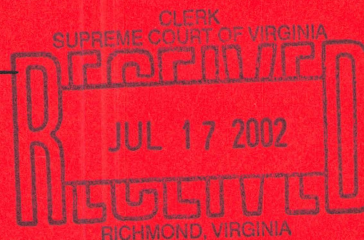


265VA127

IN THE
Supreme Court of Virginia

AT RICHMOND

Record No. 020628



ROSA FUSTE, M.D.
and
TIEN L. VANDEN HOEK, M.D.,

Appellants,

— v. —

RIVERSIDE HEALTHCARE ASSOCIATION, INC.
and
RIVERSIDE HOSPITAL, INC., et al,

Appellees.

JOINT APPENDIX

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

ROSA FUSTE, M.D.
209 Jefferson's Hundred
Williamsburg, Virginia 23185

and

TIEN L. VANDEN HOEK, M.D.
4 Fallmeadow Court
Hampton, Virginia 23666

Plaintiffs,

v.

RIVERSIDE HEALTHCARE ASSOCIATION, INC.)
606 Denbigh Blvd.)
Newport News, Virginia)

RIVERSIDE HOSPITAL, INC.)
500 J. Clyde Morris Blvd.)
Newport News, Virginia)

RIVERSIDE PHYSICIAN SERVICES, INC.)
610 Thimble Shoals Blvd.)
Newport News, Virginia)

PENINSULA HEALTHCARE, INC.)
606 Denbigh Blvd.)
Newport News, Virginia)

HEALTHKEEPERS, INC.)
606 Denbigh Blvd.)
Newport News, Virginia)

Defendants.)

LAW NO.:

JURY TRIAL DEMANDED

SECOND AMENDED MOTION FOR JUDGMENT

NOW COME Rosa Fuste, M.D. and Tien L. Vanden Hoek, M.D., by counsel, and state
as follows for their Second Amended Motion for Judgment:

NATURE OF THE CASE

1. This is an action for termination in violation of Virginia public policy, defamation and conspiracy to injure another in their profession.
2. The Plaintiffs were Riverside pediatricians. In 1999, they made various complaints about Riverside's patient care, violations of law and billing practices. Their salaries were almost immediately cut in half and Dr. Fuste was stripped of certain positions. The Plaintiffs employment was terminated wrongfully in retaliation for their complaints and their refusal to work under unlawful conditions in October 1999.
3. After their discharge, Defendants defamed them and conspired to injure them in their profession.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter as the events complained of herein occurred in the Commonwealth of Virginia and the parties reside and conduct business in the Commonwealth of Virginia.
5. Venue is properly set in this matter pursuant to Va. Code § 8.01 - 262 & 263.

PARTIES

6. Dr. Fuste is a resident of the Commonwealth of Virginia and maintains her principal residence at 209 Jefferson's Hundred, Williamsburg, Virginia 23185.
7. Dr. Vanden Hoek is a resident of the Commonwealth of Virginia and maintains her principal residence at 4 Fallmeadow Court, Hampton, Virginia 23666.
8. Riverside Healthcare Association, Inc. ("RHA") is a Virginia corporation and maintains its principal place of business at 606 Denbigh Blvd., Newport News, Virginia.

9. Riverside Hospital, Inc. ("Riverside Hospital") is a Virginia corporation and maintains its principal place of business at 500 J. Clyde Morris Blvd., Newport News, Virginia.

10. Riverside Physician Services, Inc. ("RPS") is a Virginia corporation and maintains its principal place of business at 610 Thimble Shoals Blvd., Newport News, Virginia.

11. Healthkeepers, Inc. ("Healthkeepers") is a Virginia corporation and maintains its principal place of business at 606 Denbigh Blvd., Newport News, Virginia.

12. Peninsula Healthcare, Inc. ("PHI") is a Virginia corporation and maintains its principal place of business at 606 Denbigh Blvd., Newport News, Virginia.

13. Unless otherwise indicated, the term "Riverside" refers to each and every defendant except PHI and Healthkeepers. While Plaintiff's were employed by RHA, the Riverside entities had, at all times relevant to this action, common policies, ownership, missions and management.

ALLEGATIONS OF FACT

14. Plaintiffs were employed as pediatricians by RHA until October 1, 1999, when they were wrongfully terminated from their employment. After this termination, the Riverside Defendants conspired with PHI and Healthkeepers to prevent patients of Drs. Fuste and Vanden Hoek from following them to their new practice, to injure their professional reputations and to prevent their new medical practices from becoming viable businesses.

Plaintiffs' Terms of Employment

15. Plaintiffs were originally employed by RHA pursuant to written contracts which are attached to the First Amended Motion for Judgment as exhibits. See, Fuste Contract, Exhibit A; Vanden Hoek Contract Exhibit B.

16. After Plaintiffs entered the original 1994¹ employment agreements with RHA, a compensation scoring system based upon units of productivity known as "Relative Value Units" or "RVU's" was imposed for nearly all RHA physicians. This is a system of measuring physician productivity commonly used in many large healthcare organizations. Because a significant portion of Plaintiffs' time was spent teaching and supervising residents, they were completely excluded from the RVU system until 1998.

17. In 1998, the Plaintiffs were each assigned RVU goals of approximately 4,200 per month. Acknowledging their significant resident supervision and teaching duties, and the fact that the RVU system did not lend itself to measuring these tasks, RHA made the 1998 goals aspirational for Plaintiffs. They were mandatory for all other non-teaching pediatricians.

18. Plaintiffs' agreements with RHA were typical "best efforts" contracts at all times prior to August 1999. In other words, prior to August, 1999, Plaintiffs' contracts required forty hours of work per week without mandatory productivity targets.

19. The written contracts of Dr. Fuste and Dr. Vanden Hoek expired under their own terms on December 31, 1996 and April 30, 1997, respectively. Neither contract renewed on those dates. They were superseded by "at will" employment agreements paying each Plaintiff greater than 150% of their original base salaries in exchange for their agreement to perform their duties as pediatricians and numerous other duties not delineated in their original contracts.

20. In addition to her duties as a physician, Dr. Fuste served as Director of Riverside's pediatric practice for which she received an annual stipend of \$20,000.00. She also served on the Board of Advisors for Riverside Physician Associates.

¹ As is apparent on the face of the agreements, they were executed in 1993, services commenced in 1994.

Riverside's Wrongful Termination of Plaintiffs

21. New written contract proposals were presented to Drs. Vanden Hoek and Fuste on June 29, 1999. The proposals contained no change in their then current base salaries of \$150,000, or in Dr. Fuste's \$20,000 annual pediatric directorship stipend. This represented compensation increases 40% above the 1994 written contracts in recognition of the change in the employment relationships that had occurred over the years. The proposals also contained no RVU requirements, although they did contain aspirational performance targets of 50,000 RVUs annually.

22. Shortly after presenting the new contracts, Riverside administration changed its policy of evaluating all pediatric patients regardless of ability to pay. The administration planned to implement a financial check of each patient's ability to pay prior to any provision of vaccinations, evaluation or treatment, turning away those who could not pay or commit to a payment plan.

23. The Plaintiffs realized that aspects of this policy would constitute a significant change from past practice, place children of indigent families in jeopardy and would violate applicable law. In fact, this policy did violate, among other statutes and regulations, Virginia Code § 32.1-310 et. seq., Virginia Code § 54.1-111, Virginia Code § 54.1-2914, the federal Emergency Medical Treatment and Labor Act ("EMTALA"), and regulations implemented pursuant to Va Code § 32.1-43 by the Virginia Department of Health to ensure vaccination of children, specifically 12 VAC 30-10-50 A(5) & (6). Plaintiffs vigorously protested this change in policy. Their protests angered officials of RHA and Riverside.

24. The Plaintiffs had, in the same time period, previously voiced strong protests regarding certain billing and medical care practices at RHA and Riverside. Specifically, they had complained that: 1) Riverside and RHA sought to improperly withhold, based on patient's ability

to pay, vaccines that had been provided to Riverside and RHA free of charge under state and federal programs intended for children of indigent families; 2) Riverside and RHA improperly diverted and sold vaccines provided free to Riverside and intended for children of indigent families; 3) Riverside and RHA allowed unlicensed and/or uncertified persons (residents) to provide medical services to patients without proper attending physician supervision, and requested that Drs. Fuste and Vanden Hoek do likewise for their pediatric patients to increase RVU production; and 4) Riverside and RHA charged Medicaid and other third party payors for services they represented as being performed by board certified or board eligible physicians when, in fact, they were performed by improperly supervised residents in training.

25. Conducting a medical practice while allowing the practices set forth in paragraphs 22 through 24 above constituted a Class I Misdemeanor under Virginia Code §54.1-111 at all times relevant to this action.

26. Riverside and RHA responded to Plaintiffs' protests by removing Dr. Fuste from the Directorship of Riverside's pediatric practice and presenting Dr. Fuste and Dr. Vanden Hoek with new contracts in July, 1999, *mandating* that they each produce 9,000 RVU's per month to earn the same respective base salaries of \$150,000.00 annually. This constituted 216 percent of the recent June 29 contract proposal requirements and a similar increase over the 1998 monthly RVU goal. Moreover, it constituted 237 percent of the average monthly goal of Riverside's other seven pediatricians. In addition, RHA demanded Dr. Fuste's resignation from the Board of Advisors of Riverside Physicians Associates.

27. It was clear that Drs. Fuste and Vanden Hoek would have to accede to and participate in the commission of the crimes, ethical violations and violations of law set forth herein to remain employed by RHA.

28. Drs. Fuste and Vanden Hoek were informed that if they did not sign the new contracts, their base salaries would be reduced from \$150,000 per year, to \$100,000 and \$85,000 per year, respectively; the base salaries set forth on Schedule A of the old 1994 contracts.

29. When the Plaintiffs refused to agree to the 9,000 RVU per month contracts, RHA and Riverside cut their pay by over 40%, as previously threatened, effective August 16, 1999, with no corresponding reduction in duties.

30. It became clear to Plaintiffs that RHA and Riverside had no intention of restoring their salaries, yielding in the monthly 9000 RVU requirement or allowing Plaintiffs to operate their practices and provide care to patients in accordance with their professional, ethical and legal obligations as physicians.

31. In taking these actions, RHA and Riverside terminated Plaintiffs' previously existing employment, and deliberately made Plaintiffs' working conditions intolerable so as to cause any reasonable physician in their situations to leave RHA.

32. In each instance, RHA's and Riverside's actions constitute wrongful termination, or, in the alternative, wrongful constructive termination.

Conspiracy to Injure and Defamation of Plaintiffs

33. The Plaintiffs opened Pediatric Consultants of Hampton Roads ("Pediatric Consultants") on February 1, 2000 at 1405-E Kiln Creek Parkway.

34. The Defendants, through their agents, intentionally combined and conspired with each other to harm Plaintiffs' business maliciously and willfully. Specifically, Barry Gross and Dr. Eugene Temple, acting in the course and scope of their employment with RHA and as agents of Riverside, combined with C. Burke King and Mae Ellis Terrebonne, officers of Healthkeepers and PHI who were acting in the course and scope of their employment, to ensure

that Plaintiffs would not see Healthkeepers and PHI patients and that these patients and credentialing officials at other hospitals would not see or professionally associate the Plaintiffs.

35. Gross and Temple communicated to King and Terrebone their desire that the Plaintiff not be permitted to see Healthkeepers and PHI patients. They communicated this desire in a wilful and malicious effort to harm the Plaintiffs medical practices. King and Terrebone joined and furthered the conspiracy by acceding to this request. Upon information and belief, Terrebone and King knew Riverside's accusations were false and, in any event, made no effort to determine their truthfulness.

36. Gross, Temple, King and Terrebone all sought to prevent Plaintiffs' practices from becoming viable by falsely informing patients, agents of other hospitals, and credentialing officials at Mary Immaculate Hospital and Sentara Hampton General that Plaintiffs' were "unprofessional", "uncooperative", that they "abandoned their patients" and that there were "concerns about their competence." These publications and the combination that gave rise to them were willful and malicious. ✓

37. Moreover, the Defendants and Defendants' agents discussed in paragraph 36 above, all made these false statements to others within their organizations and these persons, not all of whom are currently known, repeated and published these false allegations to others outside Defendants' respective organizations. This was done in an intentional and malicious effort to harm Plaintiffs' business.

38. A prospective staff member of Pediatric Consultants, Rebecca Cantwell, was contacted by Kimberly Martin of Riverside in mid-January 2000, and told that Dr. Fuste's and Vanden Hoek's new practice would be immediately shut down the day it opened, and that if she took a job there she would never have a future job with Riverside. This statement prejudiced

Plaintiffs' in their profession and business as it, and other similar statements, made it more difficult for Drs. Fuste and Vanden Hoek to recruit the staff necessary to open their office.

39. Hospital medical staff privileges are essential for a physician to practice medicine and /or participate with major payors such as Trigon Blue Cross / Blue Shield, Cigna, etc. To continue practicing pediatrics and participate with area health plans, the Plaintiffs requested to return from sabbatical and to have their medical staff privileges at Riverside Hospital re-activated, a routine formality. However, when the Medical Executive Committee of Riverside Hospital met on February 2, 2000, to act on this request, Dr. Eugene Temple alleged, in bad faith, that they had "abandoned" their patients on October 1, 1999, making a motion that they should not be allowed back on the medical staff.

40. Approximately 50% of the Plaintiffs' patients at Riverside belonged to Healthkeepers. Numerous patients asked Healthkeepers and PHI to be allowed to follow Drs. Vanden Hoek and Fuste as their pediatricians. To effect this, the Plaintiffs requested continued participation with Healthkeepers and PHI. This request was subsequently denied in an April 26, 2000, letter from C. Burke King, President of Healthkeepers and PHI. King denied their request at the behest of Gross, Temple and Riverside. In doing so, he conspired with them to harm Plaintiffs' business.

41. Former patients who wanted to follow-up with Drs. Vanden Hoek and Fuste were informed by agents of Riverside Hospital, RHA, RPS, Healthkeepers and PHI that because of alleged "unprofessional behavior" and "patient abandonment," the Plaintiffs would never be allowed to participate in the Healthkeepers and /or PHI network. As a direct result of this action, patient choice was constrained, the Plaintiffs' reputations were damaged in the patient population, and the Plaintiffs lost substantial revenue.

42. To continue practicing pediatrics on the Peninsula, Drs. Vanden Hoek and Fuste applied for medical staff membership at Sentara Hampton General Hospital and Mary Immaculate Hospital, as well as for continued participation with numerous health plans. Critical to this process was the timely and truthful release of staff status, clinical privileges, and employment information by Riverside. RHA, RPS and Riverside Hospital interfered with this process by delaying the release of needed information, by misrepresenting the facts of the Plaintiffs' departure, and by falsely alleging that Plaintiffs had acted "unprofessionally", had "left suddenly," were "uncooperative" and had "abandoned their patients".

43. Unsolicited letters and communications were also provided to the credentials committee of Sentara Hampton General Hospital and Mary Immaculate Hospital by, RHA, RPS, Riverside Hospital, Healthkeepers and PHI through their respective agents. These communications also falsely alleged that Drs. Vanden Hoek and Fuste were "uncooperative", "unprofessional", "left suddenly" and had "abandoned their patients".

44. In the spring of 2000, May Ellen Terrebonne with Healthkeepers and PHI, in the course and scope of her employment with those entities, wrote an unsolicited letter to Sentara Hampton General and Mary Immaculate Hospital falsely stating that Drs. Fuste and Vanden Hoek had been "unprofessional", "uncooperative" and that they should not be credentialed. Her intent in writing this letter was to prevent their medical practice from becoming successful. This act was malicious and effected in furtherance of the conspiracy discussed above.

45. In the summer of 2000, Barry Gross, acting in the course and scope of his employment with RHA and Riverside, wrote a letter to the Sentara and Mary Immaculate credentialing committees falsely and maliciously stating that Drs. Fuste and Vanden Hoek had

been "very uncooperative" at Riverside and had "left suddenly". His intent in writing this letter was to prevent their medical practice from becoming successful.

46. In the spring and summer of 2000, many parents and grandparents of Plaintiffs' former patients called Riverside and Healthkeepers in an attempt to locate them, and resume their relationships. Riverside and Healthkeepers published the following false statements regarding Drs. Fuste and Vanden Hoek in wilful and malicious attempts to harm their business.

a) Margie Rosso called the Riverside Pediatrics office at Main Street and spoke with the front desk clerk. Ms. Rosso was informed that Drs. Fuste and Vanden Hoek left suddenly, and their whereabouts were unknown.

b) Ms. Rosso then called Rita Atherton at Healthkeepers to inquire as to where she could find Drs. Fuse and Vanden Hoek. Atherton informed her they had left suddenly and that she should find another pediatrician.

c) Michael Freeman, Beverly Innis, Frances Goff, Kimberly Woods, Tiffanie Smith, Dawn Guye, Janey Cary, Pamela Dessasso, Carolyn Fite, Deborah Harvet, Laurie Crosby, Dena Day, Dana Taylor, Stephanie Woodrum and Traci Poole, all parents or grandparents of Plaintiffs' patients, called the Riverside pediatrics front desk and were informed that Drs. Fuste and Vanden Hoek had left their practices suddenly and their whereabouts were unknown.

d) Vergie Outlaw called Kimberly Martin at Riverside inquiring as to Drs. Fuste and Vanden Hoek and was informed that they were not able to work in this area.

e) Ms. Delling called Kimberly Martin inquiring as to Dr. Fuste's whereabouts and was informed that Dr. Fuste was not be able to work in this area.

f) Fay Carr learned that Dr. Fuste had opened a practice somewhere in Newport News. Her son had occasion to see Dr. Ewing at Riverside Express, and she asked Dr. Ewing to call Dr.

Fuste for follow-up. Dr. Ewing consulted with the Riverside and he then informed Ms. Carr she had been misinformed and that Dr. Fuste had left town.

g) Jennifer Ballard called Healthkeepers and spoke with someone there named "Theresa". She was informed that Drs. Fuste and Vanden Hoek will "never be put back on the Healthkeepers list of providers because of the way they left Riverside."

47. The actions of RHA, Riverside Hospital, RPS, Healthkeepers and PHI constituted defamation of the Plaintiffs and arose from an unlawful combination to intentionally injure Plaintiffs and their business. These defamatory communications were published in bad faith.

48. The actions of RHA, Riverside Hospital and RPS conspiring with Healthkeepers and PHI constituted a combination to willfully and maliciously injure the Plaintiffs in the practice of their profession in violation of Virginia Code §18.2-499 and 500.

COUNT I

Termination of Dr. Fuste in Violation of Virginia Public Policy

49. Paragraphs 1 through 48, above, are incorporated in this count by reference.

50. Riverside's actions set forth herein constitute the wrongful termination of Dr. Fuste in violation of Virginia public policy.

51. The public policies supporting this claim are found in each of the following statutes:

- a) Virginia Code §54.1-111 (8) (making unlawful any act committed by a physician in violation of professional regulations and/or statutes);
- b) Virginia Code §54.1-2914 (prohibiting physicians from engaging in unlawful and unethical acts, acts in violation of state and federal law, etc);
- c) Virginia Code §54.1-2902 (prohibiting persons from engaging in, or facilitating, practice of medicine without a license);
- d) Virginia Code §54.1-111(4) (prohibiting the performance of acts restricted by statute to persons holding appropriate licenses and certifications; prohibiting unlawful use, or facilitating unlawful use of a medical license);
- e) Virginia Code §54.1-2952 (requiring proper supervision of residents);
- f) Virginia Code §32.1-310, et seq. (prohibiting healthcare providers from engaging in, or facilitating, waste, fraud and abuse);
- g) 12 VAC 30-10-50 A(5) & (6) (requiring Riverside to administer pediatric vaccines regardless of ability to pay).
- h) Commonwealth of Virginia Department of Medical Assistance Services Physician Manual; Chapter II, "Provider Participation Requirements" (requiring proper supervision of residents).

52. Each of the statutes and regulations set forth above, standing alone, supports Dr. Fuste's cause of action for termination in violation of Virginia public policy.

53. For a physician to practice such that any statute or regulation governing the practice of medicine is violated is, itself, a Class I misdemeanor. The policies mandated by RHA and Riverside, about which Plaintiffs complained and in which they refused to accede, effectively placed the Plaintiffs in the untenable position of having to commit repeated Class I misdemeanors in order to keep their jobs and resulted in the destruction of their careers with RHA.

54. Riverside's and RHA's actions as set forth above were the legal, actual and proximate cause of the damages suffered by Dr. Fuste. These damages include loss of back pay, front pay, and benefits as well as humiliation, pain, suffering, anxiety and loss of quality of life. Dr. Fuste has suffered total pecuniary damages in an amount not less than ONE MILLION DOLLARS AND 00/100 DOLLARS (\$1,000,000.00). She has suffered nonpecuniary damages in the amount of THREE MILLION AND 00/100 DOLLARS (\$3,000,000.00). Moreover, Riverside's actions were willful, malicious and outrageous and Dr. Fuste is entitled to an award of punitive damages.

COUNT II

Termination of Dr. Vanden Hoek in Violation of Virginia Public Policy

55. Paragraphs 1 through 54, above, are incorporated in this count by reference.
56. Riverside's and RHA's actions set forth herein constitute the wrongful termination of Dr. Vanden Hoek in violation of Virginia public policy.
57. The Public policies supporting this claim are found in each of the following statutes:
- a) Virginia Code §54.1-111(8) (making unlawful any act committed by a physician in violation of professional regulations and/or statutes);
 - b) Virginia Code §54.1-2914 (prohibiting physicians from engaging in unlawful and unethical acts, acts in violation of state and federal law, etc);
 - c) Virginia Code §54.1-2902 (prohibiting persons from engaging in, or facilitating, practice of medicine without a license);
 - d) Virginia Code §54.1-111(4) (prohibiting the performance of acts restricted by statute to persons holding appropriate licenses and certifications; prohibiting unlawful use, or facilitating unlawful use of a medical license);
 - e) Virginia Code §54.1-2952 (requiring proper supervision of residents);

- f) Virginia Code §32.1-310, et seq. (prohibiting healthcare providers from engaging in, or facilitating, waste, fraud and abuse);
- g) 12 VAC 30-10-50 A(5) & (6) (requiring Riverside to administer pediatric vaccines regardless of ability to pay).
- h) Commonwealth of Virginia Department of Medical Assistance Services Physician Manual; Chapter II, "Provider Participation Requirements" (requiring proper supervision of residents).

58. Each of the statutes and regulations set forth above, standing alone, supports Dr. Vanden Hoek's cause of action for termination in violation of Virginia public policy.

59. For a physician to practice such that any statute or regulation governing the practice of medicine is violated is, itself, a Class I misdemeanor. The policies mandated by RHA and Riverside, about which Plaintiffs complained and in which they refused to accede, effectively placed the Plaintiffs in the untenable position of having to commit repeated Class I misdemeanors in order to keep their jobs and resulted in the destruction of their career with RHA.

60. Riverside's actions as set forth above were the legal, actual and proximate cause of the damages suffered by Dr. Vanden Hoek. These damages include loss of back pay, front pay, and benefits as well as humiliation, pain, suffering, anxiety and loss of quality of life. Dr. Vanden Hoek has suffered total pecuniary damages in an amount not less than SEVEN HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS (\$750,000.00). She has suffered nonpecuniary damages in the amount of THREE MILLION AND 00/100 DOLLARS (\$3,000,000.00). Moreover, Riverside's actions were willful, malicious and outrageous and Dr. Vanden Hoek is entitled to an award of punitive damages.

COUNT III

Defamation of Dr. Fuste

61. Paragraphs 1 through 60, above, are incorporated in this count by reference.

62. RHA, Riverside Hospital, RPS, Healthkeepers and PHI, through their various officers and agents, published false and defamatory information injuring Dr. Fuste in her profession.

63. This false information was communicated to persons outside their respective organizations and, in many instances, this information was unsolicited. These communications were made in bad faith.

64. The Defendants actions constitute both common law defamation and defamation *per se*.

65. Defendants' actions as set forth above were the legal, actual and proximate cause of the damages suffered by Dr. Fuste. These damages include loss of back pay, front pay, and benefits as well as humiliation, pain, suffering, anxiety and loss of quality of life. Dr. Fuste has suffered total pecuniary damages in an amount not less than ONE MILLION DOLLARS AND 00/100 DOLLARS (\$1,000,000.00). She has suffered nonpecuniary damages in the amount of THREE MILLION AND 00/100 DOLLARS (\$3,000,000.00). Moreover, Riverside's actions were willful, malicious and outrageous and Dr. Fuste is entitled to an award of punitive damages.

COUNT IV

Defamation of Dr. Vanden Hoek

66. Paragraphs 1 through 65, above, are incorporated in this count by reference.

67. RHA, Riverside Hospital, RPS, Healthkeepers and PHI, through their various

officers and agents, published false and defamatory information injuring Vanden Hoek in her profession.

68. This false information was communicated to persons outside their respective organizations and, in many instances, this information was unsolicited. These communications were made in bad faith.

69. The Defendants actions constitute both common law defamation and defamation *per se*.

70. Defendants' actions as set forth above were the legal, actual and proximate cause of the damages suffered by Dr. Vanden Hoek. These damages include loss of back pay, front pay, and benefits as well as humiliation, pain, suffering, anxiety and loss of quality of life. Dr. Vanden Hoek has suffered total pecuniary damages in an amount not less than SEVEN HUNDRED FIFTY THOUSAND DOLLARS AND 00/100 DOLLARS (\$750,000.00). She has suffered nonpecuniary damages in the amount of THREE MILLION AND 00/100 DOLLARS (\$3,000,000.00). Moreover, Defendants' actions were willful, malicious and outrageous and Dr. Vanden Hoek is entitled to an award of punitive damages.

COUNT V

Conspiracy to Injure Dr. Fuste in the Practice of Her Profession

71. Paragraphs 1 through 70, above, are incorporated in this count by reference.

72. RHA, Riverside Hospital, RPS, Healthkeepers and PHI conspired with each other to injure Dr. Fuste in her profession. Specifically, agents and officers of these entities communicated and conspired with each other to issue and publish false and defamatory information about Dr. Fuste's conduct while she was employed with RHA.

73. Defendants' conduct was willful, malicious and outrageous and Dr. Fuste

has been significantly harm by this conduct. Defendants conduct violates Va. Code §18.2-500.

74. Defendants' actions as set forth above were the legal, actual and proximate cause of the damages suffered by Dr. Fuste. These damages include loss of back pay, front pay, and benefits as well as humiliation, pain, suffering, anxiety and loss of quality of life. Dr. Fuste has suffered total pecuniary damages in an amount not less than ONE MILLION DOLLARS AND 00/100 DOLLARS (\$1,000,000.00). She has suffered nonpecuniary damages in the amount of THREE MILLION AND 00/100 DOLLARS (\$3,000,000.00). Moreover, Defendants' actions were willful, malicious and outrageous and Dr. Fuste is entitled to an award of punitive damages.

COUNT VI

Conspiracy to Injure Dr. Vanden Hoek in the Practice of Her Profession

75. Paragraphs 1 through 74, above, are incorporated in this count by reference.

76. RHA, Riverside Hospital, RPS, Healthkeepers and Peninsula Healthcare conspired with each other to injure Dr. Vanden Hoek in her profession. Specifically, agents and officers of these entities communicated and conspired with each to issue and publish false and defamatory information about Dr. Vanden Hoek's conduct while she was employed with RHA.

77. Defendants' conduct was willful, malicious and outrageous and Dr. Vanden Hoek has been significantly harm by this conduct. Defendants conduct violates Va Code §18.2-500.

78. Defendants' actions as set forth above were the legal, actual and proximate cause of the damages suffered by Dr. Vanden Hoek. These damages include loss of back pay, front pay, and benefits as well as humiliation, pain, suffering, anxiety and loss of quality of life. Dr. Vanden Hoek has suffered total pecuniary damages in an amount not less than SEVEN HUNDRED FIFTY THOUSAND DOLLARS AND 00/100 DOLLARS (\$750,000.00). She has suffered nonpecuniary damages in the amount of THREE MILLION AND 00/100 DOLLARS

(\$3,000,000.00). Moreover, Defendants' actions were willful, malicious and outrageous and Dr. Vanden Hoek is entitled to an award of punitive damages.

JURY TRIAL DEMANDED

Plaintiffs request a jury trial on all issues raised in this Motion for Judgment.

WHEREFORE, Dr. Rosa Fuste and Dr. Tien L. Vanden Hoek respectfully pray that they be awarded damages in the amounts of FOUR MILLION DOLLARS (\$4,000,000.00) and THREE MILLION SEVEN HUNDRED FIFTY THOUSAND DOLLARS (\$3,750,000.00), respectively, for back pay, front pay and all compensatory damages incurred as a result of their wrongful terminations. Moreover, Plaintiffs request that punitive damages be awarded against Riverside in amounts to be proved at trial, and that they be awarded their costs and fees incurred in bringing this action plus prejudgment and post-judgment interest.

Respectfully submitted,

ROSA FUSTE, M.D.

TIEN L. VANDEN HOEK, M.D.

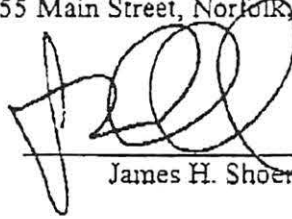
By: 

Of Counsel

Duncan Garnett
VSB#12355
James H. Shoemaker, Jr.
VSB# 33148
Douglas E. Miller
VSB# 38951
PATTEN, WORNOM, HATTEN & DIAMONSTEIN, L.C.
12350 Jefferson Avenue
Suite 360
Newport News, Virginia 23602
(757) 223-4500

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Second Amended Motion for Judgment was served via first class mail to Robyn Hansen, Jr., Jones, Blechman, Woltz & Kelly, P.C., 600 Thimble Shoals Blvd., Newport News, Virginia 23612 and John Franklin, III, Taylor and Walker, P.C. 1300 First Virginia Tower, 555 Main Street, Norfolk, Virginia 23514 this 18th day of July, 2001.

A handwritten signature in black ink, appearing to read 'James H. Shoemaker, Jr.', written over a horizontal line.

James H. Shoemaker, Jr.

THIS AGREEMENT. effective as of 11/16/93, by and between RIVERSIDE HEALTHCARE ASSOCIATION, INC. ("RRMC") and Rosa M. Fuste, M.D. ("Physician").

WHEREAS, RRMC operates a physician office under the name "Riverside Pediatric Center" hereinafter referred to as "the Center".

WHEREAS, Physician is a physician duly licensed by the Commonwealth of Virginia and has agreed to provide professional services for RRMC under the terms hereinafter set forth:
and

WHEREAS, Physician is willing to hold confidential certain sensitive and valuable information disclosed or available to Physician in the course of his services for RRMC and to refrain from competitive business activities in the event such services should be terminated.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That for and in consideration of the premises and mutual covenants herein contained, the parties agree as follows:

1. EMPLOYMENT

RRMC hereby employs Physician and Physician hereby accepts such employment upon the terms and conditions hereinafter set forth.

2. TERM

The term of this Agreement shall be ~~March 1, 1994 to April 30, 1997~~ ^{JANUARY 1, 1994 DECEMBER 31, 1996} *Conf GHB*, unless sooner terminated as herein provided. If neither party notifies the other, by no later than ninety (90) days prior to the end of the initial or any extension term hereof, that this Agreement shall be allowed to expire at the end of such term, this Agreement shall automatically be extended for an additional year. Either party may terminate this agreement without cause by giving the other party Ninety (90) days notice.

3. SERVICES

- a. Physician shall provide medical professional coverage in accordance with reasonable schedules of coverage prepared by RRMC.
- b. During the scheduled period of coverage, Physician shall be responsible for the care of all patients entering the Center for treatment.
- c. Upon the completion of the period of services for which Physician is scheduled for any day, Physician shall complete any emergency treatment which Physician has begun or arrange with the succeeding physician for the completion of such treatment. In addition, Physician shall complete the medical records for all patients treated by him that day, including but not limited to, the following items: relevant history, physical examination, laboratory reports, x-ray interpretations, diagnosis and disposition with instructions to the patient.
- d. Physician hereby agrees to become a participating provider in all managed care and other third-party payors, including, but not limited to, HMO's, PPO's, Medicare, and Medicaid in conjunction with Riverside Health System.

4. STANDARDS

- a. Physician shall comply with the principles of ethics of the American Medical Association, all federal, state and municipal laws regulating the practice of medicine, the standards of the Joint Commission on Accreditation of Healthcare Organizations, and the bylaws, rules and regulations of the Center.
- b. Physician shall use the currently approved methods and techniques of his professional specialty in the services to be rendered by him.
- c. Physician shall take all necessary steps to obtain and thereafter maintain Physician's board certification in the following specialty or practice. Area: Pediatrics.
- (d.) Physician shall not engage in any personal or professional conduct which, in the reasonable determination of RRMC does or may materially adversely affect the image or standing of RRMC or the Center.
- e. The failure of Physician to observe any of the requirements of this Section 4, including without limitation physician's best efforts to maintain or obtain board certification, shall be grounds for termination of employment hereunder with cause by RRMC at RRMC option.

5. FEES

- a. Physician shall enter on the form provided by RRMC a description of services rendered. Billing and collection of fees at the Center shall be handled solely by RRMC. Physician shall execute such authorization and provide such information as RRMC may require in connection with billing and collection.

All money and checks payable to and received by Physician from or on behalf of patients for services rendered in the Center, including any Medicaid/Medallion

fees or payments, shall be promptly remitted and endorsed over to RRMC or its designee.

6. COMPENSATION

For services rendered by Physician under this Agreement, Physician shall be paid as set forth in Schedule A to this Agreement.

7. TEMPORARY COVERAGE

Physician shall be responsible for obtaining the services of a substitute physician approved by RRMC in the event of Physician's absence from the performance of services.

8. INSURANCE

- a. RRMC shall provide Physician with professional liability insurance coverage in the amounts of \$1,000,000 per claim and \$3,000,000 aggregate, claims made. In the event Physician wishes to maintain a policy in effect prior to Physician's employment by RRMC such will be permitted by RRMC provided that the coverage and insurance company are satisfactory, and further provided that, at reasonable intervals as RRMC may request, Physician furnishes RRMC with a certificate from such insurance company evidencing such coverage and agreeing to notify RRMC regarding any claims, cancellation or termination. RRMC will negotiate in good faith regarding a reasonable reimbursement of Physician for the cost of maintaining such policy.
- b. If upon termination of this Agreement Physician does not maintain professional liability insurance in similar amount and with the same insurance company as in effect during Physician's employment with RRMC, RRMC shall purchase so-

called reporting form or tail professional liability insurance with respect to services rendered before termination in the amount in effect on termination.

9. BENEFITS

Physician shall be entitled to participate in various employee benefits attached hereto as Schedule B.

10. TERMINATION

This Agreement may be terminated immediately with cause, or without cause by either party's giving written notice of termination to the other party at least Ninety (90) days before the date of termination set forth in the notice. Upon termination, Physician shall be paid his salary and benefits accrued to the date of termination of services rendered through the date of termination only, and not additional amounts.

RRMC may require that Physician provide services hereunder during the Ninety (90) day notice period referred to above; alternatively, at its option, RRMC may (at any time upon or after giving such notice) elect to pay Physician the minimum amounts guaranteed under Schedule A with respect to all or any remaining portion of such notice period and require that Physician no longer render any services hereunder.

For purposes hereof, the term "cause" shall include, but not be limited to, any act or omission which pursuant to RRMC's then current policies would be grounds for termination of an employee, as well as (a) channelling/steering of patients for personal enrichment, (b) double billing, (c) financial misbehavior, (d) the embezzlement or other criminal misappropriation of any funds or property of RRMC, (e) receipt by Physician of any payment made in order to induce Physician to act contrary to the business interests of RRMC, (f) conviction of a felony involving moral turpitude, (g) a material breach of any of Physician's obligations hereunder, (h)

Physician's failure to cooperate with RRMC management in reasonable ways in connection with the development and operation of the Center, (i) a material breach of any Physician's obligations hereunder, (j) Physician's failure to perform the professional services competently and in a manner commensurate with the standard of care for similar settings in the community, (k) Physician's failure to properly, accurately, and timely complete medical records as required by RRMC, third party payors, and/or applicable law, including without limitation falsification for the purpose of enhancing charges, (l) Physician's absence from work (exclusive of vacation) for a period in excess of thirty (30) days (ninety (90) days in the event of disability) during any calendar year of this Contract, (m) Physician shall have his license to practice medicine in the Commonwealth of Virginia revoked, or conditioned in any manner (for good cause and after all appeals are exhausted) which affects Physician's ability to perform his duties hereunder, detracts from his reputation, or constitutes any finding of improper performance or conduct, or (n) in the event of physical or mental deterioration of Physician's capabilities and/or abilities which materially affect or interfere with the performance of his duties as set forth in this contract and continue for a period in excess of thirty (30) consecutive days.

11. ACTIVITIES DURING TERM OF AGREEMENT, CONFIDENTIALITY

Physician is employed to practice medicine actively and exclusively on behalf of RRMC. Physician will not engage in the practice of medicine except pursuant to this Agreement, and shall not contract with or accept employment from, or become associated, affiliated or connected with, directly or indirectly, any hospital emergency department, free-standing emergency facility, urgent or immediate care center, or conduct any private practice or other practice of medicine during the term of this Agreement without written prior consent from RRMC.

Physician agrees that RPMC management and business materials are proprietary and confidential, that all patient records are the property of RPMC and are confidential, and that Physician shall keep confidential and return at the termination of this Agreement all such materials and shall not photocopy or otherwise duplicate or allow (with knowledge) duplication of such materials.

12. POST-TERMINATION ACTIVITIES

Physician recognizes and acknowledges that the identity of RHA patients, employees and contractors, and the accounts and business information related thereto, are unique and valuable assets of RHA. In consideration of his engagement hereunder, compensation to be paid to him, and the disclosure of RHA proprietary information and trade secrets to him, Physician covenants and agrees that upon termination or expiration of the term of this Agreement, Physician will immediately deliver to RHA all correspondence, letters, contracts, patient lists, promotional literature, supplies, and all other materials and records of any kind in his possession or under his control relating to the business of the Practice.

The training and expertise developed by RHA in Physician is a valuable resource to RHA. If Physician were to terminate his relationship with RHA and go into competition with RHA, Physician would unfairly benefit from the training, access to confidential business information, and business relationships. Therefore, upon expiration and non-renewal of this Agreement at the conclusion of its initial or any extension term, and upon termination of this Agreement by Physician or RHA [other than termination of Physician by RHA without cause,] Physician shall not, for a period of twenty-four (24) months from date of expiration or termination, contract with or accept employment from, or become associated, affiliated, or connected with, directly or indirectly, family or general practice, free standing emergency

facility, or pediatric practice located within a three mile radius of any Riverside facility. Physician also agrees that he/she shall not accept employment by any competing entity, to include hospital company, insurance company, or health maintenance organization within the Cities of Newport News, Hampton, Poquoson, Williamsburg or the Counties of York, Gloucester, James City, Isle of Wight, or the Town of Smithfield.

Physician acknowledges that the breach or a threatened breach of the covenants and provisions of this Section 12 will result in immediate and irreparable injury to RHA and Physician agrees that RHA shall be entitled to specific enforcement of such provisions and to an injunction restraining Physician from any violation thereof. Nothing herein shall be construed as prohibiting RHA from pursuing any other legal or equitable remedies that may be available to it for any such breach or threatened breach, including the recovery of damages from Physician and the costs, including attorney's fees, of pursuing such remedies.

Physician acknowledges and agrees that the restrictions and covenants set forth in this Section 12 are reasonable and necessary in all respects. If, however, any court of law shall determine that any element of those covenants or restrictions shall be unenforceable, then such provisions shall remain in full force and effect and shall be applicable and binding in accordance with their terms to the fullest extent deemed enforceable. The waiver by RHA or its failure to enforce any particular provision of this Agreement shall not constitute a waiver of any other provision of this Agreement, or of any subsequent breach by Physician, or RHA right to enforce any and all provisions of this Agreement in accordance with its terms.

13. MEDICAL JUDGMENT

In performing the services herein specified, Physician is acting as a physician practicing his profession. RRMC shall have no right to control or direct the methods or manner of performing the services which Physician shall perform in accordance with the currently approved standards of his professional specialty. Nothing in this Agreement shall be interpreted as authorizing Physician to contract for or otherwise incur any liability for or on behalf of RRMC.

14. FEDERAL GOVERNMENT ACCESS TO RECORDS

The Secretary of the Department of Health and Human Services, the Comptroller General, and their duly authorized representatives shall be given access by Physician to the books, documents, and records necessary to verify the nature of the extent of the costs of the services provided by him for a period of four (4) years after the performance of services by him under this Agreement for which payments may be made under the Medicare or Medicaid programs.

15. NONASSIGNABILITY

Physician's rights and obligations under this Agreement shall not be assignable. RRMC's rights and obligations under this Agreement may be assigned to any affiliate of RRMC.

16. AMENDMENT

This Agreement may be amended only by the written consent of the parties.

IN WITNESS WHEREOF, Riverside Hospital, Inc. and Physician have executed this Agreement as of the 11 day of July, 1993.

Riverside Hospital, Inc.

By:

Gerald R. Brink
Gerald R. Brink
President

Title:

Witness:

Physician

Rosa M. Fuste, M.D.
Rosa M. Fuste, M.D.

Witness:

SCHEDULE A COMPENSATION

BASE SALARY

- A. Physician shall be paid base salary in equal bi-weekly installments of ~~\$5,269.23~~ ^{\$5,346.15} for 1 ^{year} ~~year~~ total base compensation of \$100,000/year.
- B. Physician shall work a minimum of 40 hours per week.

TAX WITHHOLDING

All compensation to physician shall be subject to federal, state and other withholding taxes as required by law.

SCHEDULE B

Employee Benefits

| | |
|------------------------------------|------------------|
| Vacation | 4 weeks annually |
| Holidays | 7 paid holidays |
| Continuing Medical Education Leave | 1 week annually |
| Short-Term Sick Leave | 12 days annually |

(Benefits may be negotiated with physician)

FIXED

Health Insurance
Life Insurance
Social Security (50% paid by RRMC)
Workmen's Compensation (100% paid by RRMC)
Retirement Plan
Long-Term Disability Plan

(Benefits equivalent to those offered to RRMC Management)

OTHER

Child Care and Learning Center
Employee Assistance Program - Options
Credit Union
Tax Sheltered Annuity
Hospitalization Discount (20% after insurance)
Wellness Center

JOB DESCRIPTION

Associate Director of Pediatrics

- I. Supervision of personnel in the outpatient department.
 - A. Residents (Transitional and Family Practice), Interns, and Medical Students.
 1. Assure that they are properly instructed in history taking, interview techniques, and in performing physical examinations.
 2. Indoctrinate them in basic office management and personnel management.
 3. Assure that the patients are seen in a timely, orderly sequence by the physician-in-training.
 4. Schedule or conduct classes and/or conferences in appropriate clinical subjects.
 - B. Nursing personnel.
 1. Schedule appropriate in-service training sessions.
 2. Assure that there is appropriate equipment and staff present to conduct the clinic in an orderly, efficient manner.
 - C. Supervise nurse practitioners and other personnel.
- II. Attend scheduled conferences, Pediatric departmental meetings, and the monthly pediatric Staff meetings.
- III. In the absence of the Director of Pediatric Education, the Associate Director will assume the Director's duties as necessary.
- IV. The Associate Director will fill out or sign outpatient insurance forms and any other appropriate correspondence.
- V. To make every effort to maintain accreditation for the program of continuing medical education in the broad field of pediatrics for the members of the staff of the Department and Riverside Regional Medical Center.
- VI. To participate in the Quality Assurance functions of the Department of Pediatrics of Riverside Regional Medical Center.
- VII. To interact with other members of the institution and staff as needed to fulfill any duties and responsibilities for the residency program.

FILE 10-11
In the event of absence of the Associate Director

THIS AGREEMENT, effective as of March 1997 by and between RIVERSIDE HEALTHCARE ASSOCIATION, INC. ("RRMC") and Tien L. Vanden Hoek, M.D. ("Physician").

WHEREAS, RRMC operates a physician office under the name "Riverside Pediatric Center" hereinafter referred to as "the Center".

WHEREAS, Physician is a physician duly licensed by the Commonwealth of Virginia and has agreed to provide professional services for RRMC under the terms hereinafter set forth; and

WHEREAS, Physician is willing to hold confidential certain sensitive and valuable information disclosed or available to Physician in the course of his services for RRMC and to refrain from competitive business activities in the event such services should be terminated.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That for and in consideration of the premises and mutual covenants herein contained, the parties agree as follows:

1. EMPLOYMENT

RRMC hereby employs Physician and Physician hereby accepts such employment upon the terms and conditions hereinafter set forth.

TVH's orig

EXHIBIT

B

2. TERM

The term of this Agreement shall be March 1, 1994 to April 30, 1997, unless sooner terminated as herein provided. If neither party notifies the other, by no later than ninety (90) days prior to the end of the initial or any extension term hereof, that this Agreement shall be allowed to expire at the end of such term, this Agreement shall automatically be extended for an additional year. Either party may terminate this agreement without cause by giving the other party Ninety (90) days notice.

3. SERVICES

- a. Physician shall provide medical professional coverage in accordance with reasonable schedules of coverage prepared by RRMC.
- b. During the scheduled period of coverage, Physician shall be responsible for the care of all patients entering the Center for treatment.
- c. Upon the completion of the period of services for which Physician is scheduled for any day, Physician shall complete any emergency treatment which Physician has begun or arrange with the succeeding physician for the completion of such treatment. In addition, Physician shall complete the medical records for all patients treated by him that day, including but not limited to, the following items: relevant history, physical examination, laboratory reports, x-ray interpretations, diagnosis and disposition with instructions to the patient.
- d. Physician hereby agrees to become a participating provider in all managed care and other third-party payors, including, but not limited to, HMO's, PPO's, Medicare, and Medicaid in conjunction with Riverside Health System.

4. STANDARDS

- a. Physician shall comply with the principles of ethics of the American Medical Association, all federal, state and municipal laws regulating the practice of medicine, the standards of the Joint Commission on Accreditation of Healthcare Organizations, and the bylaws, rules and regulations of the Center.
- b. Physician shall use the currently approved methods and techniques of his professional specialty in the services to be rendered by him.
- c. Physician shall take all necessary steps to obtain and thereafter maintain Physician's board certification in the following specialty or practice. Area: Pediatrics.
- d. Physician shall not engage in any personal or professional conduct which, in the reasonable determination of RRMC does or may materially adversely affect the image or standing of RRMC or the Center.
- e. The failure of Physician to observe any of the requirements of this Section 4, including without limitation physician's best efforts to maintain or obtain board certification, shall be grounds for termination of employment hereunder with cause by RRMC at RRMC option.

5. FEES

- a. Physician shall enter on the form provided by RRMC a description of services rendered. Billing and collection of fees at the Center shall be handled solely by RRMC. Physician shall execute such authorization and provide such information as RRMC may require in connection with billing and collection.

All money and checks payable to and received by Physician from or on behalf of patients for services rendered in the Center shall be promptly remitted and endorsed over to RRMC or its designee.

6. COMPENSATION

For services rendered by Physician under this Agreement, Physician shall be paid as set forth in Schedule A to this Agreement.

7. TEMPORARY COVERAGE

Physician shall be responsible for obtaining the services of a substitute physician approved by RRMC in the event of Physician's absence from the performance of services.

8. INSURANCE

- a. RRMC shall provide Physician with professional liability insurance coverage in the amounts of \$1,000,000 per claim and \$3,000,000 aggregate, claims made. In the event Physician wishes to maintain a policy in effect prior to Physician's employment by RRMC such will be permitted by RRMC provided that the coverage and insurance company are satisfactory, and further provided that, at reasonable intervals as RRMC may request. Physician furnishes RRMC with a certificate from such insurance company evidencing such coverage and agreeing to notify RRMC regarding any claims, cancellation or termination. RRMC will negotiate in good faith regarding a reasonable reimbursement of Physician for the cost of maintaining such policy.
- b. If upon termination of this Agreement Physician does not maintain professional liability insurance in similar amount and with the same insurance company as in

effect during Physician's employment with RRMC, RRMC shall purchase so-called reporting form or tail professional liability insurance with respect to services rendered before termination in the amount in effect on termination.

9. BENEFITS

Physician shall be entitled to participate in various employee benefits attached hereto as Schedule B.

10. TERMINATION

This Agreement may be terminated immediately with cause, or without cause by either party's giving written notice of termination to the other party at least Ninety (90) days before the date of termination set forth in the notice. Upon termination, Physician shall be paid his salary and benefits accrued to the date of termination of services rendered through the date of termination only, and not additional amounts.

RRMC may require that Physician provide services hereunder during the Ninety (90) day notice period referred to above; alternatively, at its option, RRMC may (at any time upon or after giving such notice) elect to pay Physician the minimum amounts guaranteed under Schedule A with respect to all or any remaining portion of such notice period and require that Physician no longer render any services hereunder.

For purposes hereof, the term "cause" shall include, but not be limited to, any act or omission which pursuant to RRMC's then current policies would be grounds for termination of an employee, as well as (a) channelling/steering of patients for personal enrichment, (b) double billing, (c) financial misbehavior, (d) the embezzlement or other criminal misappropriation of any funds or property of RRMC, (e) receipt by Physician of any payment made in order to induce Physician to act contrary to the business interests of RRMC, (f) conviction of a felony

involving moral turpitude, (g) a material breach of any of Physician's obligations hereunder, (h) Physician's failure to cooperate with RRMC management in reasonable ways in connection with the development and operation of the Center, (i) a material breach of any Physician's obligations hereunder, (j) Physician's failure to perform the professional services competently and in a manner commensurate with the standard of care for similar settings in the community, (k) Physician's failure to properly, accurately, and timely complete medical records as required by RRMC, third party payors, and/or applicable law, including without limitation falsification for the purpose of enhancing charges, (l) Physician's absence from work (exclusive of vacation) for a period in excess of thirty (30) days (ninety (90) days in the event of disability) during any calendar year of this Contract, (m) Physician shall have his license to practice medicine in the Commonwealth of Virginia revoked, or conditioned in any manner (for good cause and after all appeals are exhausted) which affects Physician's ability to perform his duties hereunder, detracts from his reputation, or constitutes any finding of improper performance or conduct, or (n) in the event of physical or mental deterioration of Physician's capabilities and/or abilities which materially affect or interfere with the performance of his duties as set forth in this contract and continue for a period in excess of thirty (30) consecutive days.

11. ACTIVITIES DURING TERM OF AGREEMENT. CONFIDENTIALITY

Physician is employed to practice medicine actively and exclusively on behalf of RRMC. Physician will not engage in the practice of medicine except pursuant to this Agreement, and shall not contract with or accept employment from, or become associated, affiliated or connected with, directly or indirectly, any hospital emergency department, free-standing emergency facility, urgent or immediate care center, or conduct any private practice or other practice of medicine during the term of this Agreement without written prior consent from RRMC.

Physician agrees that RRMC management and business materials are proprietary and confidential, that all patient records are the property of RRMC and are confidential, and that Physician shall keep confidential and return at the termination of this Agreement all such materials and shall not photocopy or otherwise duplicate or allow (with knowledge) duplication of such materials.

12. POST-TERMINATION ACTIVITIES

Physician recognizes and acknowledges that the identity of RHA patients, employees and contractors, and the accounts and business information related thereto, are unique and valuable assets of RHA. In consideration of his engagement hereunder, compensation to be paid to him, and the disclosure of RHA proprietary information and trade secrets to him, Physician covenants and agrees that upon termination or expiration of the term of this Agreement, Physician will immediately deliver to RHA all correspondence, letters, contracts, patient lists, promotional literature, supplies, and all other materials and records of any kind in his possession or under his control relating to the business of the Practice.

The training and expertise developed by RHA in Physician is a valuable resource to RHA. If Physician were to terminate his relationship with RHA and go into competition with RHA, Physician would unfairly benefit from the training, access to confidential business information, and business relationships. Therefore, upon expiration and non-renewal of this Agreement at the conclusion of its initial or any extension term, and upon termination of this Agreement by Physician or RHA other than termination of Physician by RHA without cause, Physician shall not, for a period of twenty-four (24) months from date of expiration or termination, contract with or accept employment from, or become associated, affiliated, or connected with, directly or indirectly, family or general practice, free standing emergency

facility, or pediatric practice located within a three mile radius of any Riverside facility. Physician also agrees that he/she shall not accept employment by any competing entity, to include hospital company, insurance company, or health maintenance organization in Newport News, Hampton, York County, Poquoson, Gloucester County, James City County, Isle of Wight County, Williamsburg and Smithfield.

Physician acknowledges that the breach or a threatened breach of the covenants and provisions of this Section 12 will result in immediate and irreparable injury to RHA and Physician agrees that RHA shall be entitled to specific enforcement of such provisions and to an injunction restraining Physician from any violation thereof. Nothing herein shall be construed as prohibiting RHA from pursuing any other legal or equitable remedies that may be available to it for any such breach or threatened breach, including the recovery of damages from Physician and the costs, including attorney's fees, of pursuing such remedies.

Physician acknowledges and agrees that the restrictions and covenants set forth in this Section 12 are reasonable and necessary in all respects. If, however, any court of law shall determine that any element of those covenants or restrictions shall be unenforceable, then such provisions shall remain in full force and effect and shall be applicable and binding in accordance with their terms to the fullest extent deemed enforceable. The waiver by RHA or its failure to enforce any particular provision of this Agreement shall not constitute a waiver of any other provision of this Agreement, or of any subsequent breach by Physician, or RHA right to enforce any and all provisions of this Agreement in accordance with its terms.

13. MEDICAL JUDGMENT

In performing the services herein specified, Physician is acting as a physician practicing his profession. RRMC shall have no right to control or direct the methods or manner of

performing the services which Physician shall perform in accordance with the currently approved standards of his professional specialty. Nothing in this Agreement shall be interpreted as authorizing Physician to contract for or otherwise incur any liability for or on behalf of RRMC.

14. FEDERAL GOVERNMENT ACCESS TO RECORDS

The Secretary of the Department of Health and Human Services, the Comptroller General, and their duly authorized representatives shall be given access by Physician to the books, documents, and records necessary to verify the nature of the extent of the costs of the services provided by him for a period of four (4) years after the performance of services by him under this Agreement for which payments may be made under the Medicare or Medicaid programs.

15. NONASSIGNABILITY

Physician's rights and obligations under this Agreement shall not be assignable. RRMC rights and obligations under this Agreement may be assigned to any affiliate of RRMC.

16. AMENDMENT

This Agreement may be amended only by the written consent of the parties.

IN WITNESS WHEREOF, Riverside Hospital, Inc. and Physician have executed this Agreement as of the 25th day of October, 1993.

Riverside Hospital, Inc.

By: Gerald R. Brink
Gerald R. Brink
President

Title: _____

Witness: Michael Donnelly

Physician

Tien Vanden Hoek MD
Tien L. Vanden Hoek, M.D.

Witness: John E. [Signature]

SCHEDULE A COMPENSATION

BASE SALARY

- A. Physician shall be paid base salary in equal bi-weekly installments of \$3,269.23, for a total base compensation of \$85,000/year.
- B. Physician shall work a minimum of 40 hours per week.

TAX WITHHOLDING

All compensation to physician shall be subject to federal, state and other withholding taxes as required by law.

SCHEDULE B

Employee Benefits

| | |
|------------------------------------|------------------|
| Vacation | 4 weeks annually |
| Holidays | 7 paid holidays |
| Continuing Medical Education Leave | 1 week annually |
| Short-Term Sick Leave | 12 days annually |

(Benefits may be negotiated with physician)

FIXED

Health Insurance
Life Insurance
Social Security (50% paid by RRMC)
Workmen's Compensation (100% paid by RRMC)
Retirement Plan
Long-Term Disability Plan

(Benefits equivalent to those offered to RRMC Management)

OTHER

Child Care and Learning Center
Employee Assistance Program - Options
Credit Union
Tax Sheltered Annuity
Hospitalization Discount (20% after insurance)
Wellness Center

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

**ROSA FUSTE, M.D. and
TIEN L. VANDEN HOEK, M.D.,**

Plaintiffs,

v.

AT LAW NO.: 29743-VC

**RIVERSIDE HEALTHCARE ASSOCIATION, INC.,
RIVERSIDE HOSPITAL, INC., RIVERSIDE PHYSICIAN
SERVICES, INC., PENINSULA HEALTHCARE, INC. and
HEALTHKEEPERS, INC.,**

Defendants.

ORDER

This matter came on upon the Demurrers filed on behalf of Riverside Healthcare Association, Inc., Riverside Hospital, Inc., Riverside Physician Services, Inc., Peninsula Healthcare, Inc. and Healthkeepers, Inc., and the Motion for Bill of Particulars filed on behalf of Peninsula Healthcare, Inc. and Healthkeepers, Inc. and was argued by counsel.

And it appearing to the Court that the allegations of plaintiffs' First Amended Motion for Judgment are insufficient to assert the causes of action alleged and otherwise fails to state sufficient facts upon which the relief demanded can be granted. It is accordingly,

ORDERED that the Demurrers filed on behalf of the defendants, Riverside Healthcare Association, Inc., Riverside Hospital, Inc., Riverside Physician Services, Inc., Peninsula Healthcare, Inc. and Healthkeepers, Inc., be and they hereby are sustained with leave to the plaintiffs to file a Second Amended Motion for Judgment on or before July 18, 2001, to which the defendants shall file responsive pleadings within twenty-one (21) days of

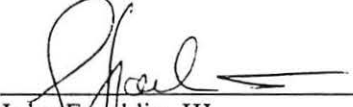
receipt, to which actions of the Court, the plaintiffs, by counsel, objected for the reasons set forth in the record.

Further, in view of the Court's ruling set forth herein permitting the filing of a Second Amended Motion for Judgment, the Court withholds ruling on the Motion for Bill of Particulars filed herein by the defendants, Peninsula Healthcare, Inc. and Healthkeepers, Inc., and will reconsider that motion if filed in response to plaintiffs' Second Amended Motion for Judgment.

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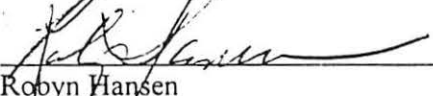
July 23, 2001.
Vincent Conway, Jr.
JUDGE

We ask for this:



John Franklin, III
Counsel for Peninsula Healthcare, Inc.
and Healthkeepers, Inc.

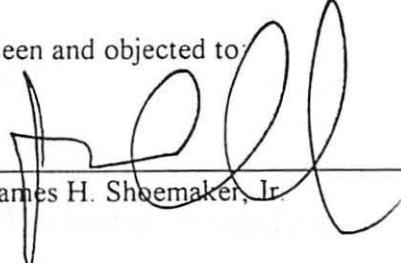
p.d.



Robyn Hansen
Counsel for Riverside Healthcare
Association, Inc., Riverside Hospital,
Inc. and Riverside Physician Associates, Inc.

p.d.

Seen and objected to:



James H. Shoemaker, Jr.

p.q.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ROSA FUSTE, M.D. and
TIEN L. VANDEN HOEK, M.D.,

Plaintiffs,

v.

AT LAW NO.: 29743-VC

RIVERSIDE HEALTHCARE ASSOCIATION, INC.,
RIVERSIDE HOSPITAL, INC., RIVERSIDE PHYSICIAN
SERVICES, INC., PENINSULA HEALTHCARE, INC. and
HEALTHKEEPERS, INC.,

Defendants.

MOTION FOR BILL OF PARTICULARS TO
PLAINTIFFS' SECOND AMENDED MOTION FOR JUDGMENT

The defendants, Peninsula Healthcare, Inc. and Healthkeepers, Inc., move the Court for an Order requiring the plaintiffs to file a Bill of Particulars setting forth the particulars of their claims as to these defendants and specifically setting forth the following particulars:

1. State each fact upon which you rely in alleging that these defendants and specifically, C. Burke King and Mae Ellis Terrebonne intentionally combined and conspired with the other defendants named herein to harm plaintiffs' business maliciously and willfully as alleged in paragraph 34 of plaintiffs' Second Amended Motion for Judgment.

-2. State the specific facts upon which you rely in alleging the matters set forth in paragraph 35 of plaintiffs' Second Amended Motion for Judgment, stating precisely the dates and substance of all communications alleged, and if in writing, produce a copy of each such communication.

3. State the specific facts upon which you rely in alleging the matters set forth in paragraph 36 of plaintiffs' Second Amended Motion for Judgment, stating precisely the dates

and substance of all communications alleged, and if in writing, produce a copy of each such communication.

4. State the specific facts upon which you rely in alleging the matters set forth in paragraph 41 of plaintiffs' Second Amended Motion for Judgment, stating precisely the dates and substance of all communications alleged, and if in writing, produce a copy of each such communication.

5. State the specific facts upon which you rely in alleging the matters set forth in paragraph 42 of plaintiffs' Second Amended Motion for Judgment, stating precisely the dates and substance of all communications alleged, and if in writing, produce a copy of each such communication.

6. State the specific facts upon which you rely in alleging the matters set forth in paragraph 43 of plaintiffs' Second Amended Motion for Judgment, stating precisely the dates and substance of all communications alleged, and if in writing, produce a copy of each such communication.

7. State the specific facts upon which you rely in alleging the matters set forth in paragraph 44 of plaintiffs' Second Amended Motion for Judgment, stating precisely the dates and substance of all communications alleged, and if in writing, produce a copy of each such communication.

8. If not set forth above, state the facts upon which you rely in alleging the matters set forth in paragraphs 62 and 63 of plaintiffs' Second Amended Motion for Judgment, specifically identifying each officer and agent of Healthkeepers, Inc. and/or Peninsula Healthcare, Inc. who you allege published false and defamatory information as to Dr. Fuste

and as to each officer and agent, the precise substance of each publication which you allege was false and defamatory, the date it was published and whether in writing or verbal, and if verbal, by whom and to whom it was communicated, and if in writing, attach a copy of each publication which you allege was false and defamatory, stating further the factual basis upon which you allege that each such publication was false and defamatory.

9. If not set forth above, state the facts upon which you rely in alleging the matters set forth in paragraphs 67 and 68 of plaintiffs' Second Amended Motion for Judgment, specifically identifying each officer and agent of Healthkeepers, Inc. and/or Peninsula Healthcare, Inc. who you allege published false and defamatory information as to Dr. Vanden Hoek and as to each officer and agent, the precise substance of each publication which you allege was false and defamatory, the date it was published and whether in writing or verbal, and if verbal, by whom and to whom it was communicated, and if in writing, attach a copy of each publication which you allege was false and defamatory, stating further the factual basis upon which you allege that each such publication was false and defamatory.

10. If not set forth above, state the facts upon which you rely in alleging in paragraph 72 that these defendants conspired to injure Dr. Fuste in her profession, stating precisely the facts upon which you rely in alleging that agents and officers of these defendants communicated and conspired with each other to issue and publish false and defamatory information about Dr. Fuste's conduct while she was employed with RHA, stating precisely the entire substance of each communication, the date of the communication, the identity of each person publishing each such communication, to whom it was published, the date of the

publication and the purpose for which the communication was made, and if in writing, produce a copy of the communication.

11. If not set forth above, state the facts upon which you rely in alleging in paragraph 76 that these defendants conspired to injure Dr. Vanden Hoek in her profession, stating precisely the facts upon which you rely in alleging that agents and officers of these defendants communicated and conspired with each other to issue and publish false and defamatory information about Dr. Vanden Hoek's conduct while she was employed with RHA, stating precisely the entire substance of each communication, the date of the communication, the identity of each person publishing each such communication, to whom it was published, the date of the publication and the purpose for which the communication was made, and if in writing, produce a copy of the communication.

12. State specifically all actions by these defendants which you allege were willful, malicious and outrageous so as to entitle Dr. Fuste to an award of punitive damages.

13. State specifically all actions by these defendants which you allege were willful, malicious and outrageous so as to entitle Dr. Vanden Hoek to an award of punitive damages.

PENINSULA HEALTHCARE, INC. and
HEALTHKEEPERS, INC.

By Christopher J. Wrenken
Of Counsel

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ROSA FUSTE, M.D. and
TIEN L. VANDEN HOEK, M.D.,

Plaintiffs,

v.

AT LAW NO.: 29743-VC

RIVERSIDE HEALTHCARE ASSOCIATION, INC.,
RIVERSIDE HOSPITAL, INC., RIVERSIDE PHYSICIAN
SERVICES, INC., PENINSULA HEALTHCARE, INC. and
HEALTHKEEPERS, INC.,

Defendants.

DEMURRER TO PLAINTIFFS'
SECOND AMENDED MOTION FOR JUDGMENT

The defendants, Peninsula Healthcare, Inc. and Healthkeepers, Inc., demur to plaintiffs' Second Amended Motion for Judgment on the grounds that it fails to allege a cause of action as to these defendants and fails to state the facts upon which the relief demanded can be granted and specifically on the grounds as hereinafter set forth:

1. That plaintiffs' Second Amended Motion for Judgment misjoins causes of action as to both the plaintiffs and the defendants.
2. That Count III of plaintiffs' Second Amended Motion for Judgment fails to allege a cause-of action for either common law defamation or defamation per sé as to these defendants in that it fails to allege the specific defamation attributable to either of these defendants as to each of the plaintiffs and otherwise alleges matters which constitute opinion and therefore are not defamatory as a matter of law.
3. That Count IV of plaintiffs' Second Amended Motion for Judgment fails to allege a cause of action for either common law defamation or defamation per sé as to these defendants

in that it fails to allege the specific defamation attributable to either of these defendants as to each of the plaintiffs and otherwise alleges matters which constitute opinion and therefore are not defamatory as a matter of law.

4. That Count V fails to allege a cause of action for conspiracy and otherwise fails to allege a violation of Va. Code §18.2-500.

5. That Count VI fails to allege a cause of action for conspiracy and otherwise fails to allege a violation of Va. Code §18.2-500.

WHEREFORE, these defendants move the Court for an Order sustaining their Demurrer and dismissing this action as to them.

PENINSULA HEALTHCARE, INC. and
HEALTHKEEPERS, INC.

By Christopher J. Wrenker
Of Counsel

for John Franklin, III, Esquire
TAYLOR & WALKER, P.C.
Post Office Box 3490
Norfolk, Virginia 23514-3490
(757) 625-7300
(757) 625-1504 (fax)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above and foregoing Demurrer was mailed first-class, postage prepaid to James J. Shoemaker, Jr., Esquire, Patten, Wornom, Hatten & Diamonstein, 12350 Jefferson Avenue, Suite 360, Newport News, Virginia 23602; and to Robyn Hansen, Esquire, Jones, Blechman, Woltz & Kelly, 600 Thimble Shoals Boulevard, Post Office Box 12888, Newport News, Virginia 23612-2888, this 6th day of August, 2001.

for Christopher J. Wrenker
John Franklin, III

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

ROSA FUSTE, M.D.

and

TIEN L. VANDEN HOEK, M.D.,

Plaintiffs,

v.

Law No.: 29743-VC

RIVERSIDE HEALTHCARE ASSOCIATION,
INC., *et al.*,

Defendants.

FILED
01/09/01 PM 3:59
CLERK OF COURT
NEWPORT NEWS, VA

MEMORANDUM OF LAW IN SUPPORT OF DEMURRER

NOW COME the Defendants, Riverside Healthcare Association, Inc., Riverside Hospital, Inc., and Riverside Physician Services, Inc. (hereinafter collectively referred to as "Riverside Defendants"), by counsel, and submit the following memorandum of law in support of the demurrer they filed herein to the Plaintiffs' second amended motion for judgment, and state as follows:

PROCEDURAL HISTORY

This matter was instituted by the Plaintiffs filing a motion for judgment in the Circuit Court for the City of Newport News, Virginia, on or about September 14, 2000. Riverside Defendants filed a demurrer to the motion for judgment. The Defendants Peninsula Healthcare, Inc. and Healthkeepers, Inc. also filed a demurrer and motion for a bill of particulars. In response to these pleadings, the Plaintiffs file a motion for leave to amend the motion for judgment, along with a proposed copy of the first amended motion for judgment on December 20, 2000. This Court then entered a consent order on January 6, 2001, allowing the filing of the first amended motion for judgment.

In response to this first amended motion for judgment, Riverside Defendants again filed a demurrer to the first amended motion for judgment. The Defendants Peninsula Healthcare, Inc. and Healthkeepers, Inc. filed a demurrer, a motion to drop, motion for bill of particulars and motion for profert and craying oyer with respect to these pleadings. A hearing was held before this Honorable Court on June 19, 2001. At this hearing, the Court granted Riverside Defendants and Peninsula Healthcare, Inc. and Healthkeepers, Inc. demurrers to each and every count of the Plaintiffs' first amended motion for judgment. The Court, in granting the demurrers, did afford the Plaintiffs an opportunity to file a second amended motion for judgment on or before July 18, 2001. The Plaintiffs did file their second amended motion for judgment in accord with the Court's order by July 18, 2001. In response to the second amended motion for judgment, Riverside Defendants have again filed a demurrer and the Defendants Peninsula Healthcare, Inc. and Healthkeepers have again filed a demurrer, motion to drop, motion for summary judgment, motion for profert and craying oyer, and motion for bill of particulars.

Significantly, the filing of the instant lawsuit was preceded by the Plaintiffs filing a motion for judgment in the Circuit Court for the City of Newport News in case number 28786-RW-01, solely against the Defendant Riverside Healthcare Association, Inc. for wrongful discharge under Virginia's Public Policy for substantially the same reasons as set forth in the current second amended motion for judgment. The Plaintiffs, however, filed a voluntary motion for a voluntary nonsuit in that case. Thus, this second amended motion for judgment represents the Plaintiffs' fourth pleading against the Defendant Riverside Healthcare Association, Inc. for wrongful discharge and the third pleading against the remaining Riverside Defendants for wrongful discharge and defamation.

STANDARD OF REVIEW

A demurrer tests the sufficiency of an aggressive pleading. "A demurrer admits the truth of all material facts that are properly pleaded." *Bowman v. State Bank of Keysville*, 229 Va. 534, 536, 331 S.E.2d 797, 798 (1985). Ruling on a demurrer is confined to the legal sufficiency of a pleading, and does not involve a consideration of disputed facts. *Bellamy v. Gates and Gill*, 214 Va. 315-16, 200 S.E.2d 533, 534 (1973). Accordingly, the facts that are admitted are: "(1) facts expressly alleged, (2) facts which are by fair intendment impliedly alleged, and (3) facts which may be fairly and justly inferred from the facts alleged." *Ames v. American Nat. Bank*, 163 Va. 1, 37, 176 S.E. 204, 215-16 (1934) quoted in *Duggin v. Adams*, 234 Va. 221 (1987). Moreover, on demurrer, the Court may examine not only the substantive allegations, but also any accompanying exhibit mentioned in the pleading. *Catercorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277 (1993). Even under this standard so strongly construed in favor of the Plaintiffs, the Plaintiffs in this third attempt have failed to set forth any cognizable cause of action against the Riverside Defendants under any of the Counts in the second amended motion for judgment.

DEMURRER TO COUNTS I AND II

As previously noted at the hearing on June 19, 2001, this Court sustained the Riverside Defendants' demurrer to Counts I and II of the first amended motion for judgment. Plaintiffs have failed to make any substantial changes to the second amended motion for judgment from the first amended motion for judgment. Moreover, and quite significantly, the minor changes made have no legal import, and, therefore, this Court should again sustain the Riverside Defendants' demurrer to Counts I and II.

In order to demonstrate these differences, it is instructive to compare the second amended motion for judgment to the first amended motion for judgment. The Plaintiffs have made no changes

from the first amended motion for judgment to the second amended complaint in the allegations contained in paragraphs 1 through 12. In paragraph 13 of the second amended motion for judgment, the Plaintiffs omitted the following language: "The Riverside entities are closely related enterprises. While the term "Riverside", for purposes of this pleading, does not refer to Healthkeepers or PHI, Riverside, or a single Riverside entity, upon information and belief, owns a significant interest in both PHI and Healthkeepers. For purposes of Plaintiffs' conspiracy allegations, each of the corporate Defendants are separate and distinct legal entities. The Riverside entities, on the other hand, and Healthkeepers and PHI, on the other hand, have completely separate management and ownership structures. They are not related to the Riverside entities." The second sentence of paragraph 14 was changed from "[a]fter this termination, Defendants conspired to prevent them from practicing their profession and to injure reputations." to the following substantially similar language, "[a]fter this termination, the Riverside Defendants conspired with PHI and Healthkeepers to prevent patients of Drs. Fuste and Vanden Hoek from following them to their new practice, to injure their professional reputations, and to prevent their new medical practices from becoming viable businesses." Paragraphs 15 through 18 remain the same in both pleadings. In paragraph 19, the Plaintiffs made some grammatical changes to the language contained in the second amended motion for judgment, and eliminated the following sentence found in the first amended motion for judgment: "After the expiration of the written contracts, the Plaintiffs continued to remain employ by RHA with subsequent significant increases in both duties performed and compensation received."

The Plaintiffs then move to the factual allegations that Plaintiffs maintain are directed solely towards "Riverside's wrongful termination of Plaintiffs". Paragraphs 21 and 22 in this section remain unchanged. In paragraph 23, the Plaintiffs add in the second amended motion for judgment the following sentence at the conclusion of the recitation of the same code sections previously cited in Plaintiffs' first amended motion for judgment: "Their protests angered officials of RHA and

Riverside.” Paragraph 24 remained the same except for the fact that the last sentence was moved to create a new paragraph numbered 25. Paragraph 26 is identical to the original paragraph 25 in the amended motion for judgment, except for the fact that the last sentence of paragraph 25 from the first amended motion for judgment was eliminated from paragraph 26 of the second amended motion for judgment and moved to a new paragraph 27. Paragraphs 28 and 29 are then again identical to paragraphs 26 and 27 in the first amended motion for judgment. In paragraph 30, which is almost identical to paragraph 28 of the first amended motion for judgment, the Plaintiffs have inserted “and Riverside” after RHA. In the original motion for judgment filed, only Riverside was mentioned. In the first amended motion for judgment, only RHA was mentioned, and now in the second amended motion for judgment in paragraph 30, both RHA and Riverside are referenced.

Plaintiffs then deleted paragraphs 29, 30 and 31 of the first amended motion for judgment which provided, “RHA slashing of Plaintiffs’ compensation and refusal to yield in the new RVU demands, and made it clear to all concern that the employment relationship between RHA and Plaintiffs must soon end. In taking the action set forth herein, RHA terminated Plaintiffs previously existing terms and conditions of employment, and deliberately made Plaintiffs’ working conditions intolerable so as to cause any reasonable physician in their situations to resign. RHA deliberately intended to force Plaintiffs’ resignation. It knew, when its slashed Plaintiffs’ salary and refused to yield to Plaintiffs’ protest regarding the various legal concerns, that their actions would have this effect.” Paragraph 29 of the first amended motion for judgment. “In any event, on September 21, 1999, identical letters were sent to Drs. Vanden Hoek and Fuste by Dr. Eugene Temple, Jr., their supervisor, essentially resigning for them with an effective date of October 1, 1999, although resignation had yet been submitted or even discussed.” Paragraph 30 of the first amended motion for judgment. “After the Plaintiffs indicated that they would leave on October 1, 1999, identical letters were again sent by Dr. Temple on September 28, 1999, countermanding the first letter and

demanding that Plaintiffs stay and continue to work for half of what they were compensated just one month before. Plaintiffs refused, offering to stay after October 1, 1999, only if their demands were met.” Paragraph 31 of the first amended motion for judgment. In the place instead of those three allegations, the Plaintiffs now plead: “In taking these actions, RHA and Riverside terminated Plaintiffs’ previously existing employment, and deliberately made Plaintiffs’ working conditions intolerable so as to cause any reasonable physician and their situations to leave RHA.” Paragraph 31 of the second amended motion for judgment. Paragraph 32 remains the same. The Plaintiffs then in actual Counts I and II make no changes whatsoever from Counts I and II except to renumber the paragraphs.

Clearly, none of the changes provided by the Plaintiffs in the second amended motion for judgment change the factual allegations contained in the first amended motion for judgment. Moreover, the very same laws that the Plaintiffs set forth in the first amended motion for judgment as the basis for its claim that a wrongful termination had occurred are the very same laws that the Plaintiffs rely on in the second amended motion for judgment. Accordingly, this Court in accord with its prior ruling should sustain the Defendant Riversides’ demurrers to Counts I and II of the Plaintiffs’ motion for judgment.

Moreover, as recognized in this Court’s prior ruling, the Plaintiffs have failed to allege any facts in Counts I and II which would support an action for wrongful discharge under Virginia’s narrow public policy exception to the employment at-will doctrine. Plaintiffs have alleged that they were constructively discharged by Riverside in violation of Virginia public policy. The public policies upon which the Plaintiffs rely to support their claim are listed in paragraph 23 of the factual allegations and paragraph 51 of Count I and 57 of Count II of the second amended motion for judgment. Counts I and II are mirror images of each other with the sole exception that Count I seeks damages for Dr. Fuste, and Count II seeks damages for Dr. Vanden Hoek. The public policies and

the conduct alleged are identical. The Plaintiffs rely upon six statutes enacted by the General Assembly, one regulation promulgated by the Virginia Department of Medical Assistant Services (DMAS), and the Virginia Department of Medical Assistance Services Physicians Manual. Plaintiffs reliance on the above statutes and regulations do not support, as a matter of law, Plaintiffs claims that they have been wrongfully discharged in violation of Virginia public policy.

The Commonwealth of Virginia is both a long and strong adherent to the employment at-will doctrine. Under this doctrine, an employee has no recourse against an employer for a termination of employment unless the employee can establish one of the following: (1) the employee had a contract of employment and the employer's action violated that contract; (2) the employer's action violated a specific statute governing employment relations such as, for example, Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991; and/or (3) the employer's action constituted a violation of a public policy, and thus an exception to the employment at-will doctrine.

In the instant matter, the Plaintiffs, although incorporating their employment contracts, allege in paragraph 19 that these contracts were superseded by "at-will" employment agreements. The contracts on their face, however, indicate that they automatically extend for an additional year each year that one party does not notify the other of the intent to terminate. Inasmuch as this Court is allowed to consider referenced exhibits in ruling on this demurrer, this Court should sustain the Riverside Defendants' demurrer on the basis that the Plaintiffs were not at-will employees, but contract employees whose rights are governed under the contract. *Catercorp., Inc. v. Catering Concepts, Inc.*, 246 Va. at 24. Nevertheless, for the purposes of argument, the Riverside Defendants will assume that the Plaintiffs were at-will employees. However, all reasonable inferences from the motion for judgment must lead the Court to the conclusion that the Plaintiffs resigned from their employment as opposed to the Riverside Defendants having terminated their employment. See, e.g.,

paragraph 31, second amended motion for judgment. In fact, in paragraph 32, the Plaintiffs state, “In each instance, RHA’s and Riverside’s actions constitute wrongful termination, or, in the alternative, wrongful constructive termination.” Although Virginia has recognized a wrongful discharge public policy exception to the employment at-will doctrine in the context of a termination, it has never recognized a constructive discharge as a basis for a public policy wrongful discharge action.

VIRGINIA DOES NOT RECOGNIZE THE CONCEPT OF CONSTRUCTIVE DISCHARGE, AND, THEREFORE, PLAINTIFFS’ MOTION FOR JUDGMENT FAILS TO STATE A CAUSE OF ACTION.

The Virginia Supreme Court has never recognized constructive discharge as a substantive claim for wrongful discharge in violation of public policy. Significantly, in the wrongful discharge claims addressed by the Virginia Supreme Court, the employer had terminated the employee’s employment. See e.g., *Bowman v. State Bank of Keysville*, 229 Va. 534 (1985); *Miller v. SEVAMP*, 234 Va. 462 (1987); *Dray v. New Market Poultry Products, Inc.*, 258 Va. 187, 578 S.E.2d 312 (1999). Moreover, the public policy exception to the employment at-will doctrine is a very narrow exception which the Virginia Supreme Court sparingly applies. See e.g., *Lawrence Chrysler Plymouth v. Brooks*, 251 Va. 94, 465 S.E.2d 806 (1996); *Doss v. Jamco*, 254 Va. 362, 492 S.E.2d 441 (1997). Accordingly, extending this doctrine to situations where the employee resigns is not in keeping with the limited nature of this cause of action.

Although the Circuit Courts in Virginia have indicated uncertainty exists over whether an action for constructive discharge can exist for public policy wrongful discharge (see *Peyton v. United Southern Aluminum Products*, 49 Va. Cir. 187 (City of Richmond, June 9, 1999), the better reasoned opinion is that the action should not be extended to constructive discharges. In *Jones v. Professional Hospitality Resources, Inc.*, 35 Va. Cir. 458 (City of Virginia Beach, February 24, 1995), the Circuit

Court recognized that the Virginia Supreme Court in *Miller v. SEVAMP*, 234 Va. 462, 467- 468, emphasized that the narrow exception to the employment at-will rule is limited to **discharges** which violate public policy. See *Jones v. Professional Hospitality Resources, Inc.* 35 Va. Cir. at 460 (the Court in *Miller* “emphasized that tortious nature of the discharge derives from the employer’s misuse of its freedom to terminate the services of its at-will employees”). The Court in *Jones* reviewed *Lockhart v. Commonwealth Education Systems, Corp.*, 247 Va. 98 (1994), *Progress Printing Co. v. Nichols*, 244 Va. 337 (1992), *Bowman v. State Bank of Keysville*, 229 Va. 534 (1985); *Miller v. SEVAMP*, 234 Va. 462 (1987) and determined that in each case the employee was terminated. Accordingly, the narrow exception to the employment at-will doctrine does not contemplate the resignation of an employee followed by an action for wrongful discharge. The Circuit Court in *Jones* stated, “when the employee chooses to resign, no special rules apply. It is only when the employer actually terminates the employee in violation of some established public policy that the narrow exception is applied.” In *Jones*, the Circuit Court determined that the public policy exceptions to wrongful discharge actions should not be expanded to include constructive discharge based on its recognition that the exception is indeed a narrow one; the courts of Virginia have sparingly applied it; and that the notion of constructive discharge as a basis for the exception has not been recognized in Virginia. *Jones*, 35 Va. Cir. at 460. The wisdom of the *Jones* opinion applies with equal force in the instant matter. Given the narrowness of the exception and the Supreme Court’s continued trend to further restrict its use, this Court should also refuse to expand a cause of action for wrongful discharge to situations where the Plaintiffs resign such as in the instant matter.

Accordingly, the Plaintiffs have failed to state a cause of action for constructive discharge in violation of Virginia public policy , and this court should sustain the defendants demurrer.

**THE PLAINTIFFS HAVE FAILED TO STATE A WRONGFUL DISCHARGE
IN VIOLATION OF VIRGINIA PUBLIC POLICY.**

Even assuming that the Court would recognize constructive discharge, the Plaintiffs have still failed to state a claim for wrongful discharge in violation of Virginia public policy. As noted previously, the public policy exception to the employment at-will doctrine is a very narrow one. The first time the cause of action was recognized was in 1985 in the case of *Bowman v. State Bank of Keyesville*, 229 Va. 534, 331 S.E.2d 797 (1985). In *Bowman*, the Virginia Supreme Court recognized for the first time that at-will employees did have a cause of action for retaliatory discharge in violation of public policy.

This public policy exception is often denoted as a *Bowman* claim or action. The *Bowman* action was later refined in *Miller v. SEVAMP, Inc.*, 234 Va. 462, 362 S.E.2d 915 (1987). In *SEVAMP*, the Court held that a *Bowman* claim exists only to redress “discharges which violate public policy. That is, the policy underlying existing laws designed to protect property rights, personal freedoms, health, safety or welfare of the people in general.” *Miller v. SEVAMP*, 234 Va. at 465, 362 S.E.2d 915, ____ (1987). The Court went on to state “[t]he employment at-will doctrine is a settled part of the law of Virginia. Parties negotiating contracts for rendition of services are entitled to rely on its continued stability. Serious policy considerations, affecting countless business relationships, are involved in any change that may be contemplated. We therefore think it wise to leave to deliberative processes of the General Assembly any substantial alteration of the doctrine.” *SEVAMP*, 234 Va. at 468, 362 S.E.2d 915, ____ (1987).

After *SEVAMP*, the Virginia Supreme Court continued to define the parameters of a *Bowman* claim. See, *Lockhart v. Commonwealth Education Systems Corp.*, 247 Va. 98, 104, 239 S.E.2d 328 (1994); *Lawrence Chrysler Plymouth v. Brooks*, 251 Va. 94, 465 S.E.2d 806 (1996); *Doss v. Jamco*, 254 Va. 362, 492 S.E.2d 441 (1997). In September of 1999, the Virginia Supreme Court again

addressed the limits of such a claim in *Dray v. New Market Poultry Products, Inc.*, 258 Va. 187, 518 S.E.2d 312 (1999). The Court in *Dray* restricted *Bowman* claims to situations where an “expressed statutory right” exists, and the statute is designed to protect the employee as opposed to the general public. *Dray v. New Market Poultry Products, Inc.*, 258 Va. 187 (1999). In *Dray*, a former employee filed a motion for judgment against her employer seeking damages for wrongful termination. The employee alleged that prior to her termination she was a quality control supervisor for a poultry processor. She stated that she was fired on September 11, 1996, after reporting adulterated poultry products to the plant’s on-site government inspectors. She further stated that she had previously made such reports, and that she was told by her supervisor “that she would be fired if she ever again brought plant sanitary deficiencies to the attention of the . . . governmental inspectors”. *Dray*, 258 Va. at 189. In support of her cause of action for wrongful discharge, she cited “the Virginia Meat and Poultry Inspection Act”, Code §§31-884.17 through 884.36. The trial court, in sustaining a demurrer, held that the motion for judgment did not set forth a legally cognizable claim for wrongful discharge. “The court ruled that the plaintiff had failed ‘to extrapolate’ from the broad declaration found in the Act, of an intent to serve ‘the public good’ generally, a specific public policy intended to benefit **the class of individuals** to which the plaintiff belonged. Thus, the court decided, the employee’s claim did not qualify as an exception to the employment-at-will doctrine.” *Dray*, 258 Va. at 190 (emphasis added). The Court, after emphasizing the narrow nature of the *Bowman* exception to the employment at-will doctrine held “the plaintiff seeks to mount a generalized, common-law ‘whistleblower’ retaliatory discharge claim. Such a claim has not been recognized as an exception to Virginia’s employment at-will doctrine, and we refuse to recognize it today.” *Dray*, 258 Va. at 190.

In reaching its conclusion, the Court analyzed the Act upon which the Plaintiff sought to infer Virginia’s public policy. The Court found that the Act did not confer any right or duty upon the

Plaintiff or any other similarly situated Defendant. Instead, the Act's objective was to protect the public at large from adulterated meat. *Dray*, 258 Va. at 190. The Plaintiff countered that the Act had two provisions which provided her with an articulated public policy allowing her to evade the employment at-will doctrine. Specifically, she relied upon Code §3.1-884.22 which forbids intrastate distribution of uninspected, adulterated, or misbranded meat and poultry products, and Code §3.1-884.25(2) which established criminal penalties for any person who "resists, . . . impedes, . . . or interferes" with state meat inspectors. The Court found that these two provisions did not support the Plaintiff because she was not within the class of individuals intended to be benefitted by the statute. The *Dray* decision offers fundamental refinements to the *Bowman* cause of action. It significantly limits the types of statutes upon which a Plaintiff can base a wrongful discharge action. The only statutes upon which a Plaintiff can rely are those statutes intended to benefit a group or class of individuals of which the Plaintiff is a member.

On January 14, 2000, the Supreme Court in *Mitchem v. Counts*, 259 Va. 179, 523 S.E.2d 246 (2000) and *City of Virginia Beach v. Harris*, 259 Va. 220, 523 S.E.2d 239 (2000), continued the refinement set forth in *Dray*, and restricted wrongful termination to those claims in which there is an enunciated public policy set forth in a specific Virginia statute, and the employee seeking protection must show that he/she is a member of the class of individuals intended to benefit from the statute. Harris, a Virginia Beach police officer, alleged that he had been wrongfully terminated from his employment in contradiction of Code §18.2-460, obstruction of justice, and §18.2-469 delay in executing lawful process. Harris alleged that while investigating a criminal activity he had probable cause to seek warrants for two individuals. He was told by his supervisor not to seek the warrants. In disregard of his supervisor's instructions, Harris appeared before a Magistrate and warrants were issued for the two individuals. Once his supervisor had learned that warrants had been obtained, he prevented one warrant from being served and requested that the general district court nolle prosequi

the other warrant. Harris thereafter appeared before the Magistrate and sought warrants for his supervisor charging him with obstruction of justice and delaying the execution of a lawful process. As a result of his actions, he was terminated.

At the trial level, the Judge found that, as a matter of law, Harris had been wrongfully terminated. The issue of damages went to the jury and damages were found against all defendants. On appeal, the Court reversed observing “that in our previous cases dealing with *Bowman*-type exceptions to employment-at-will doctrine, this Court has consistently characterized such exceptions as ‘narrow’”. *Harris*, 523, S.E.2d at 245. Most importantly, the Court explained its rationale for requiring that individuals prove that they are in a class of individuals designed to be protected by the statute. The Court said “[w]hile all statutes of the Commonwealth reflect public policy to some extent, since otherwise they presumably would not have been enacted by our General Assembly, termination of an employee in violation of the policy underlying any one of them does not automatically give rise to a common law cause of action for wrongful discharge.” 523 S.E.2d at 245. The Court held that the public policy from which a wrongful termination claim can rise must be of one of two sources.

The first instance involves laws containing explicit statements of public policy (e.g., it is the public policy of the Commonwealth of Virginia [that] . . . *Lockhart*, 247 Va. at 105, 439 S.E.2d at 331. The second involves laws that do not explicitly state a public policy, but instead are designed ‘the property rights, personal freedoms, health, safety or welfare of the people in general’. *Miller v. SEVAMP, INC.*, 234 Va. 462, 468, 362 S.E.2d 915, 918 (1987). Such laws must be in furtherance of ‘[underlying] established public policy’ that the discharge of employment violates. *Bowman*, 229 Va. at 539, 331 S.E.2d at 801. Each of the illustrative cases . . . cited in ‘*Bowman*, [where we first recognized the public policy exception to the employment-at-will doctrine] involved violations of public policies of that character’ *Miller*, 234 Va. at 468, 362 S.E.2d at 918.

The Court, however, did not stop there. It further held that once “a specific statute falls within one of these categories, an employee must also be a member of the class of individuals that the specific public policy was intended to benefit in order to state a claim for wrongful termination

in violation of the public policy”. *Harris*, 523 S.E.2d 239.

The Court, thereafter, reviewed the specific statute cited by Officer Harris, specifically §18.2-460 which defines the elements of and sets forth the criminal penalties for the crime of obstruction of justice, and, accordingly, reflects the General Assembly’s intent to prohibit interference with the administration of justice. The Court found “[t]hat section does not explicitly state in any public policy, but, like all criminal statutes, it has an underlying public policy protection for the public’s safety and welfare.” *Harris*, 523 S.E.2d at 246. The Court found that Harris was not a member of the class of individuals that the statute was designed to protect.

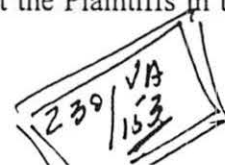
In *Mitchem v. Counts*, the Court again reaffirmed its ruling in *Harris* and *Dray*, finding that the plaintiff must enunciate a state public policy found in Virginia statute and must “[f]urther, . . . to rely on such a statute in support of a common law cause of action for wrongful termination, an employee must be a member of the class of persons that the specific public policy was designed to protect.”. *Mitchem*, 259 Va. 179, ____ (2000). Accordingly, the trilogy of *Dray*, *Harris* and *Mitchem* significantly redefined and narrowed the *Bowman* exception to employment at-will.

Applying these principles to the facts alleged in the instant complaint leads to the inescapable conclusion that the Plaintiffs have failed to state a claim for wrongful termination in violation of Virginia public policy even if constructive discharge is a viable cause of action. Significantly, the Plaintiff has not alleged nor could the Plaintiff allege that the Riverside Defendants ever threatened to terminate their employment unless they violated any of the policies enumerated in the brief. That fact alone should be sufficient to sustain demurrers. Moreover, the statutes and other authorities upon which Plaintiffs seek to base their claim for wrongful discharge do not support their claims for wrongful discharge in violation of Virginia public policy. Although statutes reflect a public policy to some extent as all statutes do, the first five references cited by the Plaintiffs deal with professional conduct, and are all found in Title 54.1 of the Virginia Code. Section 54.1-2914 deals with

professional conduct. Section 54.1-2902 prevents the unlawful practice of medicine without license. Section 54.1-111(4) and Section 54.1-111(8) make it unlawful to perform certain services unless licensed or to violate any law governing the practice of any profession governed under Title 54. The last section relied upon by the Plaintiffs contained within Title 54.1 is §54.1-2952, which prescribes the duties of physicians in the supervision of assistants. Each of these statutes are codified within §54.1, and involve the regulation of certain professions and occupations. The purpose of the title as set forth in §54.1-100 is to protect the public. Specifically, the statutes are “a reasonable exercise of [the Commonwealth’s] police powers when it is clearly found that such abridgment is necessary for the preservation of the health, safety and welfare of the public.” Va. Code §54.1-100. Accordingly, Title 54.1 and the statutes therein enunciate policies of the Commonwealth that are designed to protect the general public.

This, as noted above, does not end our inquiry. We must next analyze whether or not the Plaintiffs are members of the class of individuals that the specific public purpose is intended to benefit or protect. The Plaintiffs fail to meet this prong. The statutes contained within §54.1 are all designed to protect the public and not physicians in their individual employment. Much like the police officer in *Harris*, the Plaintiffs are attempting to use group statutes designed to protect the public at large to protect them from termination. The Court, in *Harris*, found that the criminal statute upon which Harris attempted to rely were for “the protection of the public safety and welfare”, and that Harris’s reliance on such a statute for the basis of his wrongful termination action was misplaced. *Harris*, 523 S.E.2d at 246.

The statutes upon which the Plaintiffs wish to rely are not directed at their employment, but are designed to protect the public. They are not designed to protect physicians from their employers. Even though the statutes in question in some instances do impose some duties on the physicians, the statutes are designed to protect the public in general and not the Plaintiffs in their employment.



Moreover, and quite significantly, the Plaintiffs, as noted above, have not alleged that the Riverside Defendants ever advised either of them that their jobs were in jeopardy if they did not commit acts in violation of the cited statutes. Moreover, when the General Assembly wishes to pass a statute designed to protect an employee and thereby create an exception to the employment at-will doctrine, it has the knowledge and ability to do so. For example, the Virginia Code, §40.1-51.2:1 states, “[n]o person shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for themselves or others.” No such statute has been cited by the Plaintiffs in this matter. As a matter of law, the Plaintiffs are not members of the class of individuals that §54.1 is designed to protect.

The other Code sections relied upon by the Plaintiffs also provide no cause of action. Section 32.1-310 of the Code sets forth, *inter alia*, that it is “in the interest and for the protection of the health and welfare of the residents of the Commonwealth that a proper regulatory and inspection program be instituted in connection with the providing of medical, dental and other health services to recipients of medical assistance . . .” Thus, the purpose of the statute as set forth in the statute itself is for the protection of the public at large, not the Plaintiffs in this matter. Accordingly, the Plaintiffs failed to state a cause of action for violation of §32.1-310 insofar as they are not in the category of the persons designed to be protected by the Act.

The last two sources of alleged public policy upon which the Plaintiffs seek to rely are regulations promulgated by the Commonwealth of Virginia, Department of Medical Assistance Services Physicians Manual: Chapter 2, entitled “Provider Participation Requirements”, and 12 VAC 30-10-50 A(5) and (6) addressing the administration of vaccines. Regulations, however, are not a source of public policy for the purpose of a *Bowman* claim. As the Court set forth in *City of Virginia Beach v. Harris*, 259 Va. 220, 523 S.E.2d 239, 245, only one source exists from which public policy

is sufficient to create a *Bowman* claim, and that is a duly enacted statute of the Commonwealth. Also see *Lockhart v. Commonwealth Education Systems Corp.*, 247 Va. 98, 239 S.E.2d 328 (1994).

Thus, even if the Court were to broaden *Bowman* beyond its narrow parameters to encompass a wrongful discharge claim, the second amended motion for judgment still fails to state a claim for wrongful termination in violation of Virginia public policy. Accordingly, just as this Court ruled at the hearing on June 19, 2001, this Court should again sustain the Riverside Defendants' demurrers to Counts I and II.

DEMURRER TO COUNTS III AND IV

Counts III and IV of the motion for judgment fail to state cognizable claims for defamation against any Defendant. Counts III and IV of the motion for judgment are merely mirror images of each other seeking damages for alleged defamation with the sole exception that Count III seeks damages on behalf of the Plaintiff Vanden Hoek and Count IV seeks damages on behalf of the Plaintiff Fuste. To allege a cause of action for defamation under Virginia law, the Plaintiff must allege that the publication of an actionable statement occurred concerning the Plaintiff and that the Defendant had the requisite intent. *Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713, 725 (1985). See also; *Abadin v. Lee*, 117 F.Supp. 481 (D.Md.2000); *Kidwell v. Sheetz, Inc.*, 982 F.Supp. 1177 (W.D.Va. 1997);. Furthermore, if a statement is privileged, the Plaintiff must allege facts that will allow the Court to draw an inference of abuse of that privilege. *Smalls v. Wright*, 241 Va. 52, 55, 399 S.E.2d 805, 807 (1991); *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 153, 334 S.E.2d 846, 853 (1985).

In the instant matter the plaintiffs have not only failed to allege actionable statements alleged are subject to privileges. Although the Plaintiffs do incorporate the entire factual allegations contained in the preceding paragraphs, including those specifically labeled "Conspiracy to Injury and

Defamation of Plaintiffs”, in paragraph 62 of Count III and paragraph 67 of Count IV, the Plaintiffs merely state that the Defendants published false and defamatory information against the Plaintiffs, but they do not specify what information was false and defamatory. Significantly, under Virginia law, a plaintiff must set forth the exact words upon which his or her claim of defamation is based to state a cause of action for defamation. *Federal Land Bank of Baltimore v. Birchfield*, 173 Va. 2000, 215, 3 S.E.2d 405 (1939); *Vuyyuru v. Metropolitan Hospital*, LC-2881-4, 1998 WL 9772210, at *3 (Va. Cir. Ct. 1998); *Warren v. Standard Drug Co.*, 30 Va. Cir. 335, available at 1993 WL 946036, at *3 (1993); *Cerick v. Central Fidelity Bank*, No. 84785, 1989 WL 646512, at *1 (Va. Cir. Ct. 1989).

Although the Plaintiffs have added more factual allegations in pages 7 through 12 of the second amended motion for judgment, these new allegations do not cure the deficiencies present in the original motion for judgment and the first amended motion for judgment to which this Court granted the Defendants’ demurrer. In order to establish a claim for defamation, one of the most critical elements of proof is for the Plaintiffs to establish an actionable statement. In *Yeagle v. Collegiate Times*, 255 Va. 293, 497 S.E.2d 136 (1998), the Virginia Supreme Court stated that “speech which does not contain a provably false factual connotation, or statements which cannot reasonably be interpreted as stating actual facts about a person cannot form the basis of a common law defamation action.” 255 Va. at 296. Moreover, if the statement is privileged or opinion, it does not qualify as an actionable statement, and, thus, cannot be the basis of a defamation claim. See, e.g., *Chaves v. Johnson*, 230 Va. 112, 119, 335 S.E.2d 97, 101 (1985) (stating that “opinion . . . cannot form the basis of an action for defamation”). Accordingly, if a statement is made to a proper person, it is not published for defamation claim purposes. *Laramore v. Blalock*, 259 Va. 568, 574, 528 S.E.2d 119, 122 (2000). *Kroger Co. v. Young*, 210 Va. 564, 569-70 (1970) (holding that statements subject to qualified privilege, absent malice, are not actionable.). The

Supreme Court in *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 153, 334 S.E.2d 846, 853 (1985), noted that any statement made by a person, “in good faith, on a subject matter in which the person communicating has an interest, or owes a duty . . . is qualified privileged if made to a person having a corresponding interest or duty.” 230 Va. at 153, 334 S.E.2d at 853. The privilege, however, may be overcome by proving malice by clear and convincing evidence. *Smalls v. Wright*, 241 Va. 52, 55, 399 S.E.2d 805, 807 (1991).

In the instant matter, the Plaintiffs have alleged that Drs. Barry Gross and Eugene Temple of the Riverside Defendants and C. Burke King and Mae Ellen Terrebonne of the Defendants Peninsula Healthcare, Inc. and Healthkeepers, Inc. informed patients, agents of other hospitals and credentialing officials at Mary Immaculate Hospital and Sentara Hampton General Hospital that Plaintiffs were “unprofessional”, “uncooperative”, that they “abandoned their patients”, and that there were “concerns about their competence”. Paragraph 36, second amended complaint. As the pleadings indicate, Dr. Temple’s alleged defamatory statements were made to the medical executive committee of Riverside Hospital, and as such should qualify as privileged communication under the Health Care Quality Improvement Act, as well as Virginia common law. Thus, the statements of Dr. Temple are privileged unless the Plaintiffs can prove malice or an abuse of that privilege. Moreover, the statements of Dr. Temple are clearly opinion and do not have a provably false factual connotation particularly in the context of this pleading. Significantly, even though the Plaintiffs allege in paragraph 46 and other places that these statements that the Plaintiffs left suddenly was false, a clear reading of the second amended motion for judgment, as well as the prior two motions for judgment leads one to the clear and reasonable conclusion that Vanden Hoek and Fuste left Riverside without notice, and clearly without the 90 notice period set forth in the contracts which are incorporated by reference into their complaint. In this context, the statements attributed to Dr. Temple reflect a genuinely held opinion as to the manner in which the Plaintiffs quit their employment, and as such

do not have a factually false provable connotation and are not actionable as defamation.

The Plaintiffs then allege that the Defendants and their agents made these false statements, (presumably unprofessional, uncooperative, abandoned their patients, and having concerns about their competence), to others within their organization, the identities of such individuals as indicated in the pleading are not known, and these others repeated and published these false allegations to others outside. As previously noted, under Virginia law, the Plaintiff must set forth the precise nature of the claimed defamation in order to state a cause of action. See, e.g., the *Federal Land Bank of Baltimore v. Birchfield*, 173 Va. 200, 215, 3 S.E.2d 405 (1939). Accordingly, these allegations fail to set forth a cognizable claim for defamation.

Another general theme in the Plaintiffs' allegations is that the Riverside Defendants in providing clearly requested information from the Plaintiffs to Sentara Hampton General Hospital and Mary Immaculate Hospital had advised these two hospitals that the Plaintiffs had acted "unprofessionally", had "left suddenly", "were uncooperative, and "had abandoned their patients". Paragraph 42 of the second amended complaint. Clearly, any references provided to the medical staffs at Sentara Hampton General Hospital or Mary Immaculate Hospital would be subject to a qualified privilege. See e.g. *Great Coastal Express, Inc. v. Ellington*, 234 Va. at 153. In paragraph 43, the Plaintiffs attempt to overcome the qualified privilege by alleging that apparently additional unsolicited letters and communications were "also" provided to the credentials committee of these hospitals. However, the communications that are alleged to be defamatory are the same as have been identified in paragraph 42. These allegedly defamatory statements, however, are not only privileged but considered in the context in which they are given are clearly not actionable statements because they are subjective, do not contain provably false factual connotations, and as written in this second amended motion for judgment clearly constitute opinion. Clearly, terms such as "uncooperative, unprofessional or leaving suddenly" are matters of opinion. However, when these statements are

viewed in the context in which they are alleged to have been given, one must come to the inescapable conclusion that these are opinions, and moreover, opinions which were both sought and given.

The Plaintiffs also appear to base their claim of defamation on a prospective employee of the Plaintiffs, who one assumes from the pleading must have been an employee of a Riverside defendant and who appears to have contacted Kimberly Martin of Riverside to discuss and impliedly seek her opinion about whether she should join the Plaintiffs' practice of Pediatric Consultants. Second amended complaint, paragraph 38. The alleged statement which we presume the Plaintiffs state is defamatory is that Kimberly Martin stated that "Drs. Fuste's and Vanden Hoek's new practice would be immediately shut down the day it opened and that if she took a job there, she would never have a future job with Riverside". Paragraph 38 of the second amended motion for judgment. Not only would these statements qualify as privileged, but clearly any statement about future events by Kimberly Martin is an opinion, and at the time given not subject to a provably false factual connotation. In fact, both of the Plaintiffs' contracts of employment with Riverside which have been incorporated into these pleadings by reference contain covenants not to compete. The existence of a covenant not to compete would certainly have provided justification for any such opinion concerning future events.

The last area of alleged defamation arises from parents or grandparents of former patients of the Plaintiffs who actually contacted "Riverside and Healthkeepers" concerning the whereabouts of Drs. Fuste and Vanden Hoek. See paragraph 46 of the second amended motion for judgment. The Plaintiffs basic complaint against the Riverside Defendants is that front desk clerks informed the callers that Drs. Fuste and Vanden Hoek left suddenly and their whereabouts were unknown. Clearly, such statements do not rise to the level of defamation. . Also, the Plaintiffs again reference statements by Kimberly Martin concerning the Plaintiffs' ability to practice in the area. As noted

above, such statements do not constitute defamation. This last attempt of the Plaintiffs to create a cognizable cause of action for defamation again fails. The alleged defamatory statements are not actionable statements, do not have a provable factual false connotation. The statements are merely opinion, and predictions of future events. Moreover, these statements of opinion and future events are subject to qualified privilege because all of the statements allegedly made were made by persons having an interest or duty to communicate the information to a person who also had an interest or duty to receive the information. The information was given to hospitals seeking recommendation concerning the Plaintiffs, and to patients seeking information concerning the whereabouts of the Plaintiffs. The Plaintiffs can overcome the presumption that any of these statements are subject to a qualified privilege by showing that the person to whom the statements were made had no duty or interest in the subject matter or by showing malice. *See Laramore v. Blalock*, 259 Va. 568, 575, 528 S.E.2d 119, 122 (2000); *Gazette, Inc. v. Harris*, 229 Va. at 18, 325 S.E.2d 727. Such malice, however, must be proved by clear and convincing evidence. *Small v. Wright*, 241 Va. at 55, 399 S.E.2d at 807. Clearly, the Plaintiffs cannot show that the persons who made the statements or to whom they were made did not have a duty or interest. The only manner in which the Plaintiffs can overcome this qualified privilege is proving malice by clear and convincing evidence. Accordingly, this Court should dismiss the Plaintiffs claims for defamation contained in Counts III and IV on the basis of that the Plaintiffs have failed to set forth a cognizable cause of action for defamation.

DEMURRER TO COUNTS V AND VI

In Counts V and VI, the Plaintiffs have failed to state a claim for which relief can be granted for conspiracy. Counts V and VI as with the previous paired counts are mirror images of each other with Count V being entitled “Conspiracy to Injure Dr. Fuste in the practice of her profession”, and Count VI being entitled “conspiracy to injure Dr. Vanden Hoek in the practice of her profession”.

In Counts V and VI, the Defendants again incorporate all prior allegations by reference into Counts V and VI. The Plaintiffs then conclude that the Defendants through their “agents and officers communicated and conspired with each other to issue and publish false and defamatory information about Dr. Vanden Hoek’s conduct while she was employed with RHA.” Paragraph 76, second amended complaint. The identical allegation is found in paragraph 72 of the second amended complaint with respect to Dr. Fuste. Thus, as with the first amended motion for judgment, the entire crux of the Plaintiffs’ conspiracy complaint is that the Defendants defamed them. Inasmuch as the Plaintiffs allegations in Counts III and IV fail to establish that any of the actions of the Defendants constituted defamation, the Plaintiffs Counts V and VI but from the face of the pleadings must also necessary fail.

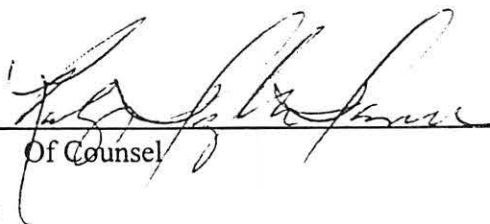
Interestingly, the Plaintiffs allege that the Defendants’ conduct violated 18.2-500 of the Code of Virginia which is merely the civil remedy statute , and they do not reference the substantive statute found at Section 18.2-499. Nevertheless, in order to set forth a cause of action for conspiracy to harm business, the statutory conspiracy to damage one’s reputation, trade or business and recover the damages set forth in Section 18.2-500, the Plaintiffs must prove (1) a combination of two or more persons for the purpose of willfully and maliciously injuring a Plaintiff in his business; and (2) resulting damage to the Plaintiff. See, e.g. *Allen Realty Corp. v. Holbert*, 227 Va. 441, 318 S>E. 2d 592 (1984). Furthermore, a conspiracy cannot exist to do an act which the law allows, and thus some improper act must be alleged. See, e.g., *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 337 S.E. 2d. 744 (1985). In the instant matter, the only unlawful act alleged is defamation, and the plaintiff as fully briefed above is unable to sustain a claim for defamation. Accordingly, the court should grant the Riverside defendants demurrer to Counts V and VI.

CONCLUSION

WHEREFORE, the Defendants, Riverside Healthcare Association, Inc., Riverside Hospital, Inc., and Riverside Physician Services, Inc., pray that this Court will dismiss the second amended motion for judgment for failure to state a cause of action upon which relief can be granted, and further award the Defendants its costs and such other relief as this Court deems wanted to meet the ends of justice.

Respectfully submitted,

RIVERSIDE HEALTHCARE ASSOCIATION, INC.
RIVERSIDE HOSPITAL, INC. and RIVERSIDE
PHYSICIAN SERVICES, INC.

By: 
Of Counsel

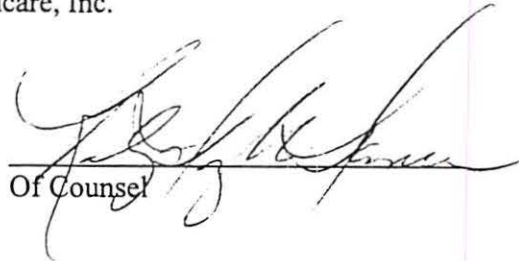
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CERTIFICATE OF SERVICE

I certify that on November 6, 2001, I faxed and mailed a copy of the foregoing to counsel for Plaintiff and to counsel for Defendants Peninsula Healthcare, Inc. and Healthkeepers, Inc., by depositing same in the United States Mail, postage prepaid, addressed as follows:

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Healthkeepers, Inc.



Of Counsel

(245915)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ROSA FUSTE, M.D. and
TIEN L. VANDEN HOEK, M.D.,

Plaintiffs,

v.

AT LAW NO.: 29743-VC

RIVERSIDE HEALTHCARE ASSOCIATION, INC.,
RIVERSIDE HOSPITAL, INC., RIVERSIDE PHYSICIAN
SERVICES, INC., PENINSULA HEALTHCARE, INC. and
HEALTHKEEPERS, INC.,

Defendants.

**MOTION IN SUPPORT OF DEMURRER, MOTION TO DROP,
MOTION FOR BILL OF PARTICULARS AND MOTION FOR PROFERT AND
CRAVING OYER**

Plaintiffs' Second Amended Motion for Judgment again sets forth general conclusory allegations of conspiracy and defamation as to the defendants, Peninsula Healthcare, Inc. and Healthkeepers, Inc. By their Demurrers, these defendants have asserted that the allegations set forth in the Second Amended Motion for Judgment are again insufficient as a matter of law to state a cause of action against these defendants.

While plaintiffs specifically identify C. Burke King and Mae Ellis Terrebonne as co-conspirators with Barry Gross and Dr. Eugene Temple, plaintiffs' Second Amended Motion for Judgment fails to allege any conceivable motive for the alleged conspiracy. Plaintiffs have alleged in two previous Motions for Judgment that they, in fact, voluntarily terminated their relationship with Riverside Healthcare Association, Inc., Riverside Hospital, Inc. and Riverside Physician Services, Inc. as a result of some contractual dispute and refused to care for patients of those institutions on October 1, 1999. Plaintiffs were physician providers with

Peninsula Healthcare, Inc. and Healthkeepers, Inc. solely by virtue of their relationship with Riverside Healthcare Association, Inc. and Riverside Physician Services, Inc. Upon termination of their relationship with those entities, plaintiffs were no longer Trigon HMO Network providers. Peninsula Healthcare, Inc. and Healthkeepers, Inc. were no longer obligated to pay for the professional services of Rosa Fuste, M.D. and Tien L. Vanden Hoek, M.D. and were obligated to advise patients that Dr. Fuste and Dr. Vanden Hoek were no longer HMO Network providers. The fact that they were not reinstated does not give the plaintiffs a cause of action and certainly no such allegation has been asserted in plaintiffs' Second Amended Motion for Judgment. Plaintiffs have been given multiple opportunities to allege the specific basis for their allegations of conspiracy and defamation, and it is submitted that it is obvious from plaintiffs' Second Amended Motion for Judgment that plaintiffs have no evidence of either a conspiracy or defamation on the part of Peninsula Healthcare, Inc. and Healthkeepers, Inc., but rather are pursuing this litigation in hopes of forcing their reinstatement as providers or punishing Peninsula Healthcare, Inc. and Healthkeepers, Inc. for the consequences of plaintiffs' own voluntary decision to terminate their relationship with their prior practice groups..

The Second Amended Motion for Judgment alleges that terms such as "uncooperative", unprofessional", left suddenly" and "abandoned their patients" were published by C. Burke King and Mae Ellis Terrebonne without alleging the context or substance of any statement in which those terms were used and without any allegation as to the circumstances under which those phrases were allegedly used. There is further allegation of a letter written in the spring of 2000 by Mae Ellis Terrebonne with Healthkeepers and PHI

stating that Drs. Fuste and Vanden Hoek were “unprofessional”, “uncooperative” and they should not be credentialed. While these defendants adamantly deny that any such letter exists, and while there are clearly federal and state statutes which preclude liability for providing information regarding the credentialing of physicians, the alleged defamation constitutes only opinions which are not actionable and set forth no basis upon which this Court could determine that the words were, in fact, defamatory. Likewise, in paragraph 46(b), it is alleged that Rita Atherton of Healthkeepers informed Ms. Rosso that Drs. Fuste and Vanden Hoek had left suddenly and that she should find another pediatrician. Paragraph 46(g) of plaintiffs’ Second Amended Motion for Judgment additionally alleges that Jennifer Ballard was advised by someone named “Theresa” at Healthkeepers that Drs. Fuste and Vanden Hoek will never be put back on the Healthkeepers list of providers because of the way they left Riverside. It is respectfully submitted that none of the phrases or statements alleged constitute defamation and certainly do not constitute defamation as alleged in the Second Amended Motion for Judgment. *Chavez v. Johnson*, 230 Va. 112, 335 S.E.2d 97 (1985).

It is submitted that, as a matter of law, plaintiffs’ Second Amended Motion for Judgment fails to provide any factual basis to support the conclusory allegations of conspiracy or “a willful and malicious effort to harm the plaintiffs’ medical practices”. It is further submitted that the Second Amended Motion for Judgment again fails to allege the specific facts, circumstances and substance of the conversations which are alleged to be defamatory, and accordingly, as a matter of law, plaintiffs’ Second Amended Motion for Judgment fails to allege a cause of action for either conspiracy or defamation as to these defendants.

With respect to the Motion to Drop and claim of misjoinder in the Demurrer, it is the

memory of the undersigned that, at the last hearing, plaintiffs' counsel admitted that the Amended Motion for Judgment misjoined parties and causes of action. Clearly, plaintiffs' separate causes of action arise out of separate transactions and occurrences and may not be joined as plaintiffs would not be entitled to a joint and several verdict against all defendants under the allegations of the Second Amended Motion for Judgment. *Powers v. Cherin*, 249 Va. 33, 452 S.E.2d 666 (1995). Despite what the undersigned understood to be an admission by plaintiffs' counsel, plaintiffs have again misjoined causes of action and parties in their Second Amended Motion for Judgment.

For the above reasons, it is respectfully submitted that the Demurrer, Motion for Summary Judgment and Motion to Drop filed on behalf of Peninsula Healthcare, Inc and Healthkeepers, Inc. be hereby sustained and that this action be dismissed as to these defendants.

In the alternative, the defendants, Peninsula Healthcare, Inc. and Healthkeepers, Inc., respectfully move the Court to require the plaintiffs to file a Bill of Particulars specifically responding to the Motion for Bill of Particulars filed in response to plaintiffs' Second Amended Motion for Judgment and further moves the Court for an order sustaining their Motion for Proferat and Craving Oyer. These defendant will rely on and adopt and incorporate by reference their previous brief filed in support of the Motion for Bill of Particulars filed in response to the Amended Motion for Judgment. In order for these defendants to be reasonably apprized of the true nature of plaintiffs' claim as to them, and in order for this Court to be able to judge whether the alleged communications are, in fact, defamatory or are otherwise privileged, plaintiffs should be required to respond to the Motion for Bill of

Particulars and to produce the documents which they assert publish defamatory statements as to the plaintiffs.

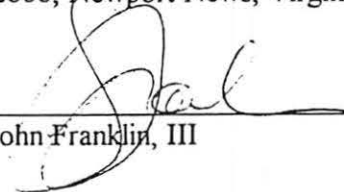
PENINSULA HEALTHCARE, INC. and
HEALTHKEEPERS, INC.

By 
Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above and foregoing Motion in Support of Demurrer, Motion to Drop, Motion for Bill of Particulars and Motion for Profert and Craving Oyer was mailed first-class, postage prepaid to James J. Shoemaker, Jr., Esquire, Patten, Wornom, Hatten & Diamonstein, 12350 Jefferson Avenue, Suite 360, Newport News, Virginia 23602; and to Robyn Hansen, Esquire, Jones, Blechman, Woltz & Kelly, 600 Thimble Shoals Boulevard, Post Office Box 12888, Newport News, Virginia 23612-2888, this 6 day of November, 2001.


John Franklin, III

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

ROSA FUSTE, M.D.,

and

TIEN L. VANDEN HOEK, M.D.,

Plaintiffs,

v.

RIVERSIDE HEALTHCARE ASSOCIATION, INC.,

RIVERSIDE HOSPITAL, INC.,

RIVERSIDE PHYSICIAN SERVICES, INC.,

PENINSULA HEALTHCARE, INC.,

and

HEALTHKEEPERS, INC.,

Defendants.

LAW NO.: 29743-VC

MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANTS' DEMURRERS,
AND PENINSULA HEALTHCARE'S AND HEALTHKEEPERS' MOTION TO DROP,
MOTION CRAVING OYER & MOTION FOR BILL OF PARTICULARS

Plaintiffs, Rosa Fuste, M.D. and Tien L. Vanden Hoek, M.D., by counsel, state as follows
for their Memorandum of Law in Opposition to the Defendants' Demurrers and to Peninsula
Healthcare's and Healthkeepers' Motion to Drop, Motion Craving Oyer and Motion for Bill of
Particulars:

INTRODUCTION

Plaintiffs were Riverside pediatricians employed by the Riverside Healthcare Association,

Inc. ("RHA"). In 1999, they made various complaints about Riverside's patient care, violations of law and billing practices. Almost immediately, their salaries were nearly cut in half and Dr. Fuste was stripped of certain positions. Plaintiffs' employment was terminated wrongfully, or constructively terminated, in retaliation for their complaints and their refusal to work under unlawful conditions in October, 1999. After their discharge, the Defendants defamed them and conspired to injure them in their profession.

STANDARD OF REVIEW

Demurrers admit the truth of all facts properly alleged. *Bowman v. State Bank of Keysville*, 229 Va. 534, 536, 331 S.E.2d 797, 798 (1985). A demurrer tests the legal sufficiency of a pleading, and all allegations of the pleading are to be viewed in the light most favorable to the plaintiff. *CaterCorp., Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24-25, 431 S.E.2d 277 (1993). "When a Motion for Judgment or a Bill of Complaint contains sufficient allegations of material facts to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer." *Cater Corp., Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277 (1993). Even though a Motion for Judgment or Bill of Complaint may be imperfect, "when it is drafted so that defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer; if a defendant desires more definite information, or a more specific statement of the grounds of the claim, the defendant should request the court to order the plaintiffs to file a Bill of Particulars." *Cater Corp., Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277 (1993). The facts admitted by demurrer are those expressly alleged, those which fairly can be

viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged.” *Rosillo v. Winters*, 235 Va. 268, 270, 367 S.E.2d 717 (1988).

ALLEGATIONS OF FACT

Plaintiffs were employed as pediatricians by RHA until October 1, 1999, when they were wrongfully terminated from their employment. (Complaint ¶14). They were terminated in retaliation for various complaints they made about Riverside’s patient care, violation of law and fraudulent billing practices. (Complaint ¶2). After their termination, the Riverside Defendants conspired with PHI and Healthkeepers to prevent patients of Doctors Fuste and Vanden Hoek from following them to their new practice, to injure their professional reputations, and to prevent their new medical practices from becoming viable businesses. (Complaint ¶14).

Plaintiffs’ Terms of Employment Prior to Their Complaints to Riverside

Plaintiffs were originally employed by RHA pursuant to written contracts. (Complaint ¶15). After Plaintiffs entered the original 1994 Employment Agreements with RHA, a compensation scoring system based upon units of productivity known as “Relative Value Units” or “RVU’s” was imposed for nearly all RHA physicians. (Complaint ¶16). This is system of measuring physician productivity commonly used in many large healthcare organizations. (*Id.*) Because a significant portion of Plaintiffs’ time was spent teaching and supervising residents, they were completely excluded from the RVU system until 1998. (*Id.*) Then, in 1998, the Plaintiffs were each assigned RVU goals of approximately 4,200 per month. (Complaint ¶17). Acknowledging their significant resident supervision and teaching duties, and the fact that the RVU system did not lend itself to measuring these tasks, RHA made the 1998 goals aspirational for Plaintiffs. (*Id.*) The RVU requirements were mandatory for all other non-

teaching pediatricians. (*Id.*).

Plaintiffs' agreements with RHA were typical "best efforts" contracts at all times prior to August, 1999. (Complaint ¶18). In other words, prior to August, 1999, Plaintiffs' contracts required forty hours of work per week without mandatory productivity targets. (*Id.*). The written contracts of Dr. Fuste and Dr. Vanden Hoek expired under their own terms on December 31, 1996 and April 30, 1997, respectively. (Complaint ¶19). Neither contract renewed on those dates. (*Id.*). They were superseded by "at will" employment agreements paying each Plaintiff greater than 150% of their original base salaries in exchange for their agreement to perform their duties as pediatricians and numerous other duties not delineated in their original contracts. (*Id.*).

In addition to her duties as a physician, Dr. Fuste served as Director of Riverside's pediatric practice for which she received an annual stipend of \$20,000.00. (Complaint ¶20). She also served on the Board of Advisors for Riverside Physician Associates. (*Id.*).

Riverside's Wrongful Termination of Plaintiffs

New written contract proposals were presented to Drs. Fuste and Vanden Hoek on June 29, 1999. (Complaint ¶21). The proposals contained no change in their then-current base salaries of \$150,000.00, or in Dr. Fuste's \$20,000.00 additional annual pediatric directorship stipend. (*Id.*). This represented compensation increases 40% above the 1994 written contracts in recognition of the change in the employment relationships that had occurred over the years. (*Id.*). The proposals also contained no RVU requirements, although they did contain aspirational performance targets of 50,000 RVU's annually. (*Id.*).

Shortly after presenting the new contracts, Riverside administration changed its policy of evaluating all pediatric patients regardless of ability to pay. (Complaint ¶22). The administration

planned to implement a financial check of each patient's ability to pay prior to any provision of vaccinations, evaluation or treatment, turning away those who could not pay or commit to a payment plan. (*Id.*). Plaintiffs realized that aspects of this policy would constitute a significant change from past practice, place children of indigent families in jeopardy and would violate applicable law. (Complaint ¶23). In fact, this policy did violate, among other statutes and regulations, Virginia Code §32.1-310 *et. seq.*, Virginia Code §54.1-111, Virginia Code §54.1-2914, the Federal Emergency Medical Treatment and Labor Act ("EMTALA"), and regulations implements pursuant to Virginia Code §32.1-43 by the Virginia Department of Health to ensure vaccination of children, specifically 12 VAC 30-10-50 A(5) & (6), and other law cited in the Complaint. (Complaint ¶¶23, 51 & 57).

The Plaintiffs vigorously protested this change in policy. (Complaint ¶23). Their protests angered officials of RHA and Riverside. (*Id.*). The Plaintiffs had, in the same time period, previously voiced strong protests regarding certain billing and medical care practices at RHA and Riverside. (Complaint ¶24). Specifically, they had complained that: 1) Riverside and RHA sought to improperly withhold, based on patient's ability to pay, vaccines that had been provided to Riverside and RHA free of charge under state and federal programs intended for children of indigent families; 2) Riverside and RHA improperly diverted and sole vaccines provided free to Riverside and intended for children of indigent families; 3) Riverside and RHA allowed unlicensed and/or uncertified persons (residents) to provide medical services to patients without proper attending physician supervision, and requested that Drs. Fuste and Vanden Hoek do likewise for their pediatric patients to increase RVU production; and 4) Riverside and RHA charged Medicaid and other third party payors for services they represented as being performed

by board certified or board eligible physicians when, in fact, they were performed by improperly supervised residents in training. (*Id.*).

Conducting a medical practice while allowing the practices set forth in paragraphs 22 through 24 of the Complaint constitutes a Class I Misdemeanor under Virginia Code §54.1-111. (Complaint ¶25). Riverside and RHA responded to Plaintiffs' protests by removing Dr. Fuste from the Directorship of Riverside's pediatric practice and presenting Drs. Fuste and Vanden Hoek with new contracts in July, 1999, *mandating* that they each produce *9,000 RVU's per month* to earn the same respective base salaries of \$150,000.00 annually. (Complaint ¶26). This constituted 216 percent of the recent June 29 contract proposal requirements and a similar increase over the 1998 monthly RVU goal. (*Id.*). Moreover, it constituted 237 percent of the average monthly goal of Riverside's other seven pediatricians. (*Id.*).

It was clear that Drs. Fuste and Vanden Hoek would have to accede to and participate in the commission of the crimes, ethical violations and violations of law set forth in the Complaint to remain employed by RHA. (Complaint ¶27). Drs. Fuste and Vanden Hoek were informed that if they did not sign the new contracts, their base salaries would be reduced from \$150,000.00 per year, to \$100,000.00 and \$85,000.00 per year, respectively, the base salaries set forth on Schedule A of the old 1994 contracts. (Complaint ¶28). When the Plaintiffs refused to agree to the 9,000 RVU per month contracts, RHA and Riverside cut their pay by over 40%, as previously threatened, effective August 16, 1999, with no corresponding reduction in duties. (Complaint ¶29).

In taking these actions, RHA and Riverside retaliated against the Plaintiffs by terminating their previously existing employment, and deliberately making Plaintiffs' working conditions

intolerable so as to cause any reasonable physician in their situations to leave RHA. (Complaint ¶31).

Conspiracy to Injure and Defamation of Plaintiffs

All of the Defendants, through their agents, intentionally combined with each other to harm Plaintiffs' business maliciously and willfully. (Complaint ¶34). Specifically, Barry Gross and Dr. Eugene Temple, acting in the course and scope of their employment with RHA and Riverside, combined with C. Burke King and Mae Ellis Terrebonne, officers of Healthkeepers and PHI, who were acting in the course and scope of their employment, to ensure that Plaintiffs would not see Healthkeepers and PHI patients and that these patients and credentialing officials at other hospitals would not see or professionally associate the Plaintiffs. (*Id.*).

Gross and Temple communicated to King and Terrebone their desire that the Plaintiffs not be permitted to see Healthkeepers and PHI patients. (Complaint ¶35). They communicated this desire in a willful and malicious effort to harm the Plaintiffs' medical practices. (*Id.*). King and Terrebone joined and furthered the conspiracy by acceding to this request. (*Id.*). Upon information and belief, Terrebone and King knew Riverside's accusations were false and, in any event, made no effort to determine their truthfulness. (*Id.*). Gross, Temple, King and Terrebone all sought to prevent Plaintiffs' practices from becoming viable by falsely informing patients, agents of other hospitals, and credentialing officials at Mary Immaculate Hospital and Sentara Hampton General that Plaintiffs were "unprofessional," "uncooperative," that they "abandoned their patients" and that there were "concerns about their competence." (Complaint ¶36). These publications, and the combination that gave rise to them, were willful and malicious. (*Id.*).

A prospective staff member of Pediatric Consultants, Rebecca Cantwell, was contacted

by Kimberly Martin of Riverside in mid-January, 2000, and told that Drs. Fuste's and Vanden Hoek's new practice would immediately be shut down the day it opened, and that if she took a job there she would never have a future with Riverside. (Complaint ¶38). Hospital medical staff privileges are essential for a physician to practice medicine and/or participate with major payors such as Trigon Blue Cross/Blue Shield, Cigna, etc. (Complaint ¶39). To continue practicing pediatrics and participate with area health plans, the Plaintiffs requested to return from sabbatical and to have their medical staff privileges at Riverside Hospital reactivated, a routine formality. (*Id.*). However, when the Medical Executive Committee of Riverside met on February 2, 2000, to act on this request, Dr. Eugene Temple alleged, in bad faith, that they had "abandoned" their patients on October 1, 1999, making a motion that they should not be allowed back on the medical staff. (*Id.*).

Approximately 50% of the Plaintiffs' patients at Riverside belonged to Healthkeepers. (Complaint ¶40). Numerous patients asked Healthkeepers and PHI to be allowed to follow Drs. Fuste and Vanden Hoek as their pediatricians. (*Id.*). To effect this, the Plaintiffs requested continued participation with Healthkeepers and PHI. (*Id.*). This request was subsequently denied in an April 26, 2000, letter from C. Burke King, President of Healthkeepers and PHI. (*Id.*). King denied their request at the behest of Gross, Temple and Riverside. (*Id.*). It was clear that this was the result of a conspiracy. Former patients who wanted to follow-up with Drs. Fuste and Vanden Hoek were informed by agents of Riverside Hospital, RHA, RPS, Healthkeepers and PHI that because of alleged "unprofessional behavior" and "patient abandonment," the Plaintiffs would never be allowed to participate in the Healthkeepers and/or PHI network. (Complaint ¶41). As a direct result of this action, patient choice was constrained, the Plaintiffs' reputations

were damaged in the patient population, and the Plaintiffs lost substantial revenue. (*Id.*).

To continue practicing pediatrics on the Peninsula, Drs. Fuste and Vanden Hoek applied for medical staff membership at Sentara Hampton General Hospital and Mary Immaculate Hospital as well as for continued participation with numerous health plans. Critical to this process was the timely and truthful release of staff status, clinical privileges and employment information by Riverside. Riverside interfered with this process by delaying the release of needed information, by misrepresenting the facts of the Plaintiffs' departure, and by falsely alleging that Plaintiffs had acted "unprofessionally," had "left suddenly" were "uncooperative" and had "abandoned their patients". (Complaint ¶42).

Unsolicited letters and communications were also provided to the credentials committee of Sentara Hampton General Hospital and Mary Immaculate Hospital by RHA, RPS, Riverside Hospital, Healthkeepers and PHI through their respective agents. These communications also falsely allege that Drs. Fuste and Vanden Hoek were "uncooperative", "unprofessional", "left suddenly" and had "abandoned their patients". (Complaint ¶43). In the Spring of 2000, May Ellen Tarrabon with Healthkeepers and PHI, in the course and scope of her employment with those entities, wrote an unsolicited letter to Sentara Hampton General and Mary Immaculate Hospital falsely stating that Drs. Fuste and Vanden Hoek had been "unprofessional", "uncooperative" and that they should not be credentialed. Her intent in writing this letter was to prevent their medical practice from becoming successful. This act was malicious and effected in furtherance of the conspiracy discussed above. (Complaint ¶44).

In the Summer of 2000, Barry Gross acting in the course and scope of his employment with RHA and Riverside, wrote a letter to Sentara and Mary Immaculate Hospital credential

committees falsely and maliciously stating that Drs. Fuste and Vanden Hoek has been “very uncooperative” at Riverside and had “left suddenly”. (Complaint ¶45) His intent in writing this letter was to prevent their medical practice from becoming successful. (*Id.*).

In the spring and summer of 2000, many parents and grandparents of Plaintiffs’ former patients called Riverside and Healthkeepers in an attempt to locate them and resume their professional relationships. (Complaint ¶46). Riverside and Healthkeepers published several false statements in response to these requests in willful and malicious attempts to harm Drs. Fuste and Vanden Hoek’s practice. (*Id.*). Kimberly Martin of Riverside specifically informed Vergie Outlaw that Drs. Fuste and Vanden Hoek were not able to work in this area. (*Id.*). Likewise, a Ms. Delling called Kimberly Martin of Riverside inquiring as to Dr. Fuste’s whereabouts and was also informed that Dr. Fuste was not able to work in the area. (Complaint ¶46). Jennifer Ballard called Healthkeepers and spoke with an employee there concerning the whereabouts of Drs. Fuste and Vanden Hoek. Ms. Ballard was informed that they would “never be put back on a Healthkeepers list of providers because of the way they left Riverside”. (Complaint ¶46).

ARGUMENTS AND AUTHORITIES

The Plaintiffs were terminated in violation of Virginia public policy because they had both a duty and a right to resist the policy changes and violations of law detailed in the Motion for Judgment. Moreover, a significant and growing majority of circuit courts that have directly addressed the constructive discharge issue have concluded that such a claim exists within the Commonwealth.

A. Plaintiffs' Termination Violated the Public Policy of the Commonwealth.

While Virginia still adheres to the doctrine of "employment at will," the adherence is no longer absolute. *See, e.g., Mitchem v. Counts*, 259 Va. 179, 523 S.E.2d 246, 251 (2000). In 1985, the Supreme Court of Virginia created an exception to the doctrine when the termination violates the public policy of the Commonwealth. *Bowman v. State Bank of Keysville*, 229 Va. 534 (1985). In *Bowman*, the Supreme Court of Virginia held that the Plaintiffs' employer was liable for wrongful discharge after it had terminated them for refusing to vote their stock in the company in accordance with management's wishes. The Court held that the employees' termination violated the public policy expressed in Virginia securities law that individual stockholders should vote their shares free from duress and intimidation by corporate management. *Bowman*, 229 Va. at 538-540. The Court concluded that an employer could not "lawfully use the threat of discharge . . . as a device to control the otherwise unfettered discretion of a shareholder to vote freely his or her stock in the corporation" *Id.* Since the *Bowman* decision in 1985, the public policy exception has evolved. In *Lockhart v. Commonwealth Educational Systems Corporation*, 247 Va. 98 (1994), the Supreme Court of Virginia held that a *Bowman* claim could be based on Virginia public policy embodied in the Virginia Human Rights Act, Virginia Code §2.1-714 et seq. This holding effectively broadened the scope of the public policy exception to all discrimination cases. The General Assembly, however, in response to *Lockhart*, amended the VHRA so as to preclude reliance on the Act in prosecuting a *Bowman* claim involving discrimination. *Doss v. Jamco, Inc.*, 254 Va. 362, 492 S.E.2d 441, 446-47 (1997).

While *Doss* made it clear that a *Bowman* claim cannot be based on the anti-discrimination provisions in the VHRA, the case created significant questions over which statutes may serve as

the basis of a *Bowman* claim. In two recent decisions, the Supreme Court of Virginia has settled this debate. While all Virginia statutes reflect a Virginia Public policy to some extent, “termination of an employee in violation of the policy underlying any one of them does not automatically give rise to a . . . cause of action for wrongful discharge.” *City of Virginia Beach v. Harris*, 259 Va. 220, 523 S.E.2d 239, 245 (2000). The Court in *Harris* recognized two classes of statutes that could give rise to a *Bowman* claim. *Harris*, 259 Va. at 232-233. The first is where a statute plainly expresses a public policy of the Commonwealth. *Id.* The second, more common category, are statutes which do not explicitly state a public policy, but “are designed to protect the property rights, personal freedoms, health, safety or welfare of the people in general, and thereby further an underlying established public policy that is violated by the discharge at issue”. *Id.* Even where a statute falls within one of these categories, it may only serve as the basis of a *Bowman* claim if the aggrieved employee demonstrates that she is a member of the class of individuals the public policy is intended to benefit. *See Mitchem v. Counts*, 259 Va. 179, 189-190, 523 S.E.2d. 246, 251 (2000); *Dray v. Newmarket Poultry Products, Inc.*, 258 Va. 187, 518 S.E.2d 312, 313 (1999). To state a *Bowman* claim, the Plaintiff must show that she is “within the protective reach of the statute which supplied the public policy component of his or her claim.” *Id.* *See also Levertton v. Allied Signal, Inc.*, 991 F.Supp. 486, 493 (E.D. Va. 1998).

None of the statutes on which Plaintiffs rely are within the first category of statutes because they do not explicitly express a public policy of the Commonwealth. They all, however, fall within the second category because they are clearly designed to protect the welfare of the general public by assuring children get vaccinated regardless of ability to pay, ensuring availability of competent medical care, ensuring that health care professionals are honest, etc.

Therefore, it is clear that the statutes and regulations upon which the Plaintiffs rely may serve as the basis of a *Bowman* claim provided they can demonstrate that they are within the class of individuals within the statutes' protective reach. *Id.*

Contrary to Plaintiffs assertions, the Virginia Supreme Court has made it very clear that the statutes' protective reach extends beyond the class of persons who might be victims of its violation. *See Mitchem* 259 Va. at 187-190. A statute's protective reach extends to those who have a legal duty or right under the statute. *Id.*; *see also Dray*, 258 Va. at 191.

This concept was first discussed in the *Dray* case, relied upon by Riverside, but it has been greatly refined in the past two years. In *Dray*, a quality control inspector at a poultry processing plant was terminated for reporting unsanitary conditions to a government inspector. The Virginia Supreme Court affirmed the trial court's ruling that she failed to state a claim for wrongful discharge because the statute upon which she relied, the Virginia Meat and Poultry Products Inspection Act, did not "confer rights or duties upon her or any other similarly situated employee of the defendant." *Dray*, 258 Va. at 191.

Two more recent decisions, issued on the same day, and both involving attempts by a Plaintiff to use a criminal statute as the basis of a *Bowman* claim, clearly define who is, and who is not, within a statute's protective reach. In *Mitchem*, the Virginia Supreme Court upheld the *Bowman* claim of an employee that had been terminated for refusing to submit to her supervisor's sexual advances. The Plaintiff contended that her termination violated the public policies expressed in the criminal statutes prescribing fornication¹ and lewd and lascivious

¹See Virginia Code §18.2-344

behavior². The Virginia Supreme Court held that the Plaintiff in *Mitchem* was within the class persons those statutes were intended to reach or benefit because they were criminal statutes “enacted for the protection of the general public” and the employment at will doctrine was “never intended to serve as a shield for employers who seek to force their employees, under the threat of discharge, to engage in criminal activity.” *Mitchem*, 259 Va. at 187-190.

Comparing the result in *Mitchem* to the result in *Harris* illuminates that proper analytical path in the present case. In *Harris*, a police officer was discharged for obtaining a warrant against his supervisor, charging him with obstruction of justice, because the supervisor had directed the Plaintiff not to serve a warrant on a criminal suspect. The Plaintiff alleged that he had been discharged in violation of the public policy expressed in the obstruction of justice statute.³ More specifically, the Plaintiff claimed he was fired for taking steps to prevent his superior from obstructing justice. The Plaintiff was unable to point to a statute that conferred upon him a right or a duty to take these steps. As a result, the Virginia Supreme Court rejected his claim. In *Mitchem*, the Plaintiff was essentially alleging that she had to commit crimes to keep her job, the Plaintiff in *Harris* could not make this allegation.

Holding that an employee had stated a viable *Bowman* claim after he was fired for refusing to commit forgery at his employer’s behest, United States District Judge Ellis of the Eastern District’s Alexandria Division, compared *Mitchem* and *Dray* and stated as follows:

The Plaintiff in *Harris* was not within the protective reach of the obstruction of justice statute because he was neither required by the statute to do what he did, nor was he a victim of any putative violation of it. Instead, he sought to invoke

²See Virginia Code §18.2-345

³See Virginia Code §18.2-460

the obstruction of justice statute to justify an act the statute did not require, namely obtaining an arrest warrant for his superior officer. By contrast, the *Mitchem* Plaintiff was within the protective reach of both statutes cited there because she was arguably under a legal duty imposed upon her by the statutes to refrain from doing what her supervisor wanted her to do, namely, engage in fornication and lewd and lascivious conduct. In sum, these cases taken together teach that, to assert a valid *Bowman* claim, a Plaintiff must have either (i) a statutorily created right which the termination interferes with or violates (*Bowman*) or (ii) a statutorily imposed duty which the employee is terminated for refusing to violate (*Mitchem*, *Dray*).

Anderson v. ITT Industries, 92 F. Supp. 2d 516 (E.D.Va. 2000)

Clearly, an employee need not be a victim of the crime he is asked to commit to fall within a statute's protective reach. The present case is governed by Judge Ellis' analysis. Drs. Fuste and Vanden Hoek were discharged for refusing to engage in conduct prohibited by numerous Virginia laws and regulations. (Complaint ¶¶23-32 & 51, 57). The Plaintiffs here fall within a class of individuals the statutes were designed to protect because the statutes imposed upon them a legal duty not to engage in the prohibited conduct. Indeed, without conscientious physicians willing to fulfill their duties, the public health (and purse) are imperiled. The statutes relied upon by Drs. Fuste and Vanden Hoek plainly imposed upon them a duty not to allow indigent children who presented at their office to go unvaccinated, patients to be treated by improperly supervised residents, commission of waste, fraud and abuse, etc. Accordingly, Plaintiffs are within the protective reach of the statutes cited in the Motion for Judgment, and they have stated a valid *Bowman* wrongful discharge claim. If the Defendant's argument is to be adopted, an employee who refuses to commit a crime at an employer's behest would have no remedy if she chooses to leave her employment rather than committing the crime.

B. Plaintiffs Were Constructively Discharged in Violation of Virginia Law.

A significant and growing *majority* of circuit courts that have addressed the issue recognize the doctrine of constructive discharge. *Johnson v. Behsudi*, 52 Va. Cir. 533, 1997 WL 33120363 (January 16, 1997); *Melina v. Summer Consultants, Inc.*, 1996 WL 1065653 (Fairfax Circuit Court, December 9, 1996); *Lundy v. Cole Vision Corporation*, 39 Va. Cir. 254 (City of Richmond 1996); *Dearing v. Thor*, VLW 098-8-247 (Roanoke City Circuit Court 1998); *Peyton v. United Southern Aluminum Products*, 49 Va. Cir. 187 (City of Richmond, June 9, 1999). All of the cases set forth above present situations where trial courts overruled demurrers which argued that constructive discharge does not exist in Virginia.

The results of the cases set forth above are not merely the products of better reasoning. Where employers give employees the ultimatum to violate the law or leave, application of the constructive discharge doctrine is unavoidable. The result urged by the Defendants would leave an employee who chooses to resign rather than commit crimes no civil remedy against his employer. The reasoning of the cases set forth above not only protects employees, it protects the rule of law. Employees having no choice but to commit crimes or face financial distress with no recourse would be more likely to commit those crimes.

Plaintiffs' research into this issue reveals just two cases holding that the doctrine of constructive discharge does not exist in Virginia: the *single* case cited by the Plaintiffs and a federal case predating the cases cited above that states that the doctrine does not *yet* exist in Virginia. The great weight of authority, and, just as importantly, the weight of reason, mandates application of the constructive discharge doctrine in this case.

C. Plaintiffs Have Stated a Cause of Action for Defamation.

The Defendants' contention that "the Plaintiffs merely state that the Defendants published false and defamatory information against the Plaintiffs, but they do not specify what information was false and defamatory" is a representation bordering on Orwellian. While the Plaintiffs would prefer that this submission be less voluminous, the following recap of the allegations cannot be avoided: Plaintiffs allege that Gross, Temple, King and Tarrabon, in the course and scope of their employment, all sought to prevent Plaintiffs' practices from becoming viable by falsely informing patients, agents of other hospitals, and credentialing officials at Sentara Hampton General Hospital and Mary Immaculate Hospital that Plaintiffs were "unprofessional", "uncooperative", that they "abandoned their patients" and that there were "concerns about their competence" (Complaint ¶¶34-36); Plaintiffs further allege that "these publications and the combination that gave rise to them were willful and malicious" (Complaint ¶36); in the very next paragraph, Plaintiffs allege that the Defendants "repeated and published these false allegations to others outside Defendants respective organizations. . . in an intentionally and malicious effort to harm Plaintiffs' business" (Complaint ¶37); Plaintiffs then outline an additional nine paragraphs of specific falsehoods and conclude as follows "The actions of RHA, Riverside Hospital, RPS, Healthkeepers and PHI constitute defamation of the Plaintiffs and arose from an unlawful combination to intentionally injure Plaintiffs and their business. These defamatory communications were published in bad faith." If the Defendants are arguing that Plaintiffs' failure to reprint this text within the body of Count III renders the pleading deficient, then they stand Virginia Supreme Court's guidance in *CaterCorp* on its head.

The Defendants contention is that the Plaintiffs complain of opinions, and not facts, is

likewise specious. Accusing a physician of “abandoning her patients” is not opinion. It is clearly a statement of fact. Stating that the Plaintiffs “are not allowed to practice in the area” is not an opinion, it is a statement of fact. Being that there are “concerns about [a physician’s] competence” is not an opinion, it is a statement of fact. Stating that a physician has engaged in “unprofessional behavior” is not opinion, it is a statement of fact. Stating that physicians will “never be put back on the Healthkeepers list of providers because of the way they left Riverside” is not a statement of opinion, it is a statement of fact.

In analyzing whether or not words spoken are common law defamation or defamation *per quod* requires a showing of special damages; and defamation *per se* which does not require a showing of special damages as those damages are presumed. *Leming v. Moore*, 221 Va. 884, 889 (1981); *Shupe v. Rosa Stores*, 213 Va. (1972). The following types of statements constitute defamation *per se*:

- 1) Words which impute to a person a commission of some criminal offense involving moral turpitude which may be indicted and punished;
- 2) Words which impute that a person is infected with some disease;
- 3) Words which impute to a person unfitness to perform the duties of an office or employment or wanted integrity in the discharge of such an office or employment; and
- 4) Words which prejudice a person in his or her profession or trade. *Id.*

In *Great Coastal Express v. Ellington*, 230 Va. 142 (1985), an employer accused a truck driver employee of “commercial bribery” in his effort to get a shop foreman to alter the governor on the truck so that he could drive faster against company regulations. The trial court held that

this constituted defamation *per se* and the employee was awarded \$20,000 in compensatory damages and \$50,000 in punitive damages by the jury.

The Defendant appealed arguing the allegations did not constitute defamation and, in any event, were protected by a qualified privilege. In disposing of the Defendant's argument, the Virginia Supreme Court stated that allegations made "substantial danger to the employees reputation apparent" and that the trial court properly found that the statement constituted defamation *per se*. *Great Coastal Express v. Ellington*, 231 Va. at 148-152. In dispatching the defense's qualified privilege argument, the Court noted that "a communication, made in good faith, on a subject matter in which the person communicating has an interest or owes a legal duty, legal, moral or social, is a qualified privilege if made to a person having a corresponding interest or duty". *Great Coastal Express*, 230 Va. at 153. Moreover, the Court noted that it is for the trial court, not the jury, to decide whether a privilege exists. The Court noted, however, that the standard for defeating the privilege is not "clear and convincing evidence" of malice, rather "the privilege is lost if the jury finds, from a preponderance of the evidence," and:

- 1) the words were spoken with actual malice; *or*
- 2) the language was unnecessarily intemperate or disproportionate in strength; *or*
- 3) the words were not in good faith, and without an honest belief in their truth; *or*
- 4) the words were deliberately adopted a method of speaking the alleged words which gave unnecessary publicity to such words; *or*
- 5) Defendant purposely arranged to speak the alleged words in the presence of a person or persons who had no interest in the matter; *or*
- 6) the statements were for the purpose of gratifying some sinister or corrupt

motive such as hatred, revenge, personal spite, ill will or desire to injury the plaintiff; *or*

- 7) the statements were made with such gross indifference or recklessness as to amount to wanton and willful disregard for the rights of the Plaintiff.

Plaintiffs have clearly alleged sufficient facts to survive the demurrers to the defamation counts.

D. Plaintiffs Have Stated a Cause of Action for Violation of Virginia Code §18.2-499 & 500.

How the Defendants can read paragraphs 34 through 48 of the Motion for Judgment and complain that they have “no context” is baffling. Defendants essentially urge an entirely different standard of pleading and ignore the Virginia Supreme Court’s holding in *CaterCorp*: “When a motion for judgment or bill of complaint contains sufficient allegations of material facts to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer.” *CaterCorp*, 246 Va. at 24. Riverside contends that Virginia Code §18.2-499 was not incorporated into the Motion for Judgment or the relevant counts. They apparently did not read paragraph 48 of the Motion for Judgment. As to their allegation that sufficient facts have not been pleaded to support the conspiracy allegations, Plaintiffs contend that paragraphs 34 through 36 would, alone, support these counts, to say nothing of the rest of the Motion for Judgment.

To recover in an action under this section, Plaintiffs must plead and prove: 1) a combination of two or more persons for the purpose of willfully and maliciously injuring the Plaintiff in his profession, and 2) resulting damage to the Plaintiff. *Allen Realty Corporation v. Holbert*, 227 Va. 441 (1984). Clearly, the Plaintiffs have successfully stated a cause of action

under the Virginia business conspiracy statute.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request that the Defendants' Demurrers and Motions be overruled.

Respectfully submitted,

ROSA FUSTE, M.D. and
TIEN L. VANDEN HOEK, M.D.

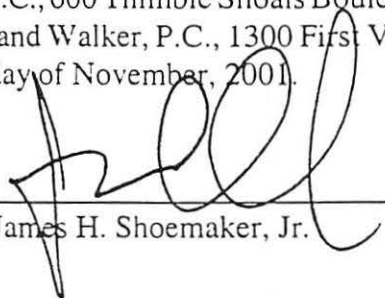
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum of Law in Opposition to the Defendants' Demurrers, and Peninsula Healthcare, Inc.'s and Healthkeepers' Motion to Drop, Motion Craving Oyer & Motion for Bill of Particulars was served via first class mail to Robyn Hansen, Jr., Jones, Blechman, Woltz & Kelly, P.C., 600 Thimble Shoals Boulevard, Newport News, Virginia, 23612, and John Franklin, III, Taylor and Walker, P.C., 1300 First Virginia Tower, 555 Main Street, Norfolk, Virginia, 23514, this 3rd day of November, 2001.



James H. Shoemaker, Jr.

ORIGINAL

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

3
4 ROSA FUSTE, M.D. and)

5 TIEN L. VANDEN HOEK, M.D.,)

6 Plaintiffs,)

LAW NO.

7 V.)

29743-VC

8 RIVERSIDE HEALTHCARE ASSOCIATION, INC.,)

9 RIVERSIDE HOSPITAL, INC.,)

10 RIVERSIDE PHYSICIAN SERVICES, INC.,)

11 PENINSULA HEALTHCARE, INC., and)

12 HEALTHKEEPERS, INC.,)

13 Defendants.)

14
15 TRANSCRIPT OF PROCEEDINGS

16 Newport News, Virginia

17 November 20, 2001

18
19 BEFORE:

20 H. VINCENT CONWAY, JR., JUDGE

21
22 TAYLOE ASSOCIATES, INC.

23 Registered Professional Reporters

24 Telephone: (757) 461-1984

25 Norfolk, Virginia

Appearances:

On behalf of the Plaintiffs:

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On behalf of Defendants Riverside Healthcare
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Riverside Physician Services, Inc.:

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TAYLOE ASSOCIATES, INC.

1 Appearances (cont'd):

2
3 On behalf of Defendants Peninsula Healthcare, Inc.
4 and Healthkeepers, Inc.:

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1 (The proceedings commenced at 8:35 a.m.)

2 THE COURT: I understand from the other
3 court reporter, she said, They told me this would only
4 last half an hour, so I was happy to hear that.

5 MS. HANSEN: Your Honor, your secretary
6 told us it would only last a half an hour.

7 THE COURT: Did she? Well, you have --
8 my 9:30 went off, so I don't have anything until 10.
9 Now, that doesn't mean that you should use that time.
10 I have reviewed all of the pleadings, all of the
11 arguments.

12 I called your office yesterday, Mr.
13 Shoemaker. For some reason, I did not have your
14 second amended motion for judgment. I don't have a
15 cover letter to it. I didn't have anything, but it's
16 obvious to me in reading the briefs for the defendants
17 that you filed something.

18 MR. SHOEMAKER: Well, I have a filed
19 stamped copy, Your Honor, from like July 17th or July
20 18th, if that matters.

21 THE COURT: You sent me a copy, and I can
22 see on there there is a stamp on it. I think it's
23 July the 10th.

24 MR. SHOEMAKER: Somewhere in there.

25 THE COURT: Yeah. And why it is not in

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1 this file, I can't explain, but your secretary did
2 send this to me, so I have that, so we're straight.

3 I have read all of the briefs, I have
4 reread the pleadings, I have diagrammed the complaint
5 so that I could understand it, and I am prepared to
6 listen to anything you'd like to add. Now, since
7 they're challenging your pleading, I think the
8 defendants should go first. Ms. Hansen or Mr.
9 Franklin, either.

10 MS. HANSEN: Your Honor, as you have
11 noted, we have written long briefs in this case and I
12 wrote a very long brief, and in that regard, I don't
13 have a lot more to add to what I said except I would
14 like to just summarize the position of Riverside, Your
15 Honor.

16 First, we have three essential causes of
17 action here contained in six counts. Counts 1 and 2
18 are wrongful discharges that respectively Vanden Hoek
19 and Fuste have filed against the Riverside defendants.
20 And then Counts 3 and 4 are against all of the
21 defendants and defamation claims, one on behalf of Dr.
22 Fuste, one on behalf of Vanden Hoek, and then the last
23 two counts, 5 and 6, are the conspiracy counts.

24 With respect first to the wrongful
25 discharge count, Your Honor, as I set forth in my

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1 memorandum of law, and if the Court, as you have
2 indicated, has diagrammed the pleadings, the
3 difference between the second amended complaint and
4 the first amended complaint, with respect to the
5 allegations on wrongful discharge, are, basically,
6 nothing. There's no significant changes.

7 We've gone through it. There have been
8 some eliminations of some allegations, and just a
9 phrase added that what they did angered Riverside.
10 But beyond that, there's been no substantial change to
11 the -- there has been no substantial change to the
12 allegations from the first amended motion for
13 judgment, and this court and Your Honor had previously
14 granted Riverside's demurrer based to the first
15 amended motion for judgment, and due to the fact that
16 there's been no substantial change, I would
17 respectfully -- Riverside would respectfully request
18 the Court to stay with its original ruling and grant
19 the demurrer.

20 I have gone on and briefed in the
21 memorandum that I filed why the cause of action for
22 wrongful discharge --

23 THE COURT: You have gone on and on and
24 on.

25 MS. HANSEN: And on and on, Your Honor,

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1 and I assume that you have read it and I thank you,
2 Your Honor, for reading it, sum and substance. I
3 think he was saying I talk too much. But sum and
4 substance, I would say, Your Honor, that they haven't
5 set forth a cognizable cause of action for wrongful
6 discharge under the public policy exceptions that
7 would be recognized by the Virginia Supreme Court.

8 Looking at the statutes that they're
9 relying on, and they are not to be protected in their
10 employment, if you take the totality of these
11 pleadings, Your Honor, it doesn't rise to the level of
12 a wrongful discharge that would be recognized by the
13 Virginia Supreme Court.

14 Even if the Court were to recognize
15 constructive discharge and, as we have set forth, the
16 better-reasoned opinion would be that a constructive
17 discharge would not be recognized. But even if you
18 get beyond that, the public policy exception they are
19 trying to set forth here is not one that the Virginia
20 Supreme Court would recognize.

21 Moving on then to defamation, yes, in the
22 second amended motion for judgment contains more
23 allegations, more names. It still does not cure the
24 original defect that all we have here, and you look at
25 the totality of the pleadings, it's clear from the

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1 pleadings that these doctors left. It is clear
2 from -- that these doctors left their employment
3 without providing notice. It is clear from the
4 pleadings that the statements that are attributed to
5 the Riverside defendants were made to people who would
6 have a need to know, people who would inquire and have
7 a need to know.

8 There is one instance where they try to
9 overcome that and say, well, these were unsolicited
10 letters. But the unsolicited letters were from the
11 same people that the solicited letters were from, and
12 the supposed unsolicited letters were written by the
13 same people saying the same things. And bottom line,
14 Your Honor, what you have here is opinion that does
15 not rise to the level of defamation, nor from the
16 totality of the pleadings can you construe malice
17 based on all the facts that are pled in these
18 pleadings, and, therefore, Your Honor, we would
19 request that the defamation counts, again, be
20 dismissed for failure to state a claim under Virginia
21 law for a cognizable claim of defamation.

22 Which then leads us to Counts 5 and 6,
23 which are the conspiracy counts. The conspiracy count
24 necessarily hinges on a viable defamation claim, not
25 only from the way it's pled, but under the law. And

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1 under the law, you have got to have some improper
2 purpose or improper action. The improper action that
3 has been alleged in the pleadings that the plaintiffs
4 are relying on is defamation. If there is no
5 defamation count, the conspiracy counts necessarily
6 fail. And I thank you, Your Honor.

7 THE COURT: Thank you, Ms. Hansen.

8 Mr. Franklin.

9 MR. FRANKLIN: Your Honor, I will be as
10 brief as I was in my brief. Again, our position,
11 position of Healthkeepers and Peninsula, that there
12 has been no -- that the allegations of defamation
13 again fail as being insufficient and that there is no
14 allegation of conspiracy as to my clients.

15 The -- I think what comes out in the
16 brief that's pretty clear that the allegations are
17 that Dr. Fuste and Dr. Vanden Hoek vigorously
18 complained and protested the policies at Riverside.
19 They left their practice on October 1. They left
20 their patients on October 1, 1999. They did not
21 return to practice for three or four months. So I
22 think this -- prima facie there is some basis for
23 somebody to complain that perhaps they were not
24 cooperative, they were uncooperative, that their
25 leaving was unprofessional. There is no question that

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1 they left their patients, there is no question that
2 they abandoned these patients. They did not see these
3 patients for a period of three to four months.

4 That being said, I think that all of
5 those characteristics as alleged in the motion for
6 judgment are simply expressions of opinion. There is
7 no factual allegation as to the context of those
8 statements, who they were said to by my clients, under
9 what circumstances they were said, or how they even
10 fit into any characterization of these plaintiffs.

11 There is an allegation in here that in
12 spring of 2000, Mae Ellen Terrebonne, that's Dr.
13 Terrebonne, wrote a letter, again, reiterating the
14 characterizations of unprofessional, uncooperative,
15 and should not be credentialed.

16 We adamantly deny that she wrote anything
17 on behalf of Healthkeepers or in any capacity with
18 Healthkeepers. There is no such letter in the file.
19 But even if the Court accepts there is a letter to
20 that extent, again, that is nothing more than
21 expressions of opinion, which she's absolutely
22 entitled to do under the Quality Assurance Act and
23 protected from doing under 8.01-581.16.

24 The other, I think, allegations as to
25 Healthkeepers I think pretty much underscore how

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1 insufficient the allegations are, how -- what -- the
2 absence of any factual basis for malice. They allege
3 that Rita Atherton of Healthkeepers informed Ms. Rosso
4 that Dr. Fuste and Vanden Hoek left suddenly and that
5 they -- that she should find another pediatrician.

6 Now, what happened is they left the
7 practice. When they left the practice, they lost
8 their contract or the contract for them to be
9 providers was terminated with providers under Trigon.
10 And that is standard.

11 They were granted or made providers
12 solely by virtue of their relationship with Riverside
13 Health. When they left, they left the provider
14 status. Under their own contract with Trigon, Trigon
15 had the obligation to inform their patients that they
16 were no longer providers and that they had to find a
17 new pediatrician. There's absolutely nothing
18 defamatory about had left suddenly and that she should
19 find another pediatrician.

20 Again, the other specific allegation as
21 to Healthkeepers is that there was somebody by the
22 name of Theresa at Healthkeepers that told Jennifer
23 Ballard that Dr. Fuste and Vanden Hoek will never be
24 back on Healthkeepers' list of providers because of
25 the way they left Riverside. I submit to the Court

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1 that that as a matter of law is not defamatory. It is
2 probably more future -- allegations of the future than
3 anything else.

4 The conspiracy theory, again, I agree
5 with Robyn, it rises and falls on the defamation.
6 There is no other allegation of illegal act or
7 anything that was done wrong, and I'm not sure whether
8 the plaintiffs are trying to assert that their
9 termination of their contracts with my clients was
10 conspiratorial. If that's the allegation, then
11 absolutely it fails because we are clearly entitled to
12 remove them as providers, and there is no contention
13 whatsoever that they were wrongfully removed as
14 providers.

15 So, again, Your Honor, as I have argued
16 before, I don't think the motion for judgment
17 sufficiently alleges either conspiracy or defamation,
18 and we would ask that the Court dismiss the case.

19 THE COURT: Thank you, Mr. Franklin.

20 Mr. Shoemaker.

21 MR. SHOEMAKER: Your Honor, I am going to
22 begin with the Bowman claim issue, the wrongful
23 discharge. Your Honor, I think that what the Court
24 has to decide is whether or not Judge Ellis in the
25 Alexandria Division of the Eastern District was right.

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1 In Anderson versus ITT Industries, Judge Ellis -- and
2 that's a court, Your Honor, not exactly known for
3 blazing the trail of employee rights; it is a very
4 conservative court. In comparing the Mitchem case and
5 the Harris case, Judge Ellis essentially said this:
6 That where an employer requires an employee to break
7 the law and the conduct about which the employee
8 complains would have required him to break the law and
9 that employee can point to a statute, a Bowman claim
10 is made if the employee is fired for not acceding to
11 the employer's instructions.

12 THE COURT: Were your clients fired or
13 did they resign?

14 MR. SHOEMAKER: It was a -- they -- Your
15 Honor, they resigned, and we get to the constructive
16 discharge issue.

17 But, Your Honor, the great majority of
18 circuit courts that have addressed this issue have
19 said that there's really no difference. If you look
20 at the Mitchem case, if that secretary in the Mitchem
21 case had said, listen, I'm not having sex with you
22 anymore and if that's a condition of my employment, I
23 am out of here and she left, under 80 percent of the
24 circuit courts that have addressed this issue, she
25 would have a constructive discharge claim.

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1 Your Honor, it boils down to, basically,
2 this: Employers in the Commonwealth cannot be
3 forced -- or cannot force their employees to commit
4 crimes in order to keep their job. That is where the
5 rationale and the logic of Mitchem and Anderson versus
6 ITT Industries and even the Drey case take us.

7 And, Your Honor, if you look at the
8 section of my brief on constructive discharge, I mean,
9 the weight of authority, it's not close. I mean, it
10 is not even close. I am aware of two cases that have
11 said there is no -- that have categorically said there
12 is no constructive discharge claim in Virginia.

13 Your Honor, if the Court -- if ultimately
14 that is the law, then the law in Virginia will permit
15 an employer to force employees to commit crimes. And
16 think about the public policy that's inherent with
17 that. If you have an employer that forces a long-time
18 employee, maybe they're close to retirement, maybe
19 they have spent their whole career at the company, and
20 right before they vest in their plan, they say, hey,
21 we've got -- you have got to commit some forgery or
22 you have got to commit some bribes in order to keep
23 your job and if you are not willing to do that, if you
24 are not willing to be a team player and maybe bribe
25 this contracting officer, then you're out of here. If

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1 that employee voluntarily quits instead of committing
2 those bribes, under the ruling or the assertions of
3 the defense, that employee would have no civil remedy
4 at all. And so the employee is faced with a situation
5 of either facing financial distress or committing a
6 crime with no recourse.

7 Now, Judge, if you look at the Mitchem
8 case, there is a quote from the Virginia Supreme Court
9 that says that "The employment-at-will doctrine was
10 never intended to serve as a shield for employers who
11 seek to force their employees under the threat of
12 discharge to engage in criminal activity." That is a
13 direct quote from Pages 187 through 188 of Mitchem.

14 The leap -- I mean, there is no leap at
15 all from that holding to what I assert the Court
16 should do in this case, and that is find that if you
17 tell a pediatrician they are not to practice the way
18 the standards of medicine dictate, if you tell a
19 pediatrician, in fact, that they have to commit a
20 misdemeanor or have their salary cut in half, that is,
21 essentially, a violation of the holding in Mitchem,
22 Your Honor. And the thing about -- one very important
23 point about this case is we have alleged that their
24 conduct violates the public policy set forth in
25 Virginia Code 54.1-111.8, which makes it a crime for

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1 any physician to violate a professional regulation or
2 a statute.

3 That -- Your Honor, that provision of
4 law, I can't imagine a better statute for providing a
5 strong foundation for the public policy argument in
6 this case.

7 Now, granted, the constructive discharge
8 element may give the Court some pause, but if you look
9 what all these other Circuit Courts did, faced with
10 the same situation, demurrers that essentially say
11 there is no constructive discharge in Virginia, the
12 great majority of the Courts have said, well, wait a
13 minute, you can't have an employer force an employee
14 to commit a crime. And that's the way the weight of
15 the authority is trending in Virginia.

16 Now, moving to the defamation and the
17 conspiracy claim, I will concede that the conspiracy
18 claim essentially hinges on the defamation element of
19 the pleading. That's where my agreement with the
20 defense ends. They want the Court to get into a bunch
21 of factual inquiries. They want the Court to decide
22 whether or not our -- the allegation regarding
23 abandoning patients is true. We allege that our
24 clients were falsely accused of abandoning patients.
25 That's a violent accusation, Your Honor. It's a

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1 serious accusation. We allege it plainly in
2 Paragraphs 33 through 40 of the complaint, so it would
3 be inappropriate for the Court to get into the factual
4 analysis that is asserted by the defense.

5 Ms. Hansen says, goes into her privilege
6 argument, and she wants the Court to do a factual
7 analysis of whether or not the privilege exists here.
8 It is for the Court to decide, granted, it is for the
9 Court to decide whether or not a privilege exists.
10 However, it is clearly for the jury to decide whether
11 or not that privilege is defeated by circumstances
12 such as all the elements I lay out in my brief, bad
13 faith -- just give me a couple of seconds, Your Honor,
14 I will turn to that.

15 It is for the jury to decide whether or
16 not the privilege is defeated because the words were
17 spoken with actual malice or the language was
18 unnecessarily intemperate or disproportionate in
19 strength or the words were not in good faith and
20 without an honest belief in their truth or the words
21 were deliberately -- the words deliberately adopted a
22 method of speaking that gave unnecessary publicity to
23 the incident, or the defendant purposely arranged to
24 speak the alleged words in the presence of a person or
25 persons who had no interest in the matter, or the

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1 statements were for the purpose of gratifying some
2 sinister or corrupt motive such as hatred, revenge,
3 personal spite, ill will, or desire to injure the
4 plaintiff, or the statements were made with such gross
5 indifference or recklessness as to amount to wanton
6 and willful disregard for the rights of the plaintiff.
7 Those are all factual inquiries for the jury.

8 So in order for the Court to adopt what
9 they assert here, the Court has to get into facts.
10 And that's just not appropriate on demurrer.

11 Your Honor, that cite, by the way, is
12 Gray Coastal Express, 230 Va. at 153, for all those
13 inquiries that are to be made in deciding whether or
14 not a privilege exists.

15 Your Honor, the abandoning of the
16 patients is probably the strongest allegation. Now,
17 as to the conspiracy, I have got to respond to Mr.
18 Franklin saying that there's no -- that the allegation
19 he quoted was the only -- essentially, the only
20 allegation of conspiracy. That's simply not the case.

21 Paragraph 34 through, again, roughly 38,
22 set out clearly what we are alleging that PHI and
23 Healthkeepers did. In Paragraph 35, we say
24 that Gross and Temple, the employees of Riverside,
25 communicated to King and Terrebonne, employees of PHI

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1 and Healthkeepers, their desire that the plaintiffs
2 not be permitted to see Healthkeepers and PHI
3 patients. They communicated this desire in a willful
4 and malicious effort to harm the plaintiffs' medical
5 practices. King and Terrebonne joined and furthered
6 the conspiracy by acceding to this request. Upon
7 information and belief, Terrebonne and King knew
8 Riverside's accusations were false and, in any event,
9 made no effort to determine their truthfulness.

10 Then in 36 we say, Gross, Temple, King,
11 and Terrebonne all sought to prevent plaintiffs'
12 practices from becoming viable by falsely informing
13 patients, agents of other hospitals, and credentialing
14 officials at Mary Immaculate Hospital and Sentara
15 Hampton General Hospital that plaintiffs were, quote,
16 unprofessional, end quote; quote, uncooperative, end
17 quote; that they, quote, abandoned their patients, end
18 quote; and that there were, quote, concerns about
19 their competence. These publications and the
20 combination that gave rise to them were willful and
21 malicious.

22 Now, Your Honor, back to the basic law in
23 defamation. This is an allegation of defamation per
24 se. Under the authority we've cited in our brief,
25 defamation per se exists where the words impute to the

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1 person's unfitness to perform the duties of an office
2 or employment or wanted integrity in the discharge of
3 such an office of employment or words which prejudice
4 a person in his or her profession or trade.

5 Clearly, accusing someone falsely of
6 abandoning their patients prejudices a physician in
7 their profession.

8 Your Honor, I think the brief spells out
9 everything, and I don't think I'll belabor this any
10 longer. And we submit that perhaps they can come back
11 on summary judgment, but we have laid out the facts
12 and we have laid out the law, and the demurrer should
13 be overruled.

14 THE COURT: Thank you, Mr. Shoemaker.
15 Let me ask you a question. I want to brainstorm with
16 you a moment. Suppose we have an attorney that goes
17 to a law firm and they agree to pay him \$150,000 a
18 year and after two years they say, you're just not
19 bringing in the work; we're going to reduce your
20 salary. And that person says, well, there's a
21 problem. You're not referring me business; you're not
22 advertising me; you are not marketing me properly; you
23 share in this. And they continue and the next year
24 the salary is reduced again, and then the attorney
25 says, you know, number one, you people have turned

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1 your copy center into a profit thing and that hurts
2 clients, that's fraud on a client. And, next, a lot
3 of associates around here are charging time and
4 they're really not working that .3 on the case, I know
5 it. And, next, under the code of responsibility we're
6 supposed to pursue our work diligently, and I have
7 walked around here and I notice a lot of people in
8 this office are not being diligent, and so I want to
9 be treated with a little bit more respect. And they
10 have a partners meeting and the partners don't
11 particularly care for this person at all, and,
12 eventually, the next year comes around and the
13 writing's on the wall, the salary is going down, the
14 person's not productive. So on December 31st the
15 person leaves the law firm.

16 Now, it seems to me there are several
17 things that can be done, depending on the seriousness.
18 You could go to the Commonwealth's attorney, you could
19 request a special grand jury and see if you could shut
20 the law firm down as a public nuisance. That's pretty
21 far-fetched but that's one option.

22 Number 2, as a lawyer under our system,
23 you could report any complaints to the state bar,
24 disciplinary process. Although I would suggest that
25 if anyone was hurt, say by the lack of diligence, you

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1 wouldn't have standing. Someone else would have to
2 raise that, the client who was harmed.

3 The third thing I could do would be to go
4 into court and sue, claiming constructive discharge
5 and that what I was encouraging you, basically, to do
6 is to comply with the laws and regulations of the
7 legal profession and the law firm reacted against me
8 in such a manner, retribution, that they forced me to,
9 in fact, resign. And now I want five million dollars.

10 What my difficulty is I don't understand
11 how any private cause of action that the lawyer, if
12 any, may have is elevated to a breach of public
13 policy. I could understand clients suing. How does
14 the lawyer take advantage of the rules and regulation
15 for and in support of his own personal claim against
16 the law firm? And suppose the law firm, he goes to
17 get another job and the law firm says, he's difficult,
18 basically, he walked away from his clients, he's
19 unprofessional, he's an irritant, he lacks all
20 interpersonal skills, and so I not only sue them for
21 constructive discharge in violation of state
22 regulation, state law, but I sue them for defamation.

23 How do you elevate the private wrong and
24 put it under the class of people to be protected by
25 the state policy?

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1 MR. SHOEMAKER: Your Honor, you do it the
2 way Judge Ellis did it in ITT Industries.

3 THE COURT: Okay. In my analogy now, you
4 would say what?

5 MR. SHOEMAKER: Well, in your analogy --

6 THE COURT: I am just trying to
7 understand.

8 MR. SHOEMAKER: In your analogy, if --
9 first of all, the timing you are talking about, there
10 certainly seems to be a strong attenuation between the
11 time the man first complained about the perceived
12 wrong and the time he ultimately left, which we don't
13 have here. We have absolute compression of the time
14 line. But in your analogy, if we're talking about
15 fraud, it is a crime to commit fraud, and if the
16 employer is saying to this attorney he has to commit
17 fraud and accede to this pattern of fraud in order to
18 maintain his salary, and if the facts are, if these
19 are the facts, that he refuses to accede in that
20 fraud, he gets his salary cut in half, and he says,
21 I'm not living with half my salary, this is a
22 constructive discharge and I am leaving, then he uses
23 the criminal provisions against fraud as the basis for
24 his public policy, just as Judge Ellis used the
25 criminal prohibitions against forgery to find the

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1 public policy for that man in ITT Industries.

2 THE COURT: So it is your position in
3 this case that because they wouldn't comply with
4 certain procedures, they were, what, forced into a
5 position of constructive discharge, constructive
6 termination?

7 MR. SHOEMAKER: Well, Your Honor, you are
8 saying the word "procedures." I am saying "fraud."
9 If the facts are they were telling the man, you have
10 got to commit this fraud on your clients --

11 THE COURT: Or we'll cut your salary in
12 half.

13 MR. SHOEMAKER: Or we'll cut your salary
14 in half.

15 THE COURT: Or fire you.

16 MR. SHOEMAKER: Right, or fire you.

17 THE COURT: Then he would have a private
18 cause of action.

19 MR. SHOEMAKER: Yes, sir.

20 THE COURT: Now, in your case, is it your
21 allegation that these doctors were told to do X, Y,
22 and Z, and if they did not do that, as a consequence,
23 their salaries would be cut in half and/or they would
24 be fired?

25 MR. SHOEMAKER: Well, Your Honor, no

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1 employer is that obtuse. What you are saying is a
2 savvy employer can get around a Bowman claim if
3 they -- if they dodge those words.

4 What happened here was something very
5 close. In the summer, my clients were presented with
6 a great contract. The contract essentially
7 acknowledged their existing employment condition; they
8 are perfectly happy with that contract. Then there is
9 a blowup over these various issues, one being the
10 pediatric vaccine issue, the other being supervision
11 of residents. After that, once this blowup occurs,
12 Dr. Fuste, and this is an important note, Dr. Fuste is
13 actually fired, not constructively fired, actually
14 fired from the directorship of the pediatric practice.

15 THE COURT: From a board position.

16 MR. SHOEMAKER: That's a \$20,000-a-year
17 position.

18 THE COURT: All right.

19 MR. SHOEMAKER: Not directorship, I'm
20 sorry. She ran -- she was in charge of the pediatric
21 practice, and it had a \$20,000-a-year stipend; she is
22 actually fired from that position.

23 Then they are told --

24 THE COURT: And wait a minute. You said
25 she is fired because what?

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1 MR. SHOEMAKER: Because they actually
2 fired her, because --

3 THE COURT: Because.

4 MR. SHOEMAKER: Because she complained
5 and wasn't being -- she complained about their
6 pediatric vaccine issue, about the resident
7 supervision issue, about the issues we allege in the
8 complaint, these violations of law and practice that
9 Riverside was foisting upon them. She complained.
10 Riverside gets angry and reacts, removes her from
11 the -- from being the head of the pediatric practice
12 and then says to them, you know that nice contract we
13 just gave you, that nice contract that only had an
14 aspirational RVU target and that RVU target was
15 totally in line with all your peers'? Well, now we're
16 going to more than double that; you now have to work
17 more than twice as hard than all your peers; in
18 addition, you have to teach in order to make that same
19 salary. How does that sound?

20 Clearly, the RVU target was unattainable.
21 It was some 220 percent of what all the other doctors
22 were required to do. And those doctors weren't
23 teachers. My clients were teaching physicians. So it
24 was a clear message, it was the highway or our way.
25 And they said, well, if you don't take this deal, if

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1 you don't take the new 50,000 RVU deal, we are going
2 to cut your pay in half, and that's exactly what they
3 did in August, cut their pay slam in two.

4 THE COURT: And it is your position that
5 because she complained, this is the action that the
6 defendants, one or more of them took?

7 MR. SHOEMAKER: Yes, sir, in a very tight
8 time line. There is no attenuation of the time line
9 here. It is very tight. In the span of 45, 50 days
10 all of this occurs. Not even that.

11 THE COURT: All right. Anything else
12 you'd like to add?

13 MR. SHOEMAKER: No, Your Honor. That's
14 all I have.

15 THE COURT: All right. I sense some
16 shuffling of papers over here, some anxiety. Ms.
17 Hansen?

18 MS. HANSEN: Yes, Your Honor.

19 THE COURT: Did Mr. Shoemaker bring forth
20 some wisdom?

21 MS. HANSEN: No, he did not bring forth
22 any wisdom, with all due respect to Mr. Shoemaker,
23 although I do respect him. I would say that his
24 zealousness for his clients' behalf I found when I
25 hear what he argues and what he pleads, the pleadings

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1 don't lead me to the conclusion nor a reasonable
2 conclusion, and I know we have to construe all these
3 facts in favor of the plaintiff, and I will say right
4 here, Your Honor, that some of the representations, if
5 we have to get into the facts, will not bear out as
6 true, but his representations got quite zealous here,
7 Your Honor, and compared this to a scenario where
8 someone is told to commit a crime and if you don't
9 commit a crime, I am going to terminate you. He has
10 not pled that. He cannot plead that. The facts don't
11 support that at all, Your Honor.

12 What he has pled is there were numerous
13 statutes that covered the practice of medicine, much
14 like Your Honor's hypothetical that he gave him, and
15 that these people complained. Then he says they were
16 provided -- and he says in retaliation for these
17 complaints, they're provided with these new contracts.

18 Well, the new contracts cut their
19 salaries right from the pleading from 150,000 to
20 100,000 and 85,000. I don't think that's going to put
21 them in poverty row, Your Honor, in any event, and it
22 is clear from Riverside's perspective, one is not
23 connected with the other and -- but that's neither --
24 we have got to go with what he's pled here, Your
25 Honor, and he hasn't pled that Riverside said, Dr.

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1 Fuste and Dr. Vanden Hoek, you have got to commit
2 these crimes, you have got to commit a crime and if
3 you don't commit these crimes, your job is
4 jeopardized. He has not pled that, he can't plead
5 that, and you can't construe that from the pleadings.
6 And that's on -- that's what I see on the wrongful
7 discharge.

8 With respect to the defamation, Your
9 Honor, it's still -- it's clear from -- you have got
10 to look at the totality of these pleadings, and it
11 would be, in my opinion, a shame to let this go
12 forward beyond this because it's clear these are
13 opinions, justifiable opinions that these individuals
14 had. There was a hearing before the executive
15 committee that's protected by the Health Care Quality
16 Improvement Act where there was findings of
17 abandonment of patients, Your Honor. That's as I
18 understand. And so, Your Honor, those are -- these
19 are opinions based on the facts that you can deduce
20 from these pleadings, and I would ask you, again, to
21 sustain the demurrers, as you did before.

22 THE COURT: Mr. Franklin.

23 MR. FRANKLIN: Your Honor, just one
24 thing, the Chavez case, cited by both my brief and the
25 hospital's brief, establishes that the

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1 characterization of speech as fact or opinion is a
2 matter of law for the Court to determine. So
3 that's -- the Court has to make that decision before
4 we proceed further.

5 And I think the Court has to look at the
6 allegations of the motion for judgment. And it is our
7 complaint, and I don't think counsel has -- I think
8 counsel has kind of agreed by reading the paragraphs
9 that he has read, there is this joint accusation of
10 using these four words against my clients and the
11 hospital employees. There is no allegation as to the
12 context those words were used in, there is no
13 allegation of the situation in which they were
14 expressed, so the Court has got to look at these words
15 and determine whether these were opinions or facts.
16 And I would submit to the Court that each one of these
17 contentions is simply an expression of opinion.

18 The allegations, the specific
19 allegations, the only time he gets specific is as to
20 Rita Atherton and Theresa, and I would submit to the
21 Court as a matter of law that is not defamation. And
22 so I think we are right back where we have been -- we
23 were last time we were here, I believe. You know, I
24 think it is interesting that counsel admits that his
25 conspiracy allegation hinges on defamation. So

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1 without the defamation, there is no conspiracy.

2 THE COURT: Thank you, Mr. Franklin.

3 Mr. Shoemaker.

4 MR. SHOEMAKER: Your Honor, I don't know
5 what else to add, other than we seem to have -- I
6 think they have on Orwellian view of my pleading. The
7 factual paragraphs number close to 50. Paragraphs 33
8 through 48 set out all the contexts that could
9 possibly be set out. Now, Mr. Franklin's referring to
10 Paragraph 46. Paragraph 46 is merely an example of
11 some 17 or 20 people who were told various things as a
12 result of this conspiracy, in addition to everything
13 else we pled in the preceding 20 paragraphs. And so I
14 just -- their view of the pleading, I think, is just
15 wrong.

16 THE COURT: All right. Thank you, sir.

17 I appreciate the briefs submitted by all
18 parties. These are some of the most difficult
19 decisions the Court has to make. I know and I
20 remember how much work each side does in preparing for
21 these hearings, and I know counsel identify with their
22 clients, and each victory or nonvictory is often a
23 personal thing, and I hesitate to rule too quickly
24 until I make sure that I understand what is being said
25 and what the law is.

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1 At the same time, after sufficient
2 information is received, I think it is incumbent upon
3 the Court to make the rulings deemed most appropriate.
4 At this stage of the proceeding, on demurrers, all
5 facts and the implications of those facts are viewed
6 favorably on behalf of the plaintiffs. However, the
7 Court is not bound to accept the conclusory
8 allegations that arise from those favored facts. My
9 concern in viewing the pleading in its entirety is
10 with respect to the wrongful discharge.
11 Notwithstanding what is said, as a matter of law, the
12 facts as pled do not appear to rise to the level of a
13 wrongful discharge. If we argue constructive
14 discharge, I do not think that is sufficiently
15 supported.

16 The public policy violations upon a
17 resignation or termination are not found to be
18 supported by the Court on these facts. The Court does
19 not believe that the two plaintiffs are parties to be
20 protected under the statutes. And in reviewing the
21 pleading again, I get some sort of flavor of some sort
22 of private ombudsman action, and I do not think that
23 the statutes were enacted to provide that sort of
24 action.

25 The defamatory statements as alleged, on

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1 balance, appear to be opinion by and between people
2 involved in the health care field. And the conspiracy
3 theory, having had some closeness with that sort of
4 cause of action in other cases, is not supported by
5 the facts in this case.

6 The comments for the most part concerning
7 opinions, whether one acts in a particular fashion
8 after a dispute of this type, the Court does not find
9 as defamation. This is a corporate divorce, there are
10 allegations of fault, and with reference to the
11 abandonment of clients, I think that boils down to
12 the -- I don't recall the date now, in October when
13 they left and whether or not there were continuing
14 care responsibilities at that time.

15 Viewing the pleading and giving all the
16 weight possible in favor of the plaintiffs, the Court
17 does not feel that the causes of action of wrongful
18 discharge, defamation, or conspiracy are supported,
19 even assuming implications as the Court must in favor
20 of the plaintiff. The conclusions do not at least
21 persuade this Court that these causes of action have
22 been properly set forth and supported. And because of
23 that, I think it would be unfair to continue this
24 matter as to the defendants.

25 My initial view was that I would see that

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1 this matter continued until we got to the evidentiary
2 stage to prove what I believed to be the case, that
3 the conclusions being cited as growing from these
4 facts do not rationally follow.

5 But I think it is a duty, notwithstanding
6 my great regard for counsel, that assuming everything
7 and all inferences, and I know counsel for the
8 plaintiffs is sincere, I do not share his confidence
9 in the strength of the causes of action alleged in
10 this pleading. And as a consequence, this Court will
11 sustain the demurrers filed on behalf of all
12 defendants without leave to amend and dismiss this
13 matter from the docket of this court, with exceptions
14 to be allowed and noted on behalf of the plaintiffs
15 for such further proceedings as may be appropriate.

16 Mr. Franklin.

17 MR. FRANKLIN: Yes, Your Honor.

18 THE COURT: Would you prepare an order --

19 MR. FRANKLIN: I will, Your Honor.

20 THE COURT: -- to that effect and submit
21 it to the Court and allow Mr. Shoemaker to take the
22 appropriate exceptions for the reasons stated in court
23 as well as any he may wish to attach to that order.

24 MR. FRANKLIN: I will, Your Honor. Thank
25 you, sir.

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1 MS. HANSEN: Thank you, Your Honor.

2 THE COURT: Thank you, counsel.

3 MR. SHOEMAKER: Thank you, Your Honor.

4 (The proceedings were concluded at 9:20

5 a.m.)

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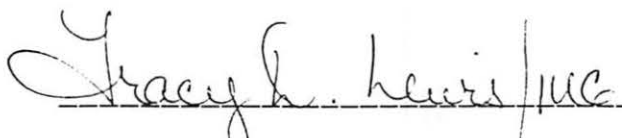
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COURT REPORTER'S CERTIFICATE

I, Tracy D. Lewis, Registered Professional Reporter, certify that I recorded verbatim by stenotype the proceedings in the captioned cause before H. VINCENT CONWAY, JR., Judge of said Court, Newport News, Virginia, on the 20th day of November, 2001.

I further certify that to the best of my knowledge and belief, the foregoing transcript constitutes a true and correct transcript of the said proceedings.

Given under my hand this 10th day of December, 2001, at Norfolk, Virginia.

A handwritten signature in cursive script that reads "Tracy D. Lewis" followed by a vertical line and the letters "RPR".

Tracy D. Lewis, RPR

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ROSA FUSTE, M.D. and
TIEN L. VANDEN HOEK, M.D.,

Plaintiffs,

v.

AT LAW NO.: 29743-VC

RIVERSIDE HEALTHCARE ASSOCIATION, INC.,
RIVERSIDE HOSPITAL, INC., RIVERSIDE PHYSICIAN
SERVICES, INC., PENINSULA HEALTHCARE, INC. and
HEALTHKEEPERS, INC.,

Defendants.

ORDER

This matter came on upon the Demurrers filed herein by the defendants, Riverside Healthcare Association, Inc., Riverside Hospital, Inc., Riverside Physician Services, Inc., Peninsula Healthcare, Inc. and Healthkeepers, Inc., and was argued by counsel.

For the reasons set forth in the record, it is

ORDERED that the Demurrers filed on behalf of the defendants, Riverside Healthcare Association, Inc., Riverside Hospital, Inc., Riverside Physician Services, Inc., Peninsula Healthcare, Inc. and Healthkeepers, Inc., be and they hereby are sustained without leave to amend, and accordingly, it is

ORDERED that this action be and it hereby is dismissed with prejudice, to which actions of the Court, the plaintiffs, by counsel, excepted to the Court's ruling on the grounds set forth in their brief in opposition to the Demurrers and argument before the Court as contained in the record.

ENTER:

December 12, 2001

JUDGE

We ask for this:

 p.d.

Robyn Hylton Hansen
Counsel for Riverside Healthcare Association,
Inc., Riverside Hospital, Inc. and Riverside
Physician Services, Inc.

 p.d.

John Franklin, III
Counsel for Peninsula Healthcare, Inc. and
Healthkeepers, Inc.

Seen and objected to:

 p.q.

James J. Shoemaker, Jr.
Counsel for Plaintiffs

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

ROSA FUSTE, M.D.,

and

TIEN L. VANDEN HOEK, M.D.,

Plaintiffs,

v.

RIVERSIDE HEALTHCARE ASSOCIATION, INC.,

RIVERSIDE HOSPITAL, INC.,

RIVERSIDE PHYSICIAN SERVICES, INC.,

PENINSULA HEALTHCARE, INC.,

and

HEALTHKEEPERS, INC.,

Defendants.

LAW NO.: 29743-VC

02 JUN-14 PM 2:12

NOTICE OF APPEAL

The Plaintiffs, Rosa Fuste, M.D. and Tien L. Vanden Hoek, M.D., hereby give notice of their appeal of the order issued on December 12, 2001, by Judge Vincent Conway sustaining Defendants' demurrers. Plaintiff shall file a transcript, Statement of Facts or other incidents of the case. The transcript has been ordered from the court reporter who reported the case.

Respectfully submitted,

ROSA FUSTE, M.D. and
TIEN L. VANDEN HOEK, M.D.

By

Of Counsel

James H. Shoemaker, Jr.
VSB # 33148
Patten, Wornom, Hatten & Diamonstein, L.C.
12350 Jefferson Avenue
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Newport News, Virginia 23602
(757) 223-4500

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Notice of Appeal** was sent first class mail to Robyn Hansen, Jr., Jones, Blechman, Woltz & Kelly, P.C., 600 Thimble Shoals Boulevard, Newport News, Virginia, 23612, and John Franklin, III, Taylor and Walker, P.C., 1300 First Virginia Tower, 555 Main Street, Norfolk, Virginia, 23514, this 4th day of January, 2002.

James H. Shoemaker, Jr.

IN THE
Supreme Court of Virginia
AT RICHMOND

Record No. _____

ROSA FUSTE, M.D.,
and
TIEN L. VANDEN HOEK, M.D.,

Appellants,

– v. –

RIVERSIDE HEALTHCARE ASSOCIATION, INC.,

and

RIVERSIDE HOSPITAL, INC. et. al.,

Appellees.

PETITION FOR APPEAL

DUNCAN GARNETT
JAMES H. SHOEMAKER, JR.
DOUGLAS E. MILLER
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PETITION FOR APPEAL

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

I. STATEMENT OF THE CASE

This case presents claims of termination against public policy, constructive termination against public policy, defamation *per se* and violation of the Virginia Business Conspiracy Statute that were dismissed by the trial court on demurrer. The Appellants are pediatricians who were employed by the Riverside Healthcare Association, Inc. ("RHA"). In 1999, they were presented with the choice of violating the law or surrendering their employment. Problems first began for Appellants when they made various complaints about their employer's violation of law, substandard patient care and fraudulent billing practices. Immediately after making these complaints, their salaries were cut nearly in half, and Dr. Fuste was stripped of her directorship of RHA's pediatric practice. In taking these measures, RHA intentionally made both Dr. Fuste's and Dr. Vanden Hoek's conditions of employment intolerable. This constituted constructive termination in violation of Virginia public policy. After their termination, the Appellees defamed them and conspired to injure them in their profession in violation of the Virginia Business Conspiracy Statute.

The Appellants initially filed suit in the Circuit Court for the City of Newport News. The Defendants, RHA; Riverside Hospital, Inc.; Riverside Physician Services, Inc.; Peninsula Healthcare, Inc.; and Healthkeepers, Inc., demurred to the Appellants Motion for Judgment, and

Healthcare, Inc.; and Healthkeepers, Inc., demurred to the Appellants Motion for Judgment, and an agreed opportunity to amend was provided. Appellees then demurred to the First Amended Motion for Judgment and a hearing was held. Appellants sought and received leave to amend their Motion for Judgment. The Seconded Amended Motion for Judgment provided several statutory bases in support of their wrongful discharge claims and detailed facts supporting all claims. The Defendants demurred to the Second Amended Motion for Judgment, and a hearing was held. On December 12, 2001, the Court issued an order granting the Defendants' demurrer and dismissed the case with prejudice. The Appellants timely perfected this appeal.

II. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED IN HOLDING, AS A MATTER OF LAW, THAT DR. FUSTE FAILED TO STATE A VALID "BOWMAN" CAUSE OF ACTION FOR HER TERMINATION FROM THE POSITION OF DIRECTOR OF RHA'S PEDIATRIC PRACTICE.

2. THE TRIAL COURT ERRED IN HOLDING, AS A MATTER OF LAW, THAT THE APPELLANTS FAILED TO STATE VALID "BOWMAN" CLAIMS FOR CONSTRUCTIVE DISCHARGE AGAINST THE DEFENDANTS.

3. THE TRIAL COURT ERRED IN HOLDING, AS A MATTER OF LAW, THAT THE APPELLANTS FAILED TO STATE CAUSES OF ACTION FOR DEFAMATION AND THAT FALSE PUBLICATIONS ALLEGING THAT APPELLANTS "ABANDONED THEIR PATIENTS", WERE "UNPROFESSIONAL", AND THAT THERE WERE "CONCERNS ABOUT THEIR COMPETENCE" WERE NOT ACTIONABLE AS DEFAMATION OR DEFAMATION *PER SE*.

4. THE TRIAL COURT ERRED IN HOLDING, AS A MATTER OF LAW, THAT THE APPELLANTS FAILED TO STATE A CAUSE OF ACTION FOR VIOLATION OF THE VIRGINIA BUSINESS CONSPIRACY STATUTE.

III. QUESTIONS PRESENTED

1. WHETHER TERMINATION OF DR. FUSTE FROM HER POSITION AS DIRECTOR OF RHA'S PEDIATRIC PRACTICE BECAUSE SHE REFUSED TO VIOLATE VIRGINIA LAW AND REFUSED TO PROVIDE SUBSTANDARD PATIENT CARE IN VIOLATION OF VIRGINIA LAW PRESENTS A "BOWMAN" CLAIM FOR TERMINATION AGAINST PUBLIC POLICY. (A.E. 1).

2. WHETHER THE DOCTRINE OF "CONSTRUCTIVE DISCHARGE" EXISTS UNDER VIRGINIA LAW. (A.E. 2).

3. WHETHER THE APPELLANTS STATED VALID "BOWMAN" CLAIMS FOR CONSTRUCTIVE DISCHARGE WHEN THEIR PAY WAS CUT NEARLY IN HALF AND THEY WERE SUBJECTED TO INTOLERABLE WORKING CONDITIONS BECAUSE THEY REFUSED TO PROVIDE SUBSTANDARD PATIENT CARE AND COMMIT FRAUDULENT ACTS IN VIOLATION OF VIRGINIA LAW. (A.E. 2).

4. WHETHER FALSE PUBLICATIONS, MADE IN BAD FAITH, THAT A PHYSICIAN "ABANDONED HER PATIENTS", WAS "UNPROFESSIONAL" AND THAT THERE WERE "CONCERNS ABOUT HER COMPETENCE" ARE ACTIONABLE UNDER VIRGINIA LAW AS DEFAMATION OR DEFAMATION *PER SE*. (A.E. 3).

5. WHETHER THE APPELLANTS' ALLEGATIONS THAT APPELLEES CONSPIRED TO PREVENT THE OPENING OF THEIR NEW PRACTICE STATED A VIABLE CLAIM FOR VIOLATION OF THE VIRGINIA BUSINESS CONSPIRACY STATUTE. (A.E. 4).

IV. STATEMENT OF FACTS

The following facts were explicitly alleged in the Second Amended Motion for Judgment ("AMJ"):

Appellants were employed as pediatricians by RHA until October 1, 1999, when they were wrongfully terminated from their employment. (AMJ ¶14). They were terminated because they refused to violate Virginia law, including refusal to commit various misdemeanors, and in retaliation for various complaints they made about RHA's patient care, violation of law and fraudulent billing practices. (AMJ ¶2). After their termination, the Riverside Defendants conspired with PHI and Healthkeepers to prevent patients of Doctors Fuste and Vanden Hoek

from following them to their new practice, to injure their professional reputations, and to prevent their new medical practices from becoming viable businesses. (AMJ ¶14).

Appellants' Terms of Employment Prior to Their Complaints to Riverside

Appellants were originally employed by RHA pursuant to written contracts. (AMJ ¶15). After Appellants entered the original 1994 Employment Agreements with RHA, a compensation scoring system based upon units of productivity known as "Relative Value Units" or "RVU's" was imposed for nearly all RHA physicians. (AMJ ¶16). This is a system of measuring physician productivity commonly used in many large healthcare organizations. (*Id.*) Because a significant portion of Appellants' time was spent teaching and supervising residents, they were completely excluded from the RVU system until 1998. *Id.* Then, in 1998, the Appellants were each assigned RVU goals of approximately 4,200 per month. (AMJ ¶17). Acknowledging their significant resident supervision and teaching duties, and the fact that the RVU system did not lend itself to measuring these tasks, RHA made the 1998 goals aspirational for Appellants. *Id.* The RVU requirements were mandatory for all other non-teaching pediatricians.

Appellants' agreements with RHA were typical "best efforts" contracts at all times prior to August, 1999. (AMJ ¶18). In other words, prior to August, 1999, Appellants' contracts required forty hours of work per week without mandatory productivity targets. *Id.* The written contracts of Dr. Fuste and Dr. Vanden Hoek expired under their own terms on December 31, 1996 and April 30, 1997, respectively. (AMJ ¶19). Neither contract renewed on those dates. *Id.* They were superceded by subsequent "at will" employment agreements under which, by summer of 1999, Plaintiffs compensation had grown to greater than 150% of their original base salaries in exchange for their agreement to perform their usual duties as pediatricians and numerous other

duties not delineated in their original contracts. *Id.* For example, in addition to her duties as a physician, Dr. Fuste was promoted to Director of Riverside's pediatric practice for which she received an annual stipend of \$20,000.00. (AMJ ¶20). She also served on the Board of Advisors for Riverside Physician Associates. *Id.*

Riverside's Wrongful Termination of Appellants

New written contract proposals were presented to Drs. Fuste and Vanden Hoek on June 29, 1999. (AMJ ¶21). The new written proposals contained no change in their then-current base salaries of \$150,000.00, or in Dr. Fuste's \$20,000.00 additional annual pediatric directorship stipend. *Id.* This represented compensation increases 40% above the original 1994 written contracts in recognition of the change in the employment relationships that had occurred over the years. *Id.* The proposals also contained no RVU requirements, although they did contain aspirational performance targets of 50,000 RVU's annually. *Id.*

Very shortly after presenting the new contracts, but before they were executed, RHA administration changed its policy of evaluating all pediatric patients regardless of ability to pay. (AMJ ¶22). The administration planned to implement a financial check of each patient's ability to pay prior to any provision of vaccinations, evaluation or treatment, turning away those who could not pay or commit to a payment plan. *Id.* Appellants realized that aspects of this policy would constitute a significant change from past practice, place children of indigent families in jeopardy and would violate applicable law. (AMJ ¶23). In fact, this policy did violate, among other statutes and regulations, Virginia Code §32.1-310 *et. seq.*, Virginia Code §54.1-111, Virginia Code §54.1-2914, the Federal Emergency Medical Treatment and Labor Act ("EMTALA"), and regulations implemented pursuant to Virginia Code §32.1-43 by the Virginia

Department of Health to ensure vaccination of children. specifically 12 VAC 30-10-50 A(5) & (6), and other law cited in the Second Amended Motion for Judgment. (AMJ ¶¶23, 51 & 57).

The Appellants vigorously protested this change in policy. (AMJ ¶23). Their protests angered officials of RHA and Riverside. *Id.* The Appellants had, in the same time period, previously voiced strong protests regarding certain billing and medical care practices at RHA and Riverside. (AMJ ¶24). Specifically, they had complained that: 1) Riverside and RHA sought to improperly withhold, based on patient's ability to pay, vaccines that had been provided to Riverside and RHA free of charge under state and federal programs intended for children of indigent families; 2) Riverside and RHA improperly diverted and sold vaccines provided free to Riverside and intended for children of indigent families; 3) Riverside and RHA allowed unlicensed and/or uncertified persons (residents) to provide medical services to patients without proper attending physician supervision, and requested that Drs. Fuste and Vanden Hoek do likewise for their pediatric patients to increase RVU production; and 4) Riverside and RHA charged Medicaid and other third party payors for services they represented as being performed by board certified or board eligible physicians when, in fact, they were performed by improperly supervised residents in training. *Id.*

Conducting a medical practice while allowing the practices set forth in paragraphs 22 through 24 of the Second Amended Motion for Judgment would have constituted a Class I Misdemeanor under Virginia Code §54.1-111. (AMJ ¶25). Riverside and RHA responded to Appellants' protests by terminating Dr. Fuste from the Directorship of Riverside's pediatric practice and presenting Drs. Fuste and Vanden Hoek with revised contracts in July, 1999, *mandating* that they each produce *9,000 RVU's per month* to earn the same respective base

salaries of \$150,000.00 annually. (AMJ ¶26). This constituted 216 percent of the recent June 29 contract proposal requirements and a similar increase over the 1998 monthly RVU goal. *Id.* Moreover, it constituted 237 percent of the average monthly goal of Riverside's other seven pediatricians. *Id.*

It was clear that Drs. Fuste and Vanden Hoek would have to accede to and participate in the commission of the crimes, ethical violations and violations of law set forth in the Second Amended Motion for Judgment to remain employed by RHA under terms similar to the June 29 proposal. (AMJ ¶27). Drs. Fuste and Vanden Hoek were informed that if they did not sign the new contracts, their base salaries would be reduced from \$150,000.00 per year, to \$100,000.00 and \$85,000.00 per year, respectively, the base salaries set forth on Schedule A of the old 1994 contracts. (AMJ ¶28). When the Appellants refused to agree to the 9,000 RVU per month contracts, RHA and Riverside cut their pay by over 40%, as previously threatened, effective August 16, 1999, with no corresponding reduction in duties. (AMJ ¶29).

In taking these actions, RHA and Riverside retaliated against the Appellants by terminating their previously existing employment, and deliberately made Appellants' working conditions intolerable so as to cause any reasonable physician in their situations to leave RHA. (AMJ ¶31).

Conspiracy to Injure and Defamation of Appellants

All of the Appellees, through their agents, intentionally combined with each other to harm Appellants' business maliciously and willfully. (AMJ ¶34). Specifically, Barry Gross and Dr. Eugene Temple, acting in the course and scope of their employment with RHA and Riverside, combined with C. Burke King and Mae Ellis Terrebonne, officers of Healthkeepers and PHI,

who were acting in the course and scope of their employment, to ensure that Appellants would not see Healthkeepers and PHI patients and that these patients and credentialing officials at other hospitals would not see or professionally associate the Appellants. *Id.*

Gross and Temple communicated to King and Terrebone their desire that the Appellants not be permitted to see Healthkeepers and PHI patients. (AMJ ¶35). They communicated this desire in a willful and malicious effort to harm the Appellants' medical practices. *Id.* King and Terrebone joined and furthered the conspiracy by acceding to this request. *Id.* Upon information and belief, Terrebone and King knew Riverside's accusations were false and, in any event, made no effort to determine their truthfulness. *Id.* Gross, Temple, King and Terrebone all sought to prevent Appellants' new practices from becoming viable by falsely informing patients, agents of other hospitals, and credentialing officials at Mary Immaculate Hospital and Sentara Hampton General that Appellants had "abandoned their patients," were "unprofessional," "uncooperative," and that there were "concerns about their competence." (AMJ ¶36). These publications, and the combination that gave rise to them, were willful and malicious. *Id.*

A prospective staff member of Pediatric Consultants, Rebecca Cantwell, was contacted by Kimberly Martin of Riverside in mid-January, 2000, and told that Drs. Fuste's and Vanden Hoek's new practice would immediately be shut down the day it opened, and that if she took a job there she would never have a future with Riverside. (AMJ ¶38). Hospital medical staff privileges are essential for a physician to practice medicine and/or participate with major payors such as Trigon Blue Cross/Blue Shield, Cigna, etc. (AMJ ¶39). To continue practicing pediatrics and participate with area health plans, the Appellants requested to return from sabbatical and to have their medical staff privileges at Riverside Hospital reactivated, a routine

formality. *Id.* However, when the Medical Executive Committee of Riverside met on February 2, 2000, to act on this request, Dr. Eugene Temple alleged, in bad faith, that they had “abandoned their patients” on October 1, 1999, making a motion that they should not be allowed back on the medical staff. *Id.*

Approximately 50% of the Appellants’ patients at Riverside belonged to Healthkeepers. (AMJ ¶40). Numerous patients asked Healthkeepers and PHI to be allowed to follow Drs. Fuste and Vanden Hoek as their pediatricians. *Id.* To effect this, the Appellants requested continued participation with Healthkeepers and PHI. *Id.* This request was subsequently denied in an April 26, 2000, letter from C. Burke King, President of Healthkeepers and PHI. *Id.* King denied their request at the behest of Gross, Temple and Riverside knowing that the requests were specious. *Id.* It was clear that this was the result of a conspiracy. Former patients who wanted to follow-up with Drs. Fuste and Vanden Hoek were informed by agents of Riverside Hospital, RHA, RPS, Healthkeepers and PHI that because of alleged “unprofessional behavior” and “patient abandonment,” the Appellants would never be allowed to participate in the Healthkeepers and/or PHI network. (AMJ ¶41). As a direct result of this action, patient choice was constrained, the Appellants’ reputations were damaged in the patient population, and they lost substantial revenue. *Id.*

To continue practicing pediatrics on the Peninsula, Drs. Fuste and Vanden Hoek applied for medical staff membership at Sentara Hampton General Hospital and Mary Immaculate Hospital as well as for continued participation with numerous health plans. Critical to this process was the timely and truthful release of staff status, clinical privileges and employment information by RHA and Riverside. Riverside and RHA interfered with this process by delaying

the release of needed information, by misrepresenting the facts of the Appellants' departure, and by falsely alleging that Appellants had acted "unprofessionally," had "left suddenly" were "uncooperative" and had "abandoned their patients". (AMJ ¶42).

Unsolicited letters and communications were also provided to the credentials committee of Sentara Hampton General Hospital and Mary Immaculate Hospital by RHA, RPS, Riverside Hospital, Healthkeepers and PHI through their respective agents. These communications also falsely allege that Drs. Fuste and Vanden Hoek had "abandoned their patients", were "uncooperative", "unprofessional", and "left suddenly." (AMJ ¶43). In the Spring of 2000, May Ellen Tarrabon with Healthkeepers and PHI, in the course and scope of her employment with those entities, wrote an unsolicited letter to Sentara Hampton General and Mary Immaculate Hospital falsely stating that Drs. Fuste and Vanden Hoek had been "unprofessional", "uncooperative" and that they should not be credentialed. (AMJ ¶¶43 & 44). Her intent in writing this letter was to prevent their medical practice from becoming successful. *Id.* This act was malicious and effected in furtherance of the conspiracy discussed above. (AMJ ¶44).

In the Summer of 2000, Barry Gross acting in the course and scope of his employment with RHA and Riverside, wrote a letter to Sentara and Mary Immaculate Hospital credential committees falsely and maliciously stating that Drs. Fuste and Vanden Hoek has been "very uncooperative" at Riverside and had "left suddenly". (AMJ ¶45). His intent in writing this letter was to prevent their medical practice from becoming successful. *Id.*

In the spring and summer of 2000, many parents and grandparents of Appellants' former patients called Riverside and Healthkeepers in an attempt to locate them and resume their professional relationships. (AMJ ¶46). Riverside and Healthkeepers published several false

statements in response to these requests in willful and malicious attempts to harm Drs. Fuste and Vanden Hoek's practice. *Id.* Kimberly Martin of Riverside specifically informed Vergie Outlaw that Drs. Fuste and Vanden Hoek were not able to work in this area. *Id.* Likewise, a Ms. Delling called Kimberly Martin of Riverside inquiring as to Dr. Fuste's whereabouts and was also informed that Dr. Fuste was not able to work in the area. (AMJ ¶46). Jennifer Ballard called Healthkeepers and spoke with an employee there concerning the whereabouts of Drs. Fuste and Vanden Hoek. Ms. Ballard was informed that they would "never be put back on a Healthkeepers list of providers because of the way they left Riverside". (AMJ ¶46). These publications were a direct result of the aforesaid conspiracy.

V. STANDARD OF REVIEW

Demurrers admit the truth of all facts properly alleged. *Bowman v. State Bank of Keyesville*, 229 Va. 534, 536, 331 S.E.2d 797, 798 (1985). A demurrer tests the legal sufficiency of a pleading, and all allegations of the pleading are to be viewed in the light most favorable to the plaintiff. *CaterCorp., Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24-25, 431 S.E.2d 277, 279-280 (1993). "When a Motion for Judgment or a Bill of Complaint contains sufficient allegations of material facts to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer." *Cater Corp., Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993). Even though a Motion for Judgment or Bill of Complaint may be imperfect, "when it is drafted so that defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer: if a defendant desires more definite information, or a more specific

statement of the grounds of the claim, the defendant should request the court to order the plaintiffs to file a Bill of Particulars.” *Cater Corp., Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993). The facts admitted by demurrer are those expressly alleged, those which fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged.” *Rosillo v. Winters*, 235 Va. 268, 270, 367 S.E.2d 717, 717-718 (1988).

VI. ARGUMENT

The Appellants were terminated in violation of Virginia public policy because they had both a duty and a right to resist the policy changes and violations of law detailed in the Second Amended Motion for Judgment. Moreover, a significant and growing majority of circuit courts that have directly addressed the constructive discharge issue have concluded that such a claim exists within the Commonwealth.

A. Appellants’ Termination Violated the Public Policy of the Commonwealth.

While Virginia still adheres to the doctrine of “employment at will,” the adherence is no longer absolute. *See, e.g., Mitchem v. Counts*, 259 Va. 179, 523 S.E.2d 246, 251 (2000). In 1985, the Supreme Court of Virginia created an exception to the doctrine when the termination violates the public policy of the Commonwealth. *Bowman v. State Bank of Keysville*, 229 Va. 534 (1985). In *Bowman*, the Supreme Court of Virginia held that the Appellants’ employer was liable for wrongful discharge after it had terminated them for refusing to vote their stock in the company in accordance with management’s wishes. The Court held that the employees’ termination violated the public policy expressed in Virginia securities law that individual

stockholders should vote their shares free from duress and intimidation by corporate management. *Bowman*, 229 Va. at 538-540. The Court concluded that an employer could not “lawfully use the threat of discharge . . . as a device to control the otherwise unfettered discretion of a shareholder to vote freely his or her stock in the corporation” *Id.* Since the *Bowman* decision in 1985, the public policy exception has evolved. In *Lockhart v. Commonwealth Educational Systems Corporation*, 247 Va. 98 (1994), the Supreme Court of Virginia held that a *Bowman* claim could be based on Virginia public policy embodied in the Virginia Human Rights Act, Virginia Code §2.1-714 et seq. This holding effectively broadened the scope of the public policy exception to all discrimination cases. The General Assembly, however, in response to *Lockhart*, amended the VHRA so as to preclude reliance on the Act in prosecuting a *Bowman* claim involving discrimination. *Doss v. Jamco, Inc.*, 254 Va. 362, 492 S.E.2d 441, 446-47 (1997).

While *Doss* made it clear that a *Bowman* claim cannot be based on the anti-discrimination provisions in the VHRA, the case created significant questions over which statutes may serve as the basis of a *Bowman* claim. In two recent decisions, the Supreme Court of Virginia has settled this debate. While all Virginia statutes reflect a Virginia public policy to some extent, “termination of an employee in violation of the policy underlying any one of them does not automatically give rise to a . . . cause of action for wrongful discharge.” *City of Virginia Beach v. Harris*, 259 Va. 220, 523 S.E.2d 239, 245 (2000). The Court in *Harris* recognized two classes of statutes that could give rise to a *Bowman* claim. *Harris*, 259 Va. at 232-233. The first is where a statute plainly expresses a public policy of the Commonwealth. *Id.* The second, more common category, are statutes which do not explicitly state a public policy, but “are designed to protect the property rights, personal freedoms, health, safety or welfare of the people in general.

and thereby further an underlying established public policy that is violated by the discharge at issue". *Id.* Even where a statute falls within one of these categories, it may only serve as the basis of a *Bowman* claim if the aggrieved employee demonstrates that she is a member of the class of individuals the public policy is intended to benefit. *See Mitchem v. Counts*, 259 Va. 179, 189-190, 523 S.E.2d. 246, 251 (2000); *Dray v. Newmarket Poultry Products, Inc.*, 258 Va. 187, 518 S.E.2d 312, 313 (1999). To state a *Bowman* claim, the Plaintiff must show that she is "within the protective reach of the statute which supplied the public policy component of his or her claim." *Id.* *See also Leverton v. Allied Signal, Inc.*, 991 F.Supp. 486, 493 (E.D. Va. 1998).

None of the statutes on which Appellants rely are within the first category of statutes because they do not explicitly express a public policy of the Commonwealth. They all, however, fall within the second category because they are clearly designed to protect the welfare of the general public prohibiting physicians from engaging in unlawful and unethical acts,¹ by assuring children get vaccinated regardless of ability to pay,² ensuring availability of competent medical care,³ ensuring that health care professionals are honest,⁴ etc. Virginia Code §54.1-111A.(8) makes the violation of any of the statutes or regulations set forth above a criminal misdemeanor offense. Therefore, it is clear that the statutes and regulations upon which the Appellants rely may serve as the basis of a *Bowman* claim provided they can demonstrate that they are within the

¹ Va. Code Ann., §54.1-2914(4), (9), (10) & (13).

² 12 VAC 30-10-50 A(5) & (6)

³ See generally, Va. Code Ann. §54.1-111A.(8), Va. Code Ann. §54.1-2914, Va. Code Ann. §54.1-2902, Va. Code Ann. §54.1-2952

⁴ See, Va. Code Ann. §32.1-310

class of individuals within the statutes' protective reach. *Id.*

Contrary to Appellants assertions, the Virginia Supreme Court has made it very clear that the statutes' protective reach extends beyond the class of persons who might be victims of its violation. *See Mitchem* 259 Va. at 187-190. A statute's protective reach extends to those who have a legal duty or right under the statute. *Id.*; *see also Dray*, 258 Va. at 191. This concept was first discussed in the *Dray* case, but it has been greatly refined in the past two years. In *Dray*, a quality control inspector at a poultry processing plant was terminated for reporting unsanitary conditions to a government inspector. The Virginia Supreme Court affirmed the trial court's ruling that she failed to state a claim for wrongful discharge because the statute upon which she relied, the Virginia Meat and Poultry Products Inspection Act, did not "confer rights or duties upon her or any other similarly situated employee of the defendant." *Dray*, 258 Va. at 191.

Two more recent decisions, issued on the same day, and both involving attempts by a Plaintiff to use a criminal statute as the basis of a *Bowman* claim, clearly define who is, and who is not, within a statute's protective reach. In *Mitchem*, the Virginia Supreme Court upheld the *Bowman* claim of an employee who had been terminated for refusing to submit to her supervisor's sexual advances. The Plaintiff contended that her termination violated the public policies expressed in the criminal statutes proscribing fornication⁵ and lewd and lascivious behavior⁶. The Virginia Supreme Court held that the Plaintiff in *Mitchem* was within the class persons those statutes were intended to reach or benefit because they were criminal statutes "enacted for the protection of the general public" and the employment at will doctrine was "never

⁵See Virginia Code §18.2-344

⁶See Virginia Code §18.2-345

intended to serve as a shield for employers who seek to force their employees, under the threat of discharge, to engage in criminal activity.” *Mitchem*, 259 Va. at 187-190.

Comparing the result in *Mitchem* to the result in *Harris* illuminates the proper analytical path in the present case. In *Harris*, a police officer was discharged for obtaining a warrant against his supervisor, charging him with obstruction of justice, because the supervisor had directed the Plaintiff not to serve a warrant on a criminal suspect. The Plaintiff alleged that he had been discharged in violation of the public policy expressed in the obstruction of justice statute.⁷ More specifically, the Plaintiff claimed he was fired for taking steps to prevent his superior from obstructing justice. The Plaintiff was unable to point to a statute that conferred upon him a right or a duty to take these steps. As a result, the Virginia Supreme Court rejected his claim. The distinction is clear: in *Mitchem*, the Plaintiff was essentially alleging that she had to commit crimes to keep her job, the Plaintiff in *Harris* could not make this allegation.

Holding that an employee had stated a viable *Bowman* claim after he was fired for refusing to commit forgery at his employer’s behest, United States District Judge Ellis of the Eastern District’s Alexandria Division, compared *Mitchem* and *Dray* as follows:

The Plaintiff in *Harris* was not within the protective reach of the obstruction of justice statute because he was neither required by the statute to do what he did, nor was he a victim of any putative violation of it. Instead, he sought to invoke the obstruction of justice statute to justify an act the statute did not require, namely obtaining an arrest warrant for his superior officer. By contrast, the *Mitchem* Plaintiff was within the protective reach of both statutes cited there because she was arguably under a legal duty imposed upon her by the statutes to refrain from doing what her supervisor wanted her to do, namely, engage in fornication and lewd and lascivious conduct. In sum, these cases taken together teach that, to assert a valid *Bowman* claim, a Plaintiff must have either (i) a statutorily created right which the termination interferes with or violates

⁷See Virginia Code §18.2-460

(*Bowman*) or (ii) a statutorily imposed duty which the employee is terminated for refusing to violate (*Mitchem, Dray*).

Anderson v. ITT Industries, 92 F. Supp. 2d 516, 522-523 (E.D.Va. 2000)

Clearly, an employee need not be a victim of the crime he is asked to commit to fall within a statute's protective reach. The present case is governed by Judge Ellis' analysis. Drs. Fuste and Vanden Hoek were discharged for refusing to engage in conduct prohibited by numerous Virginia laws and regulations. (AMJ ¶¶23-32 & 51, 57). The Appellants here fall within a class of individuals the statutes were designed to protect because the statutes imposed upon them a legal duty not to engage in the prohibited conduct. Indeed, without conscientious physicians willing to fulfill their duties, the public health (and purse) are imperiled. The statutes relied upon by Drs. Fuste and Vanden Hoek plainly imposed upon them a duty not to allow indigent children who presented at their office to go unvaccinated, patients to be treated by improperly supervised residents, commission of waste, fraud and abuse, etc. Accordingly, Appellants are within the protective reach of the statutes cited in the Second Amended Motion for Judgment, and they have stated a valid *Bowman* wrongful discharge claim. If the Appellee's argument to the trial court is to be adopted, an employee who refuses to commit a crime at an employer's behest would have no remedy if she chooses to leave her employment rather than committing the crime.

B. Appellants Were Constructively Discharged in Violation of Virginia Law.

A significant and growing *majority* of circuit courts that have addressed the issue recognize the doctrine of constructive discharge. *Johnson v. Behsudi*, 52 Va. Cir. 533, 1997 WL

33120363 (January 16, 1997); *Melina v. Summer Consultants, Inc.*, 1996 WL 1065653 (Fairfax Circuit Court, December 9, 1996); *Lundy v. Cole Vision Corporation*, 39 Va. Cir. 254 (City of Richmond 1996); *Dearing v. Thor*, VLW 098-8-247 (Roanoke City Circuit Court 1998); *Peyton v. United Southern Aluminum Products*, 49 Va. Cir. 187 (City of Richmond, June 9, 1999). All of the cases set forth above present situations where trial courts overruled demurrers which argued that constructive discharge does not exist in Virginia.

The results of the cases set forth above are not merely the products of better reasoning. Where employers give employees the ultimatum to violate the law or leave, application of the constructive discharge doctrine is unavoidable. The result urged by the Appellees before the trial court would leave an employee who chooses to resign rather than commit crimes no civil remedy against his employer. The reasoning of the cases set forth above not only protects employees, it protects the rule of law. Employees having no choice but to commit crimes or face financial distress with no recourse would be more likely to commit those crimes.

Appellants' research into this issue reveals just two cases holding that the doctrine of constructive discharge does not exist in Virginia: the *single* case cited by the Appellees before the trial court and a federal case predating the cases cited above that states that the doctrine does not *yet* exist in Virginia. The great weight of authority, and, just as importantly, the weight of reason, mandates application of the constructive discharge doctrine in this case.

C. Appellants Have Stated a Cause of Action for Defamation.

The Appellees' contention to the trial court that "the Appellants merely state that the Defendants published false and defamatory information against the Appellants, but they do not specify what information was false and defamatory" is a representation bordering on Orwellian.

While the Appellants would prefer that this submission be less voluminous, the following recap of the allegations cannot be avoided: Appellants allege that Gross, Temple, King and Tarrabon, in the course and scope of their employment, all sought to prevent Appellants' practices from becoming viable by falsely informing patients, agents of other hospitals, and credentialing officials at Sentara Hampton General Hospital and Mary Immaculate Hospital that Appellants were "unprofessional", "uncooperative", that they "abandoned their patients" and that there were "concerns about their competence" (AMJ ¶¶34-36); Appellants further allege that "these publications and the combination that gave rise to them were willful and malicious" (AMJ ¶36); in the very next paragraph, Appellants allege that the Defendants "repeated and published these false allegations to others outside Defendants respective organizations. . . in an intentionally and malicious effort to harm Plaintiffs' business" (AMJ ¶37); Appellants then outline an additional nine paragraphs of specific falsehoods and conclude as follows "The actions of RHA, Riverside Hospital, RPS, Healthkeepers and PHI constitute defamation of the Appellants and arose from an unlawful combination to intentionally injure Appellants and their business. These defamatory communications were published in bad faith." (AMJ ¶37-46). Clearly, the defamation was alleged in sufficient detail.

The Defendants contention that the Appellants complain of opinions, and not facts, is likewise specious. Accusing a physician of "abandoning her patients" is not opinion. It is clearly a statement of fact. Stating that the Appellants "are not allowed to practice in the area" is not an opinion, it is a statement of fact. Stating that there are "concerns about [a physician's] competence" is not an opinion, it is a statement of fact. Stating that a physician has engaged in "unprofessional behavior" is not opinion, it is a statement of fact. Stating that physicians will

“never be put back on the Healthkeepers list of providers because of the way they left Riverside” is not a statement of opinion, it is a statement of fact.

There are two kinds of defamation in Virginia: common law defamation or defamation *per quod* which requires a showing of special damages; and defamation *per se* which does not require a showing of special damages as those damages are presumed. *Leming v. Moore*, 221 Va. 884, 889 (1981); *Shupe v. Roses Stores*, 213 Va. (1972). The following types of statements constitute defamation *per se*:

- 1) Words which impute to a person a commission of some criminal offense involving moral turpitude which may be indicted and punished;
- 2) Words which impute that a person is infected with some disease;
- 3) Words which impute to a person unfitness to perform the duties of an office or employment or wanted integrity in the discharge of such an office or employment; and
- 4) Words which prejudice a person in his or her profession or trade. *Id.*

In *Great Coastal Express v. Ellington*, 230 Va. 142 (1985), an employer accused a truck driver employee of “commercial bribery” in his effort to get a shop foreman to alter the governor on the truck so that he could drive faster against company regulations. The trial court held that this constituted defamation *per se* and the employee was awarded \$20,000 in compensatory damages and \$50,000 in punitive damages by the jury.

The Defendant appealed arguing the allegations did not constitute defamation and, in any event, were protected by a qualified privilege. In disposing of the Defendant’s argument, the Virginia Supreme Court stated that the allegations made “substantial danger to the employees

reputation apparent” and that the trial court properly found that the statement constituted defamation *per se*. *Great Coastal Express v. Ellington*, 231 Va. at 148-152. In dispatching the defense’s qualified privilege argument, the Court noted that “a communication, made in good faith, on a subject matter in which the person communicating has an interest or owes a legal duty, legal, moral or social, is a qualified privilege if made to a person having a corresponding interest or duty”. *Great Coastal Express*, 230 Va. at 153. Moreover, the Court noted that it is for the trial court, not the jury, to decide whether a privilege exists. The Court noted, however, that the standard for defeating the privilege is not “clear and convincing evidence” of malice, rather “the privilege is lost *if the jury finds*, from a preponderance of the evidence” that:

- 1) the words were spoken with actual malice; *or*
- 2) the language was unnecessarily intemperate or disproportionate in strength; *or*
- 3) the words were not in good faith, and without an honest belief in their truth; *or*
- 4) the words were deliberately adopted a method of speaking the alleged words which gave unnecessary publicity to such words; *or*
- 5) Defendant purposely arranged to speak the alleged words in the presence of a person or persons who had no interest in the matter; *or*
- 6) the statements were for the purpose of gratifying some sinister or corrupt motive such as hatred, revenge, personal spite, ill will or desire to injury the plaintiff; *or*
- 7) the statements were made with such gross indifference or recklessness as to amount to wanton and willful disregard for the rights of the Plaintiff.

Appellants’ allegations incorporate nearly all of these elements. Appellants have clearly alleged sufficient facts to survive the demurrers to the defamation counts.

D. Appellants Have Stated a Cause of Action for Violation of Virginia Code §18.2-499 & 500.

How the Defendants can read paragraphs 34 through 48 of the Second Amended Motion for Judgment and complain that they have “no context” is baffling. Defendants essentially urge an entirely different standard of pleading and ignore the Virginia Supreme Court’s holding in *CaterCorp*: “When a motion for judgment or bill of complaint contains sufficient allegations of material facts to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer.” *CaterCorp*, 246 Va. at 24. Riverside contends that Virginia Code §18.2-499 was not incorporated into the Second Amended Motion for Judgment or the relevant counts. They apparently did not read paragraph 48 of the Second Amended Motion for Judgment. As to their allegation that sufficient facts have not been pleaded to support the conspiracy allegations, Appellants contend that paragraphs 34 through 36 would, alone, support these counts, to say nothing of the rest of the Second Amended Motion for Judgment.

To recover in an action under this section, Appellants must plead and prove: 1) a combination of two or more persons for the purpose of willfully and maliciously injuring the Plaintiff in his profession, and 2) resulting damage to the Plaintiff. *Allen Realty Corporation v. Holbert*, 227 Va. 441 (1984). Clearly, the Appellants have successfully stated a cause of action under the Virginia business conspiracy statute.

VII. CONCLUSION

The trial court erred in granting Defendants' Demurrer. Appellants clearly stated a claim for which relief could be granted for all counts. Accordingly, Dr. Rosa Fuste and Dr. Tien Vanden Hoek respectfully request that this Court grant their Petition for Appeal and schedule this matter for briefing and oral argument.

Respectfully submitted,

**ROSA FUSTE, M.D. and
TIEN L. VANDEN HOEK, M.D.**

By: _____


Of Counsel

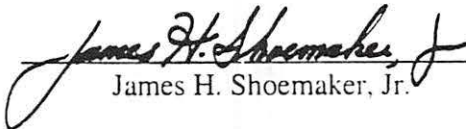
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CERTIFICATION

In accordance with the provisions of Rule 5:17 of the Rules of this Court. Appellant, by counsel, states the following:

1. The name of the Appellants are ROSA FUSTE, M.D. and TIEN L. VANDEN HOEK, M.D., and their counsel are Duncan Garnett, James H. Shoemaker, Jr. and Douglas E. Miller, of Patten, Wornom, Hatten and Diamonstein, L.C., 12350 Jefferson Avenue, Suite 360, Newport News, Virginia 23602, Tel. (757) 223-4500, Fax (757) 249-1627.
2. There is no party in this case who is not represented by counsel.
3. The name of the Appellees are Riverside Healthcare Association, Inc., Riverside Hospital, Inc.; Riverside Physician Services, Inc.; Peninsula Healthcare, Inc.; and Healthkeepers, Inc. and counsel for the Appellees are Robyn Hansen, Jr., Jones, Blechman, Woltz & Kelly, P.C., 600 Thimble Shoals Boulevard, Newport News, Virginia, 23612, and John Franklin, III, Taylor and Walker, P.C., 1300 First Virginia Tower, 555 Main Street, Norfolk, Virginia, 23514, this 12th day of March, 2002.
4. I certify that I mailed postage prepaid a true copy of the foregoing Petition for Appeal to counsel for the Appellee at the following addresses: Robyn Hansen, Jr., Jones, Blechman, Woltz & Kelly, P.C., 600 Thimble Shoals Boulevard, Newport News, Virginia, 23612, and John Franklin, III, Taylor and Walker, P.C., 1300 First Virginia Tower, 555 Main Street, Norfolk, Virginia, 23514, this 12th day of March, 2002.
5. Counsel for the Appellants desires to state orally and in person, to a panel of the Supreme Court, the reasons why the Petition for Appeal should be granted.
6. Four (4) copies of this Petition for Appeal, together with a check for the \$25.00 filing fee were sent via hand delivery to the Clerk of the Supreme Court of Virginia, 5th Floor, 100 N. Ninth Street, Richmond, Virginia 23219.

On this 12th day of March, 2002.


James H. Shoemaker, Jr.

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Friday the 7th day of June, 2002.*

Rosa Fuste, M.D., et al., Appellants,

against Record No. 020628
Circuit Court No. 29743-VC

Riverside Healthcare Association, Inc., et al., Appellees.

From the Circuit Court of the City of Newport News

Upon the petition of Rosa Fuste, M.D. and another an appeal is awarded them from a judgment rendered by the Circuit Court of the City of Newport News on the 12th day of December, 2001; upon the appellants, or some one for them, filing an appeal bond with sufficient security or an irrevocable letter of credit in the clerk's office of the trial court in the penalty of \$500, within 15 days from the date of the Certificate of Appeal, with condition as the law directs.

This appeal, however, is limited to the consideration of assignment of error No. 3 which reads as follows:

3. The trial court erred in holding, as a matter of law, that the appellants failed to state causes of action for defamation and that false publications alleging that appellants "abandoned their patients", were "unprofessional," and that there were "concerns about their competence" were not actionable as defamation or defamation per se.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignment of error No. 3 and the briefs to be filed shall be limited to such discussion as is relevant to that assignment of error.

The petition for appeal is refused as to the remaining assignments of error.

Reference is made to the said petition for the names of all the appellants and all the appellees involved in this appeal.

A Copy,

Teste:

Clerk

CERTIFICATE OF APPEAL

Pursuant to Rule 5:23, I, David B. Beach, Clerk of the Supreme Court of Virginia, do hereby certify that on June 7, 2002 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the lower court indicated in the order and to all counsel of record.

Given under my hand this 7th day of June, 2002.

Clerk

