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Re: Solomon H. Ashby, Jr. v. John L. Rowe, Jr.
Civil Docket No.: CL20-9019

Dear Gentlemen:

There is, after all, a third certainty in life: acrimony among public officials in Portsmouth will find its way into the press. Of late, it also finds its way across the Elizabeth River into this Court.

This case involves four former officials of the City of Portsmouth. The plaintiff is the former City Attorney; the defendant, the former Mayor. The plaintiff pleads the former chief of police took some action that displeased the former city manager. The city manager then placed the chief of police on administrative leave. This caused some citizens to call for the City Council to fire the city manager.

In response to this call, the plaintiff gave legal advice to the City Council concerning the possible dismissal of the city manager. After receiving his advice, the City Council voted 4-3 to sack the plaintiff. The defendant gave an interview to the press after the plaintiff's discharge.

The plaintiff further pleads that in this interview the defendant said a majority of the City Council had "lost confidence" in the plaintiff; that communication was a problem; that the plaintiff gave unbalanced advice. The defendant continued: "That [advice] was the straw that broke the camel's back. I have never seen an opinion like that before. It just did not make any sense and it doesn't make any sense now…. It's what we thought was not very balanced and good advice, and that shakes your confidence." The plaintiff does not claim any of this was

defamatory. He bases his claim on this statement: "Culminating in an opinion that you can't fire the city manager, that the city manager is bulletproof, and that just does not hold up." The plaintiff alleges this statement is false and defamatory.

The plaintiff does not contend the defendant's use of the word "bulletproof" was to be taken literally, but, rather, that the defendant was doubling down on his false statement that the plaintiff had advised the City Council that "You can't fire the city manager…." Memorandum in Opposition to Demurrer, at pp. 4-5.

The plaintiff has attached to his complaint a copy of his advice to the City Council. It is correct that the plaintiff never wrote that the City Council could not fire the city manager. However, he did write that the City Council should not do so; that a vote for her discharge could be a violation of two sections of the Portsmouth City Code, both of which are misdemeanors; that a citizen could file a "charge" with a magistrate against members so voting; that he (the plaintiff) "would have to forward the facts of City Council's action to the Commonwealth Attorney's Office for consideration." This is not construing the allegations of the complaint in the light most favorable to the defendant; rather, it is an accurate summary of the advice the plaintiff gave the City Council.

The defendant demurs on several grounds, but I can dispose of the present demurrer on one. For purposes of this demurrer I assume the statement at issue was one of fact, not opinion.

To be actionable, a statement must be both false and defamatory. Schaecher v. Bouffault, 290 Va. 83, 91, 772 S.E.2d 589, 594 (2015). It is for the court to "decide as a threshold matter of law whether a statement is reasonably capable of defamatory meaning…." Handberg v. Goldberg, 297 Va. 660, 666, 831 S.E.2d 700, 705 (2019). To be defamatory, a statement must also have a defamatory "sting" to one's reputation, and this is to be determined as a matter of law. Handberg, 297 Va. at 667, 831 S.E.2d at 706. To have the necessary "sting" the language used:

> tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous.

Handberg, 297 Va. at 668, 831 S.E.2d at 706 (quoting Moss v. Harwood, 102 Va. 386, 392, 46 S.E. 385, 392 (1904).

Early in the development of the law of defamation, general disparagements about an attorney's character or knowledge of the law were actionable. Palmer v. Boyer, Cro. Eliz. 342, 78 Eng. Rep. 590, Owen 17, 74 Eng. Rep. 867 (Q.B. 1594) (he had "no more law than a jack-an-ape"); Peard v. Jones, Cro. Car. 382, 79 Eng. Rep. 933 (K.B. 1634) ("He is a dunce and will get nothing by the law."); Baker v. Morfue, 1 Sid. 327, 82 Eng. Rep. 1136 (K.B. 1667) ("He hath no more law than Mr. C's bull," referring to another case in which it had been held actionable to say of a lawyer "he hath no more law than a goose."); Jones v. Powel, 1 Mod. 272, 86 Eng. Rep. 857, 1 Lev. 297, 83 Eng. Rep. 415, Raym. T. 196, 83 Eng. Rep. 103 (K.B. 1682) ("Thou canst not read a declaration."); Day v. Buller, 3 Wils. 59, 95 Eng. Rep. 932 (C.P. 1770) ("What, does he pretend to be a lawyer? He is no more a lawyer than the devil!") Blackstone wrote that it was actionable to call a lawyer a "knave." 3 Commentaries 123 (1768). I need not decide whether these statements would be thought today to have defamatory sting.

In King v. Lake, 2 Ventris 28, 86 Eng. Rep. 289, 1 Freeman 15, 89 Eng. Rep. 12 (K.B. 1671), the plaintiff-attorney alleged the defendant wrote a letter to a noble client in which he stated concerning the plaintiff: "Mr. R. advises you to a vexatious suit, and he will make you pay double and treble fees, is a griping lawyer, and he will milk your purse to fill his large purse." A majority found the words actionable, and in delivering their opinion stated in dictum "Or, that he gives bad counsel, it is actionable."

On this side of the Atlantic, and of more recent vintage, the Supreme Court of Virginia, has held, in accord with King v. Lake, supra, that it was defamatory to speak of a lawyer that he "just takes peoples' money" and that his clients would receive more money if they had not hired him but had dealt with the adjuster directly. Tronfield v. Nationwide Mut. Ins. Co., 272 Va. 709, 636 S.E.2d 447 (2006). Words which charge an attorney with unethical or unprofessional conduct and tend to injure or disgrace him in his profession are actionable. Carwile v. Richmond Newspapers, 196 Va. 1, 82 S.E.2d 588 (1954).

In Perk v. Vector Resources Group, 253 Va. 310, 485 S.E.2d 140 (1997), the plaintiff was a collections attorney for a hospital. The hospital ended the representation and instructed the plaintiff to deliver the accounts to it or one of the defendants. Another defendant, a law firm, was alleged to have told some of the hospital's debtors that the plaintiff had not reported to the hospital certain payments they had made to him. The Court did not give much of an explanation,

but it held the statements were not defamatory per se, nor could a defamatory charge be inferred from them. Perhaps the Court found the statements merely alleged mistake or misunderstanding.

A statement disparaging the competence of a professional's conduct of a single undertaking can be defamatory in Virginia. In Cashion v. Smith, 286 Va. 327, 749 S.E.2d 526 (2013), an action between two physicians, statements by the defendant in the presence of others, including, "you just euthanized my patient," were defamatory. Defamatory "sting" was not at issue but would appear to have been present.

There are two recent cases in which the Supreme Court of Virginia discussed the subject of "sting." In Handberg, supra, the defendant stated that the plaintiff had billed a school board for services not performed. This accusation of dishonesty was held to have defamatory "sting." 297 Va. at 669, 831 S.E.2d at 707.

In Schaecher, supra, the defendant accused the plaintiff of violating an easement, a restrictive covenant, and a county ordinance by a proposed dwelling plan. These accusations were held not inherently defamatory. 290 Va. at 95, 772 S.E.2d at 595-96. The defendant also alleged the plaintiff "was not totally truthful" about whether she was operating a commercial kennel, and that she was "lying and manipulating facts to her benefit" in dealings with the county planning commission. The latter statement was held to have the requisite "sting;" the Court held "sting" was missing in the former, 290 Va. at 101-02, 772 S.E.2d at 599.

It would thus appear that statements accusing a professional of willful incompetence or unethical conduct or anyone of dishonesty or mendacity have the requisite "sting." This is not to say these are the only allegations that could have "sting."

I view this case as mischaracterization of legal advice. I can imagine mischaracterized legal advice that could have defamatory "sting." A client falsely tells another his lawyer advised him he could do something illegal, immoral, or in violation of legal ethics. We have nothing like that here.

Context is of the utmost importance in evaluating defamatory statements. Schaecher, 290 Va. at 101, 772 S.E.2d at 599. I do not find the statement defamatory on its face, nor when considered in the context of the defendant's other statements and the advice the plaintiff actually gave, as summarized on page 2. This slight mischaracterization of advice does not injure the plaintiff's "reputation in the common estimation of mankind," throw shame or disgrace upon him, or "tend to hold him up to scorn or ridicule or render him infamous or ridiculous."

I sustain the demurrer because the statement at issue lacks defamatory "sting." I attach an order.

Sincerely yours,

Everett A. Martin, Jr.
Judge

EAM,jr./mls