious conduct (*i.e.*, conduct that in and of itself would be an actionable tort) is recognized under Virginia law as an improper method. *See Duggin*, 360 S.E.2d at 836. But, independently tortious conduct is but one species of improper methods. As the Virginia Supreme Court in *Maximus* explained, actions may also be improper which are neither independently tortious nor illegal, for example, unfair competition and unethical conduct. *See Maximus*, 493 S.E.2d at 379. Finally, we note that while a person cannot intentionally interfere with his own contract, if it can be shown that an agent of a party to the contract was acting outside the scope of his employment in tortiously interfering with such contract, then the aggrieved party may be entitled to recover in the event the agent is unable to establish an affirmative defense of justification or privilege. *See Fox*, 362 S.E.2d at 708.

The district court properly dismissed the causes of action against SMH for tortious interference with the Physician Guarantee Agreement and any implied agreement between SMH and Dr. Wuchenich to abide by SMH's Bylaws, because SMH, as a party to both the Physician Guarantee Agreement and any such implied contract, cannot intentionally interfere with its own contract. *See Fox*, 362 S.E .2d at 708. The district court also properly dismissed these same causes of action against Dr. Karmy, Dr. Ciochetty, and Dr. Phillips, because none of their conduct (failing to assign Dr. Wuchenich patients and referring two cases of Dr. Wuchenich for peer review without just cause) could be reasonably considered as having interfered with the procedural protections of SMH's Bylaws.

****18** We do, however, conclude that Dr. Wuchenich has sufficiently stated a cause of action at this early pleading stage against the Defendants for tortious interference with his expectancy of entering into contractual relationships with some patients at SMH. In this regard, Dr. Wuchenich has alleged the existence of the contractual expectancy, knowledge on the part of each defendant of the expectancy, and intentional interference with the expectancy by unfair competition (*i.e.*, Dr. Phillips and Dr. Ciochetty failing to assign Dr. Wuchenich a fair share of anesthesiology patients) and unethical conduct (*i.e.*, SMH suspending Dr. Wuchenich's medical staff privileges without just cause and Dr. Karmy

reporting two cases of Dr. Wuchenich to peer review without just cause) proximately resulting in damage to Dr. Wuchenich. *See* *Maximus*, 493 S.E.2d at 378.

In sum, we affirm the district court's dismissal of Dr. Wuchenich's tortious interference claims pertaining to SMH's Bylaws. However, we vacate the district court's dismissal of his contractual expectancy claim against the Defendants and remand that claim for further proceedings.

VII

In conclusion, we: (1) vacate the district court's dismissal of Dr. Wuchenich's claim alleging breach of SMH's Bylaws; (2) affirm the district court's dismissal of the portion of Dr. Wuchenich's breach of contract claim seeking to enforce oral assurances allegedly made by SMH to assign him a sufficient number of patients to establish an anesthesiology practice in the Woodstock, Virginia area; (3) affirm the district court's dismissal of Dr. Wuchenich's claim alleging negligent breach of contract; (4) affirm the district court's dismissal of Dr. Wuchenich's claim alleging civil conspiracy except to the extent it alleges a conspiracy among SMH, Dr. Phillips, and Dr. Ciochetty to injure Dr. Wuchenich's ability to engage in the practice of his profession by failing to assign him a fair number of patients; (5) vacate the district court's dismissal of Dr. Wuchenich's claim alleging civil conspiracy to the extent it alleges a conspiracy among SMH, Dr. Phillips, and Dr. Ciochetty to injure Dr. Wuchenich's ability to engage in the practice of his profession by failing to assign him a fair number of patients; (6) affirm the district court's dismissal of Dr. Wuchenich's claim alleging common law conspiracy to breach contractual obligations; (7) affirm the district court's dismissal of Dr. Wuchenich's claim alleging defamation except for the portion seeking redress against SMH for the ongoing publication (knowingly allowed and expected by SMH) in the National Practitioner's Data Bank that SMH had suspended Dr. Wuchenich's medical staff privileges for professional incompetency, and for SMH's publishing the false statement that Dr. Wuchenich is professionally incompetent during the post June 1, 1997 portion of the Board of Medicine's investigation of the allegations that lead to the suspension of Dr. Wuchenich's medical staff privileges at SMH; (8) vacate the portion of the district court's dismissal of Dr. Wuchenich's defamation claim seeking redress against SMH for the ongoing publication (knowingly allowed and expected by SMH) in the National Practitioner's Data Bank that SMH had suspended Dr. Wuchenich's medical staff privileges for professional incompetency, and for SMH's publishing the false statement that Dr. Wuchenich is professionally incompetent during the post June 1, 1997 portion of the Board of Medicine's investigation of the allegations leading to Dr. Wuchenich's suspension; (9) affirm the district court's dismissal of Dr. Wuchenich's claims alleging tortious interference with the Physician Guarantee Agreement and any implied agreement between SMH and Dr. Wuchenich to abide by SMH's Bylaws; (10) vacate the district court's dismissal of Dr. Wuchenich's claim alleging the Defendants tortiously interfered with his contractual expectancy of entering into contractual relationships with some patients at SMH; and (11) remand all vacated claims for further proceedings.

****19** *AFFIRMED IN PART, VACATED IN PART, AND REMANDED.*

215 F.3d 1324 (Table), 2000 WL 665633 (4th Cir.(Va.)), 2000-1 Trade Cases P 72,913 Unpublished Disposition

Briefs and Other Related Documents **(Back to top)**

. 1999 WL 33617962 (Appellate Brief) Reply Brief of Appellant (Jun. 25, 1999)Original Image of this Document (PDF)

. 1999 WL 33617963 (Appellate Brief) Brief of Appellees (Jun. 09, 1999)Original Image of this Document (PDF)

. 1999 WL 33617961 (Appellate Brief) Brief of Appellant (May. 10, 1999)Original Image of this Document (PDF)

. 99-1273 (Docket) (Mar. 01, 1999)

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