CHESAPEAKE CIRCUIT COURT JUDGES' CHAMBERS
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FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Jeremiah A. Denton Conrad M. Shumadine	Ashley D. Gillespie, law clerk for the Honorable Randall D. Smith
COMPANY:	DATE: AUGUST 6, 2012
FAX NUMBER: 757-340-4505 (Denton) 757-628-5566 (Shumadine)	TOTAL NO. OF PAGES INCLUDING COVER: 5

RE: Webb v. Virginian-Pilot Media Companies, LLC
CL10-2933

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY

NOTES/COMMENTS:

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FIRST JUDICIAL CIRCUIT OF VIRGINIA

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August 6, 2012

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Re: **Webb v. Virginian-Pilot Media Companies, LLC**
Case No.: CL10-2933

Via facsimile and mail

Dear Counsel:

This matter is before the Court on post-trial motions filed by Defendant and the Court's ruling on Defendant's motion to strike made at the conclusion of Plaintiff's case in chief and renewed at the conclusion of all of the evidence. The Court took the motions to strike under advisement at that time and the case was submitted to the jury. The jury returned a verdict in favor of Plaintiff in the amount of $3,000,000.00 compensatory damages.

The Court has reviewed the memoranda of counsel: Defendant's Bench Brief Regarding the Law on Defamation by Implication and Actual Malice; Plaintiff's Brief in Opposition to Defendant's Bench Brief Regarding the Law on Defamation by Implication and Actual Malice; Defendant's Bench Brief Regarding Whether a Claim of Preferential Treatment is a Matter of Opinion; Plaintiff's Brief in Opposition to Defendant's Bench Brief Regarding Whether a Claim of Preferential Treatment is a Matter of Opinion; Defendant's Brief in Support of Motion for a New Trial on All Issues, Remittitur, and/or a New Trial on Damages; Plaintiff's Response to Defendant's Brief in Support of Motion for a New Trial on All Issues, Remittitur, and/or a New Trial on Damages; Defendant's Brief in Support of Motion to Strike; and Plaintiff's Brief in Response to Defendant's Motion to Strike. The Court heard further oral argument from the parties on July 26, 2012, regarding these motions. The Court now stands ready to rule.

The written briefs and oral arguments of the parties clearly state their respective positions and arguments, and for the sake of brevity will not be repeated here. As to Defendant's argument concerning defamation by implication and the requirement that Defendant intend the defamatory implication, this Court believes that in Virginia defamation by implication was recognized in *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 82 S.E.2d 588 (1954). It has not been determined by our supreme court that a defendant must intend the implication. For purposes of this analysis, I will side with Plaintiff and hold Plaintiff may benefit from the circumstantial inference that everyone intends the results of their voluntary acts.

First in order of occurrence is Defendant's Motion to Strike. Because a ruling on this issue is dispositive of this case, it is unnecessary to consider Defendant's post-trial motions.

Plaintiff's evidence did not establish actual malice by clear and convincing evidence.

Standard of Review

When ruling on a motion to strike a plaintiff's evidence, a trial court "is required to accept as true all evidence favorable to a plaintiff and any reasonable inferences that may be drawn from such evidence." *James v. City of Falls Church*, 280 Va. 31, 38, 694 S.E.2d 568, 572 (2010) (citing *Austin v. Shoney's, Inc.*, 254 Va. 134, 138, 486 S.E.2d 285, 287 (1997)). "The trial court is not to judge the weight and credibility of the evidence, and may not reject any inference from the evidence favorable to the plaintiff unless it would defy logic and common sense." *Austin*, 254 Va. at 138, 486 S.E.2d at 287.

Plaintiff argues that the evidence establishes *New York Times* malice by clear and convincing evidence, and that Defendant both knew his implication was false and that he acted with reckless disregard as to whether it was false or not.

Actual Knowledge of Falsity

Plaintiff claims evidence to support knowledge of falsity derives first from Hansen's testimony that when he wrote the article he was aware that it was not possible for an assistant principal at Oscar Smith High School to influence discipline at Great Bridge High School. Plaintiff argues that this establishes that Hansen passed off as true that which he knew to be untrue: "He thus published a falsity 'with knowledge that it was false.'" (Pl.'s Br. Resp. Mot. Strike 7.) Second, Plaintiff argues Hansen admitted he had no information that Plaintiff had sought preferential treatment for his son when he wrote the article. Third, Plaintiff says both Hansen and Tom Cupitt (school spokesperson) testified that Hansen was told by Cupitt that Kevin Webb did not receive preferential because of his father's position. Fourth, "although the article was structured to imply the receipt of preferential treatment, Cupitt's denial of the implication is stated in the article, making the article self-proving evidence of knowledge of falsity." (Pl.'s Br. Resp. Mot. Strike 7.)

Because of the Court's ruling that Plaintiff is a public official, his burden is to prove by clear and convincing evidence that Defendant made the defamatory statements with actual malice, that is, with knowledge that they were false or with reckless disregard of whether it was

false or not. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 726 (1964). This standard is required to protect the rights of the public and the press to engage in uninhibited debate concerning public issues.

It is undisputed and Plaintiff concedes that the factual statements are true. He believes that it is the implication which is defamatory.

In a light construed most favorably to Plaintiff, the evidence shows that Hansen discovered no facts of preferential treatment given to Kevin Webb or Plaintiff seeking the same on behalf of his son. Contrary to Defendant's claims, the article (while stating true facts) implies that although the school states that no preferential treatment was given, Kevin Webb, the student found guilty of assaulting the father of a special education student, and who also bullied that student at school, and who also happened to be the son of an assistant principal in the school system, was allowed to remain in school, compete in sports, receive an athletic scholarship, and go on to college while the victimized student had to leave school and obtain a GED. It implies that a great injustice took place and invites the reader to question the justness of the result. A fair inference could be that because Kevin Webb's father is an assistant principal, he received preferential treatment. For purposes of the Court's analysis I will assume that one of these inferences by a reader is that Plaintiff himself obtained the preferential treatment for his son.

The question here is the breadth of the phrase "Defendant knowing the statements to be false." Hansen testified that he did not write the article with the intent to imply more than what the article stated; however, I will assume the jury did not believe him. At most a reasonable trier of fact could conclude that, despite being told and discovering no evidence of preferential treatment, the outcome of the incident was so disparate for Patrick Bristol and Kevin Webb; therefore, something wrong or inappropriate must have occurred to produce such a result. Stated another way: is the "knowing the statement to be false" standard met where the defendant writes truthful statements, but implies that even though this is the result of the reporter's interviews and research, something must surely be wrong because the result is not one that would be expected given the facts? Viewed in the light most favorable to Plaintiff, I find that it is not.

It is undisputed that Hansen did not omit any truthful information he was given during his investigation for the article. Plaintiff refused to be interviewed by Hansen and members of the school administration testified that they did not and would not disclose the Chesapeake school system's policy that explained the disparate result in the treatment of Kevin Webb and the other student absent a subpoena, which Hansen could not have obtained.

There is no contest that Hansen was told by Cupitt that no preferential treatment was given, and that Hansen accurately quoted Cupitt in the article. The only possible inference from these facts viewed in the light most favorable to Plaintiff is that Hansen disbelieved the "official reason" and invites the reader to also question the truthfulness of the school administration. This does not satisfy the requirement that Hansen knew the implication to be false. It may reach the negligence standard for a reporter to imply or provoke without knowing more, or because he could not learn more, but Plaintiff does not establish knowing falsity under *New York Times*.

Reckless Disregard of Truth or Falsity

Plaintiff argues Hansen's threat to Plaintiff to write a one-sided story if Plaintiff refused to comment on the article and Hansen's email to a colleague at the newspaper ending in the phrase "I love the smell of napalm in the morning," is direct evidence of intent to consciously disregard the truth. A media defendant in a defamation action subject to the *New York Times* actual malice standard cannot be found liable because of its failure to investigate the accuracy of any allegedly defamatory statement unless that defendant has a "high degree of awareness of probable falsity." *Jackson v. Hartig*, 274 Va. 219, 229-30, 645 S.E.2d 303, 309 (2007) (citing *Shenandoah Publ'g House, Inc. v. Gunter*, 245 Va. 320, 324, 427 S.E.2d 370, 372 (1993)). Reckless conduct is not measured by a "reasonably prudent man" standard. There must exist some evidence from which a trier of fact could reasonably conclude that Defendant in fact entertained serious doubts as to the truth of its publication. *Jackson*, 274 Va. at 228, 645 S.E.2d at 308. This is governed by a subjective standard. *Id.*

The evidence is fatally void of any facts to support the premise that Hansen ever entertained serious doubts about what he wrote or implied. This requisite is necessary under First Amendment analysis to insure that the media will endeavor to report and publish about matters of public affairs. "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S. Ct. 1323, 1326 (1968).

Concerning the email Hansen sent to a colleague, evidence that Hansen had ill will toward Plaintiff is, without more, insufficient to establish knowledge of falsity or reckless disregard for the truth. *See Jackson*, 274 Va. at 231, 645 S.E.2d at 310 (involving newspaper making similar statement about public official) (quoting *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 666, 668, 109 S. Ct. 2678 (1989).

The Court therefore finds Plaintiff has not established actual or constitutional malice by clear and convincing evidence, and will sustain Defendant's Motion to Strike. This ruling being dispositive, the Court need not address other motions filed.

The Court requests that counsel for Defendant prepare and circulate for endorsement an order consistent with the Court's ruling and submit same to the Court for entry.

Yours sincerely,

Randall D. Smith
Judge

CC: Hon. Faye W. Mitchell, Clerk of Court