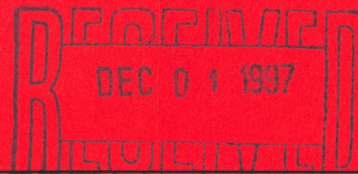


255 Va492

CLERK
SUPREME COURT OF VIRGINIA



RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

RECORD NO. 971316

GWENDOLYN L. JORDAN,

Appellant,

v.

SAMUEL SHANDS, et al.,

Appellees.

JOINT APPENDIX

**James T. Edmunds
Martha L. Bond
McEACHIN & GEE, P.C.
700 East Main Street
Suite 1201
Richmond, VA 23219
(804) 775-2374**

*Counsel for Appellant -
Gwendolyn L. Jordan*

**Robert B. Delano, Jr.
Henry C. Spalding, III
SANDS ANDERSON
MARKS & MILLER
Post Office Box 1998
Richmond, VA 23218-1998
(804) 648-1636**

*Counsel for Appellees -
Samuel Shands and
C.V. Townsend*

**William Joe Hoppe
Senior Assistant City Attorney
Room 300, City Hall
900 East Broad Street
Richmond, VA 23219
(804) 780-7951**

*Counsel for Appellees -
Jerry Oliver and
Cecil Richardson*

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V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Courts Building

GWENDOLYN L. JORDAN,
Plaintiff

v.

Civil Case No.: AB.1601.3

THE CITY OF RICHMOND, VIRGINIA
Serve on:
John Rupp, City Attorney
900 E. Broad Street
Richmond, VA 23219
(City of Richmond)
and
SAMUEL SHANDS,
Sheriff of Dinwiddie County
Dinwiddie, VA 23841
Defendant

MOTION FOR JUDGMENT

COMES NOW, the plaintiff, GWENDOLYN L. JORDAN, (hereinafter JORDAN), by counsel, and moves the Court for judgment against the defendants, THE CITY OF RICHMOND, VIRGINIA, (hereinafter RICHMOND), and SAMUEL SHANDS, Sheriff of Dinwiddie County, (hereinafter SHANDS), jointly and severally, in the amount of Five Hundred Thousand Dollars, (\$500,000.00) plus interest from June 21, 1995 and costs, all for the reasons stated below:

1. On or about June 21, 1995 police officers, acting within the course and scope of their employment with RICHMOND, arrested JORDAN and placed her in a holding cell for transportation to the City Jail.

2. The police officers were allegedly acting under the authority of a capias issued by the Juvenile and Domestic Relations Court of Dinwiddie County which described the person sought as Gwendolyn M. Jordan, 231-B, S. Jefferson Street,

See AMT

9/19/96

DC

Filed in the Clerk's Office this 22nd day of June, 1996
Writ Tax \$ 25
Fees 15
Total Paid 40
Teste: DEVILL M. DEAN, CLERK
[Signature]

Petersburg, Virginia, Female, born 10/7/59.

3. JORDAN is Gwendolyn L. Jordan, whose address is Rt 1 Box 128 C, Blackstone, Virginia 23824. A simple examination of JORDAN'S driver's license would have placed the RICHMOND police officers on notice that they had arrested the wrong person, as JORDAN continuously explained.

4. An unidentified person later entered the information as to race, height, weight, color of eyes and hair and the Social Security Number of JORDAN on the Capias and such information was also entered on the Commitment Order, with exception of the address, which was entered as JORDAN'S address instead of Gwendolyn M. Jordan's address.

5. When RICHMOND police officers asked that the Dinwiddie Sheriff's Office confirm that JORDAN, with her identifying data, was the person wanted, Dinwiddie confirmed. This confirmation was given in spite of the fact that JORDAN lived at a Blackstone address and the Gwendolyn M. Jordan that Dinwiddie was seeking was listed with a Petersburg address. The confirmation was given Sgt. C.V. Townsend of the Dinwiddie Sheriff's department, who was acting in the course and scope of his employment.

6. For three weeks JORDAN waited to have her name cleared of this false charge. When the hearing finally was held at the Dinwiddie Juvenile and Domestic Relations Court, it was obvious to the Court that JORDAN was not the same as the Gwendolyn M. Jordan Dinwiddie County sought and charges were dismissed against JORDAN.

7. JORDAN was subject to the deprivation of her liberty,

falsely arrested, falsely charged, libeled and slandered by the joint actions of the defendants, RICHMOND and SHANDS.

8. Such joint actions of the defendants led to the JORDAN'S malicious prosecution in the Juvenile and Domestic Relations Court of Dinwiddie County.

9. Such joint actions rose to the level of the intentional infliction of emotional distress on JORDAN by the defendants.

10. Such joint actions resulted in the violation of the Virginia Insulting Words Statute, Section 8.01-45 of the Code of Virginia of 1950, as amended, by the defendants in that the defendants falsely accused JORDAN of a crime, to-wit: Failure to appear before the Court on a non-support charge.

11. Such joint actions of the defendants were intentional or, at least, grossly negligent.

12. As a direct and proximate result of the defendants' joint actions, JORDAN suffered humiliation, embarrassment, anxiety, tension and the inconvenience, cost and lost time of attending the Juvenile Court hearing in Dinwiddie County.

WHEREFORE, the plaintiff, JORDAN, demands judgment against the defendant, RICHMOND and SHANDS in the amount of Five Hundred Thousand Dollars (\$500,000.00), plus interest from June 21, 1995 and costs.

A TRIAL BY JURY IS DEMANDED.

GWENDOLYN L. JORDAN

By A. D. J. H. S. C.
OF COUNSEL

NOTICE TO DEFENDANT

Proceedings are pending in the Circuit Court of the City of Richmond, Virginia, John Marshall Courts Building, and upon the expiration of ten (10) days after the giving of this notice and the expiration of the statutory period within which you may respond, in the event you do not respond, without further notice, the entry of a judgement by default as prayed for in the above pleading may be requested by the plaintiff.

A. Donald McEachin
Donald J. Gee
McEachin and Gee, P.C.
700 East Main Street
Richmond, VA 23219
(804) 775-2374

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was mailed, postage prepaid, to John Rupp, City Attorney, City of Richmond, Virginia, 900 E. Main Street, Richmond, VA 23219, and to Samuel Shands, Sheriff of Dinwiddie County, Dinwiddie, VA 23841, this 25th day of June, 1996.

A. D. J. McEachin

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Courts Building

GWENDOLYN L. JORDAN,
Plaintiff

v.

THE CITY OF RICHMOND, VIRGINIA
and
SAMUEL SHANDS, Sheriff
Defendants

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}

Civil Case No.: _____

PLAINTIFF'S FIRST SET OF INTERROGATORIES
PROPOUNDED TO DEFENDANTS
AND REQUEST FOR PRODUCTION OF DOCUMENTS

Comes now the plaintiff, Gwendolyn L. Jordan, by counsel, requesting the defendant to file an answer in writing and under oath, pursuant to Rule 4:8 of the Rules of the Supreme Court of Virginia, to the following interrogatories, amending them as additional information becomes available and to serve a true copy thereof on plaintiff's counsel within such period as prescribed by the Rules of the Supreme Court of Virginia:

INSTRUCTIONS

a. These Interrogatories are continuing in character, so as to require you to file supplementary answers if you obtain further or different information before trial.

b. Where the name of a person is requested, indicate the full name, home and business addresses and telephone numbers of such person.

c. Unless otherwise indicated, these Interrogatories refer to the time, place and circumstances of the occurrence mentioned or complained of in the pleadings.

d. Where information or knowledge in possession of a party is requested, such request includes knowledge of the party's agent, next friend, guardian, representatives and, unless privileged, his attorneys.

INTERROGATORIES

1. State the name, address, named insured (if different from you), and policy limits of any general liability carrier that afforded coverage to you on June 21, 1995.

a. If there are any questionable liability insurance coverage, state the basis for denying or questioning the coverage that might otherwise be afforded.

ANSWER:

2. State the name, address and telephone number of each person with knowledge of the June 21, 1995 arrest of the plaintiff and identify what he or she knows of the incident. Also state the job description of each person so identified.

ANSWER:

3. State all facts you rely upon in your denials of the allegations contained in the plaintiff's Motion for Judgment.

ANSWER:

4. State all facts you rely upon in support of any and all affirmative defenses you assert in your Grounds of Defense, if any, stating which facts relate to the specific affirmative defenses asserted.

ANSWER:

5. State the name(s) of any expert witness(es) who you expect or may call at the trial of this matter. For each expert witness state the following:

a. Name, address and telephone number and qualifications of each witness as an expert.

b. The subject matter which the expert will testify, including any and all opinions to which the expert will testify and the basis for the opinions of the expert.

c. The facts upon which the expert's opinion is based.

ANSWER:

6. If you or anyone on your behalf has made or obtained a document or recording concerning the facts of the incident that is the basis of this suit, identify each such document and recording.

ANSWER:

7. If you have made or given testimony, a statement, comment or report or if you have received such, concerning the incident that is the basis of this suit or any fact relevant to any issue in this case, identify the date, the persons present and the person to whom the statement was made.

ANSWER:

8. State the defendant's version of how the arrest that is the basis of this suit occurred, including what you observed in the series of events leading up to the incident, and all other aspects of the arrest and the sequence in which they occurred.

ANSWER:

9. Please state whether or not you intend to offer any opinion testimony of any sort at the trial of this matter. If you do so intend, please state whether the testimony comes from an expert witness or a lay witness. Identify the name and address of the witness and state with specificity the opinion testimony expected.

ANSWER:

REQUEST FOR PRODUCTION OF DOCUMENTS

Comes now the Plaintiff, by counsel, pursuant to the Rules of the Supreme Court of Virginia, and moves the Defendant to produce for inspection and copying at the law offices of McEachin and Gee, P.C., 700 East Main Street, Suite 1201, Richmond, Virginia, 23219, within 28 days of service upon the Defendant of this Request, the following:

1. Please provide a true and correct copy of the Defendant's general liability insurance policy in effect on June 21, 1995.
2. Please provide true copies of all communications between the Richmond City Police Department and the Dinwiddie County Sheriff's department relating to the plaintiff on June 21, 1995.
3. Please provide all other writings and memoranda of any date relating to the incident that is the basis of this suit.

GWENDOLYN L. JORDAN

By A. D. J. McEl
OF COUNSEL

A. Donald McEachin
Donald J. Gee
McEachin and Gee, P.C.
700 East Main Street
Richmond, VA 23219
(804) 775-2374

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was mailed, postage prepaid, to John Rupp, City Attorney, City of Richmond, Virginia, 900 E. Main Street, Richmond, VA 23219, and to Samuel Shands, Sheriff of Dinwiddie County, Dinwiddie, VA 23841, this 25th day of June, 1996.

A. D. J. McEl

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

GWENDOLYN L. JORDAN,

PLAINTIFF,

v.

THE CITY OF RICHMOND, VIRGINIA
and
SAMUEL SHANDS,

DEFENDANT.

Case No. LB-1601-3

GROUND OF DEFENSE

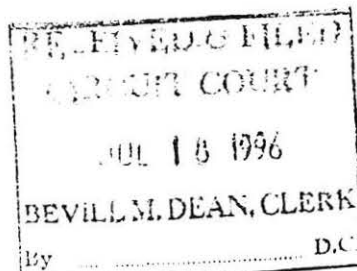
Comes now the defendant, Samuel Shands ("Shands"), by counsel, and states the following as his Grounds of Defense to plaintiff's Motion for Judgment:

1. The defendant has insufficient knowledge or information to admit or deny the allegations contained in paragraphs 1, 2, 3, 4 and 6 of the Motion for Judgment and, thus, denies these allegations and calls for strict proof thereof.

2. The defendant denies the allegations contained in paragraphs 5, 7, 8, 9, 10, 11 and 12 of the Motion for Judgment.

3. The defendant denies being indebted to the plaintiff in the amount of \$500,000.00, plus interest, plus costs.

4. All allegations contained in the Motion for Judgment not previously responded to are hereby denied.



5. The defendant affirmatively avers the defenses of absolute, sovereign, qualified and/or judicial immunities or privileges.

6. The defendant affirmatively avers that the plaintiff has failed to state a cause of action against him.

7. The defendant affirmatively avers that the plaintiff's claims are barred by the applicable statute of limitations.

8. The defendant affirmatively avers the truth of any defamatory statements made by him.

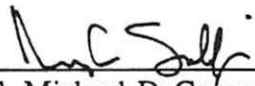
9. The defendant affirmatively avers the defense of probable cause.

10. The defendant reserves the right to amend, modify or supplement this Grounds of Defense at any time.

WHEREFORE, the defendant, Samuel Shands, by counsel, moves this Court to dismiss this action against him and to award him his attorneys' fees and costs.

SAMUEL SHANDS

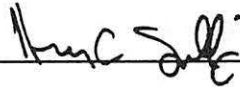
By Counsel



C. Michael DeCamps
Henry C. Spalding III
SANDS ANDERSON MARKS & MILLER
801 East Main Street, Suite 1400
P.O. Box 1998
Richmond, Virginia 23218-1998
(804) 648-1636

CERTIFICATE

I hereby certify that, on this 18th day of July, 1996, a true copy of the foregoing Grounds of Defense was mailed, first-class and postage prepaid, to A. Donald McEachin, Esquire, and Donald J. Gee, Esquire, MCEACHIN AND GEE, P.C., 700 East Main Street, Richmond, Virginia 23219, *counsel for the plaintiff*.

_____

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

GWENDOLYN L. JORDAN,

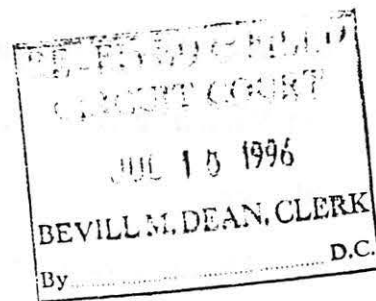
PLAINTIFF,

v.

THE CITY OF RICHMOND, VIRGINIA
and
SAMUEL SHANDS,

DEFENDANT.

Case No. LB-1601-3



DEMURRER

Comes now the defendant, Samuel Shands ("Shands"), by counsel, and hereby demurs to plaintiff's Motion for Judgment and states the following grounds in support thereof:

1. Plaintiff's Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because the defendant's actions cannot form the basis of a claim by the plaintiff based on absolute, qualified, judicial and/or sovereign immunity enjoyed by the defendant.

2. Plaintiff's Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because no cause of action exists under Virginia law for false arrest or for being "falsely charged."

3. Plaintiff's Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for defamation or insulting words because plaintiff has not identified with specificity the exact defamatory words spoken against her.

4. Plaintiff's Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for defamation or insulting words because any defamatory statements were absolutely, judicially, quasi-judicially and/or qualifiedly privileged.

5. Plaintiff's Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for defamation or insulting words because the plaintiff has not alleged the publication of any defamatory statements to a third person.

6. Plaintiff's Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted under the Virginia insulting words statute, § 8.01-45 of the Code of Virginia, because the alleged defamatory statements do not tend to violence and breach of the peace.

7. Plaintiff's Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for malicious prosecution because the plaintiff has not pled the elements of this tort, nor has she alleged facts to support the elements of a malicious prosecution action.

8. Plaintiff's Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for intentional infliction of emotional distress because the plaintiff has failed to allege the elements of this tort, nor has she alleged facts to support the elements of intentional infliction of emotional distress.

9. Plaintiff's Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because no allegations have been made which would impute liability to the defendant.

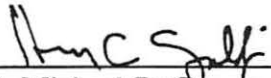
10. Plaintiff's Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because plaintiff has combined multiple claims in the same count, rendering the Motion for Judgment duplicitous.

11. The defendant reserves the right to amend, modify or supplement this Demurrer at any time and for any reason.

WHEREFORE, the defendant, Samuel Shands, by counsel, moves this Court to dismiss this action against him pursuant to this Demurrer.

SAMUEL SHANDS

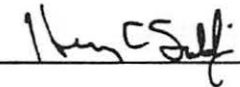
By Counsel



C. Michael DeCamps
Henry C. Spalding III
SANDS ANDERSON MARKS & MILLER
801 East Main Street, Suite 1400
P.O. Box 1998
Richmond, Virginia 23218-1998
(804) 648-1636

CERTIFICATE

I hereby certify that, on this 18th day of July, 1996, a true copy of the foregoing Demurrer was mailed, first-class and postage prepaid, to A. Donald McEachin, Esquire, and Donald J. Gee, Esquire, MCEACHIN AND GEE, P.C., 700 East Main Street, Richmond, Virginia 23219, *counsel for the plaintiff*.



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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

GWENDOLYN L. JORDAN,

PLAINTIFF,

v.

THE CITY OF RICHMOND, VIRGINIA
and
SAMUEL SHANDS,

DEFENDANT.

Case No. LB-1601-3

ORDER

On September 11, 1996, appeared before this Court the plaintiff, by counsel, and the defendants, by counsel, upon the Demurrers previously filed by the defendants. Upon consideration of these Demurrers, having heard the argument of counsel, and for the reasons stated by the Court from the bench, it is hereby **ORDERED** that the defendants' Demurrers are sustained. The plaintiff has ten (10) days from September 11, 1996, to file an Amended Motion for Judgment as against Samuel Shands only. Samuel Shands shall have ten (10) days from the date of service of the Amended Motion for Judgment to file any responsive pleadings.

It is further **ORDERED** that the Demurrer filed by the City of Richmond is sustained, that the Motion for Judgment is dismissed with prejudice as against the City of Richmond, and that the plaintiff does not have leave to amend as against the City of Richmond.


The Clerk of Court is **ORDERED** to send attested copies of this Order to all counsel of record.

ENTER: 9/19/96



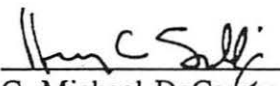
Judge

I Ask for This:




William Joe Hoppe
Senior Assistant City Attorney
CITY OF RICHMOND
Office of the City Attorney
900 East Broad Street, Suite 300
Richmond, Virginia 23219

Seen and Agreed as to the sustaining of the Demurrers;
Seen and Objected to as to the leave to amend:



C. Michael DeCamps
Henry C. Spalding III
SANDS ANDERSON MARKS & MILLER
P.O. Box 1998
Richmond, Virginia 23218-1998

Seen and Objected to:



James T. Edmunds
MCEACHIN AND GEE, P.C.
700 East Main Street
Richmond, Virginia 23219

004538\033341\ORDDDEMUR.HCS

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Courts Building

GWENDOLYN L. JORDAN,
Plaintiff

v.

Civil Case No.: LB-1601-3

SAMUEL SHANDS
and
JERRY OLIVER,
Richmond Police Department
501 N. 9th Street
Richmond, VA 23219
and
D.L. WRIGHT
Richmond Police Department
501 N. 9th Street
Richmond, VA 23219
and
CECIL RICHARDSON
Richmond Police Department
501 N. 9th Street
Richmond, VA 23219
and
C.V. TOWNSEND
Dinwiddie Sheriff's Department
Dinwiddie, VA 23841
and
JOHN DOE
an employee of SAMUEL SHANDS
and
MARY DOE
an employee of SAMUEL SHANDS
Defendants

- AMENDED MOTION FOR JUDGMENT

COMES NOW, the plaintiff, GWENDOLYN L. JORDAN, (hereinafter JORDAN), by counsel, and moves the Court for judgment against the defendants, SAMUEL SHANDS, (hereinafter SHANDS), JERRY OLIVER, (hereinafter OLIVER), and D.L. WRIGHT, (hereinafter WRIGHT), CECIL RICHARDSON, (hereinafter RICHARDSON), and C.V. TOWNSEND, (hereinafter TOWNSEND), and JOHN DOE and MARY DOE, employees of SHANDS, jointly and severally, in the amount of Two Hundred Fifty

Thousand Dollars, (\$250,000.00) compensatory damages, and Two Hundred Fifty Thousand Dollars (\$250,000.00) punitive damages, with interest from June 21, 1995 and costs, all for the reasons stated below:-

1. On or about June 21, 1995 JORDAN was involved in an automobile accident in the City of Richmond, Virginia. WRIGHT, a City of Richmond police officer, investigated the accident. JORDAN, who was injured, left by ambulance for Richmond Metropolitan Hospital.

2. Shortly after JORDAN arrived at the hospital the nurse told the doctor in JORDAN'S presence, that JORDAN was wanted and would be picked up by the Richmond Police Department.

3. At about 4:30 pm RICHARDSON, a City of Richmond police officer, appeared at the hospital and arrested JORDAN on information about an outstanding capias from the Dinwiddie County Juvenile and Domestic Relations Court. She asked him what the capias was for and he said he wasn't sure. She told him he was making a mistake. She asked to call someone in her family to pick up her 8 year old son, but her request was denied. She was escorted to the rest room where a hospital security guard stayed outside the door. She was taken to a "paddy wagon" and driven for about 15 minutes to the Third Precinct. She sat in the van for another 15 minutes while RICHARDSON went inside and when he came out she was driven to the City Lock-up. There RICHARDSON attempted to deliver her to the city jailers but when RICHARDSON could not produce a warrant the jail personnel refused to put JORDAN in jail. RICHARDSON produced a paper described as a "hit"

and the jail personnel contacted the Dinwiddie Sheriff's office and asked that the warrant be faxed to City Lock-up.

4. When the warrant arrived it had the information from JORDAN'S driver's license inserted in a warrant issued for Gwendolyn M. Jordan, 231-B S. Jefferson Street, Petersburg, Virginia 23803. JORDAN'S address is Route 1, Box 128-C, Blackstone, Virginia 23824. A simple examination of her driver's license should have alerted RICHARDSON to the fact that he had arrested the wrong person, as JORDAN continuously explained.

5. TOWNSEND and JOHN DOE and MARY DOE placed the incorrect information on the warrant issued for Gwendolyn M. Jordan. JOHN DOE and MARY DOE are employees of SHANDS, whose names are not now known.

6. TOWNSEND and JOHN DOE and MARY DOE were acting within the course and scope of their employment with SHANDS, Sheriff of Dinwiddie County, at all times relevant to this Amended Motion for Judgment.

7. WRIGHT and RICHARDSON were acting within the course and scope of their employment with JERRY OLIVER, Richmond Chief of Police, at all times relevant to this Amended Motion for Judgment.

6. JORDAN was then searched, finger printed and her personal belongings were taken from her and she was placed in a holding cell to await transportation to the City Jail.

7. At about 7:00 pm JORDAN was finally able to call home to report that she was in jail and to get someone to pick up her son.

8. At about 8:30 pm JORDAN was finally released in the custody of her aunt.

9. JORDAN was told to report to Dinwiddie Juvenile and Domestic Relations Court on July 11, 1995 at 1:30 pm. She later received a letter directing her to appear at 9.30 am. On July 11, 1995 she appeared at 9:30 am and was heard at about 2:30 pm. JORDAN was advised that Gwendolyn M. Jordan apparently did not have a social security number and that JORDAN'S social security number had been placed on Gwendolyn M. Jordan's warrant by the Richmond Police. The Court apologized to JORDAN and dismissed the charges against her.

10. During this process TOWNSEND libelled and slandered JORDAN in these words: "Subject still wanted by this jurisdiction. Have warrant in hand for failure to appear. Use this confirmation as a detainer to hold subject." These words were communicated to third parties on June 21, 1995 at 7:12 pm. These words falsely accuse JORDAN of a crime and are actionable under the Virginia Insulting Words Statute, Section 8.01-45 of the Code of Virginia of 1950, as amended and also constitute libel and slander as they were both uttered and written.

11. During this process RICHARDSON slandered JORDAN by alleging that she had committed a crime and arresting her, even though she had committed no crime. RICHARDSON'S allegation of the commission of a crime, was communicated to third persons. These words are actionable under the Virginia Insulting Words Statute, Section 8.01-45 of the Code of Virginia of 1950 as amended and also constitute slander.

12. RICHARDSON falsely arrested and detained JORDAN because she was not the person named in the warrant held by the Dinwiddie Sheriff's Office. RICHARDSON falsely arrested and imprisoned JORDAN without any sufficient legal excuse therefor by words and acts which JORDAN feared to disregard.

13. TOWNSEND, JOHN DOE and MARY DOE intentionally inflicted emotional distress on JORDAN by entering her personal and confidential data on a warrant that they knew, or should have known, was intended for another person.

14. WRIGHT intentionally inflicted emotional distress on JORDAN by transferring her personal and confidential data from her driver's license to TOWNSEND, JOHN DOE and MARY DOE, when he knew, or should have known that JORDAN was not Gwendolyn M. Jordan and that this information would be affixed to a warrant that would be the basis of a false arrest and imprisonment.

15. All of the defendants participated in a malicious prosecution of JORDAN culminating in her hearing before the Juvenile and Domestic Relations Court of Dinwiddie County on July 11, 1995.

16. At all times, each of the defendants had access to information that clearly demonstrated that JORDAN was not the person charged in the Dinwiddie capias.

17. At all times, each of the defendants acted intentionally to harm JORDAN.

18. At all times, each of the defendants acted in a grossly negligent manner, without any regard for the rights of the plaintiff, JORDAN.

19. At all times, each of the defendants acted in a reckless manner, without regard to the rights of the plaintiff, JORDAN.

20. At all times, each of the defendant's actions were outrageous and intolerable.

21. At all times, each of the defendants acted in such a manner as to demonstrate actual malice towards JORDAN.

22. As a direct and proximate result of each of the defendants' actions, JORDAN suffered severe distress, humiliation, embarrassment, anxiety, tension and the inconvenience, cost and lost time in attending the Juvenile and Domestic Relations Court hearing in Dinwiddie County.

WHEREFORE JORDAN demands judgment against SHANDS, OLIVER, WRIGHT, RICHARDSON, TOWNSEND, JOHN DOE and MARY DOE, jointly and severally, in the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) compensatory damages, and Two Hundred Fifty Thousand (\$250,000.00), punitive damages, with interest from June 21, 1995 and costs.

GWENDOLYN L. JORDAN

By 

OF COUNSEL

A. Donald McEachin
James T. Edmunds
McEachin and Gee, P.C.
700 E. Main Street
Richmond, VA 23219
(804) 775-2374

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was mailed, postage pre-paid, to Henry C. Spalding, III, Sands, Anderson, Marks and Miller, 801 E. Main Street, Richmond, VA 23219, Counsel for the defendant Samuel Shands and to William Joe Hoppe, Senior Assistant City Attorney, Room 300, City Hall, Richmond, VA 23219, and to Jerry Oliver, Chief of Police, Richmond City Police Department, 501 N. 9th Street, Richmond, VA 23219, and to D. L. Wright, Richmond City Police Department, 501 N. 9th Street, Richmond, VA 23219, and to Cecil Richardson, Richmond Police Department, 501 N. 9th Street, Richmond, VA 23219; and to C.V. Townsend, Dinwiddie County Sheriff's Department, Dinwiddie, VA 23841, this 16th day of September, 1996.

A handwritten signature in black ink, appearing to be "J. Hoppe", is written over a horizontal line.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

GWENDOLYN L. JORDAN,

PLAINTIFF,

v.

SAMUEL SHANDS
MARY OLIVER,
D.L. WRIGHT,
CECIL RICHARDSON,
C.V. TOWNSEND
JOHN DOE
and
MARY DOE,

DEFENDANTS.

Case No. LB-1601-3

Arbu

GROUND OF DEFENSE TO
PLAINTIFF'S AMENDED MOTION FOR JUDGMENT

Comes now the defendant, Samuel Shands ("Shands"), by counsel, and states the following as his Grounds of Defense to plaintiff's Amended Motion for Judgment:

1. Shands has insufficient knowledge or information to admit or deny the allegations contained in paragraphs 1, 2, 3 and 4 of the Amended Motion for Judgment and, thus, denies these allegations and calls for strict proof thereof.
2. Shands denies the allegations contained in paragraphs 5 and 6 of the Amended Motion for Judgment.
3. Shands has insufficient knowledge or information to admit or deny the allegations contained in paragraphs 7, 6 [sic] (the second paragraph number 6 of the Amended Motion for

Judgment alleges: "JORDAN was then searched, finger printed and her personal belongings were taken from her and she was placed in a holding cell to await transportation to the City Jail."), 7 [sic] (the second paragraph number 7 of the Amended Motion for Judgment alleges: "At about 7:00 pm JORDAN was finally able to call home to report that she was in jail and to get someone to pick up her son."), 8 and 9 of the Amended Motion for Judgment and, thus, denies these allegations and calls for strict proof thereof.

4. Shands denies the allegations contained in paragraph 10 of the Amended Motion for Judgment.

5. Shands has insufficient knowledge or information to admit or deny the allegations contained in paragraphs 11 and 12 of the Amended Motion for Judgment and, thus, denies these allegations and calls for strict proof thereof.

6. Shands denies the allegations contained in paragraph 13 of the Amended Motion for Judgment.

7. Shands has insufficient knowledge or information to admit or deny the allegations contained in paragraph 14 of the Amended Motion for Judgment and, thus, denies these allegations and calls for strict proof thereof.

8. Shands denies the allegations contained in paragraphs 15, 16, 17, 18, 19, 20, 21 and 22 of the Amended Motion for Judgment.

9. Shands denies indebted to the plaintiff in the amount of \$250,000.00 in compensatory damages and \$250,000.00 in punitive damages, plus interest, plus costs, or in any other amount.

10. All allegations contained in the Motion for Judgment not previously responded to are hereby denied.

11. Shands affirmatively avers the defenses of absolute, sovereign, qualified and/or judicial immunities or privileges.

12. Shands affirmatively avers the defense of the applicable statute of limitations.

13. Shands affirmatively avers that the plaintiff has failed to state a cause of action against him.

14. Shands affirmatively avers the truth of any defamatory statements which have been attributed to him.

15. Shands affirmatively avers the defense of probable cause.

16. Shands affirmatively avers the defense of guilt as an affirmative defense to plaintiff's malicious prosecution action.

17. Shands affirmatively avers that he did not institute criminal proceedings against the plaintiff.

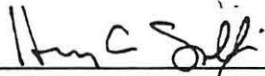
18. Shands affirmatively avers that the plaintiff has failed to mitigate her damages, if any.

19. Shands reserves the right to amend, modify or supplement this Grounds of Defense at any time.

WHEREFORE, the defendant, Samuel Shands, by counsel, moves this Court to dismiss this action against him and to award him his costs incurred therein.

SAMUEL SHANDS

By Counsel



C. Michael DeCamps
Henry C. Spalding III
SANDS ANDERSON MARKS & MILLER
P.O. Box 1998
Richmond, Virginia 23218-1998
(804) 648-1636

CERTIFICATE

I hereby certify that, on this 25th day of September, 1996, a true copy of the foregoing Grounds of Defense was mailed, first-class and postage prepaid, to James T. Edmunds, Esquire, McEachin and Gee, P.C., 700 East Main Street, Richmond, Virginia 23219, *counsel for the plaintiff*, and to William Joe Hoppe, Esquire, Senior Assistant City Attorney, City of Richmond, Office of the City Attorney, 900 East Broad Street, Suite 300, Richmond, Virginia 23219.



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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

GWENDOLYN L. JORDAN,

PLAINTIFF,

v.

SAMUEL SHANDS
MARY OLIVER,
D.L. WRIGHT,
CECIL RICHARDSON,
C.V. TOWNSEND
JOHN DOE
and
MARY DOE,

DEFENDANTS.

Case No. LB-1601-3



DEMURRER TO PLAINTIFF'S AMENDED MOTION FOR JUDGMENT

Comes now the defendant, Samuel Shands ("Shands"), by counsel, and hereby demurs to plaintiff's Amended Motion for Judgment and states the following grounds in support thereof:

1. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because the defendant's actions cannot form the basis of a claim by the plaintiff based on the absolute, qualified, judicial and/or sovereign immunity enjoyed by the defendant.

2. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for defamation or insulting words because, as a matter of law, the defamatory words alleged to have been made by Shands are incapable of sustaining a defamatory meaning.

3. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for defamation or insulting words because any defamatory statements were absolutely, judicially, quasi-judicially and/or qualifiedly privileged.

4. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted under the Virginia insulting words statute, § 8.01-45 of the Code of Virginia, because the alleged defamatory statements do not tend to violence and breach of the peace.

5. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for libel, slander, or insulting words because plaintiff has failed to allege that the defendants defamed the plaintiff knowing the statements to be false, or negligently failing to ascertain whether or not they were false.

6. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for malicious prosecution because the plaintiff has not pled the elements of this tort, nor has she alleged facts to support the elements of a malicious prosecution action.

7. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for intentional infliction of emotional distress because the plaintiff has failed to allege the elements of this tort, nor has she alleged facts to support the elements of intentional infliction of emotional distress.

8. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because no allegations have been made which would impute liability to the defendant.

9. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because plaintiff has combined multiple claims in the same count, rendering the Amended Motion for Judgment duplicitous.

10. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because plaintiff's claims are barred by the applicable statute of limitations.

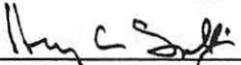
11. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because no cause of action exists under Virginia law under these circumstances as against defendants "John Doe" and "Mary Doe" and, accordingly, no actions taken by them can be imputed to Shands.

12. The defendant reserves the right to amend, modify or supplement this Demurrer at any time and for any reason.

WHEREFORE, the defendant, Samuel Shands, by counsel, moves this Court to dismiss this action against him pursuant to this Demurrer.

SAMUEL SHANDS

By Counsel



C. Michael DeCamps
Henry C. Spalding III
SANDS ANDERSON MARKS & MILLER
801 East Main Street, Suite 1400
P.O. Box 1998
Richmond, Virginia 23218-1998
(804) 648-1636

CERTIFICATE

I hereby certify that, on this 25th day of September, 1996, a true copy of the foregoing Demurrer was mailed, first-class and postage prepaid, to Donald J. Gee, Esquire, McEachin and Gee, P.C., 700 East Main Street, Richmond, Virginia 23219, *counsel for the plaintiff*, and to William Joe Hoppe, Esquire, Senior Assistant City Attorney, City of Richmond, Office of the City Attorney, 900 East Broad Street, Suite 300, Richmond, Virginia 23219.



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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

GWENDOLYN L. JORDAN,

PLAINTIFF,

v.

SAMUEL SHANDS
MARY OLIVER,
D.L. WRIGHT,
CECIL RICHARDSON,
C.V. TOWNSEND
JOHN DOE
and
MARY DOE,

DEFENDANTS.

Case No. LB-1601-3

ABW

DEFENDANT SAMUEL SHANDS'
SPECIAL PLEA OF THE STATUTE OF LIMITATIONS

Comes now the defendant, Samuel Shands ("Shands"), by counsel, and states the following as his Special Plea of the Statute of Limitations:

1. In this action, plaintiff is seeking \$250,000.00 in compensatory damages and \$250,000.00 in punitive damages based on the defendants' alleged intentional infliction of emotional distress, defamation and malicious prosecution of the plaintiff. All of the events which allegedly gave rise to these claims occurred on or before June 21, 1995. Motion for Judgment at ¶¶ 1, 10 and 13.

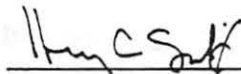
2. Virginia Code § 8.01-248 sets the limitations period for personal actions for which no limitation is otherwise prescribed as one year after the right to bring such action has accrued.

Although § 8.01-248 was amended in 1995 and extended this one-year period to two years, the amendment only affects personal actions accruing on or after July 1, 1995. Here, from the face of the Motion for Judgment, Ms. Jordan's causes of action, to the extent they exist, arose prior to July 1, 1995. Accordingly, Ms. Jordan was required to commence this action prior to June 21, 1996. The Motion for Judgment, however, was not filed until June 27, 1996. The Amended Motion for Judgment, adding three new parties from the Dinwiddie County Sheriff's Department (including "John Doe" and "Mary Doe"), was not filed until on or after September 16, 1996. Because this action was not commenced within one year of June 21, 1995, it is time-barred.

WHEREFORE, the defendant, Samuel Shands, by counsel, requests that this Court sustain his Special Plea of the Statute of Limitations and dismiss this action with prejudice.

SAMUEL SHANDS

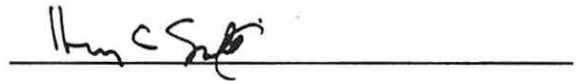
By Counsel



C. Michael DeCamps
Henry C. Spalding III
SANDS ANDERSON MARKS & MILLER
P.O. Box 1998
Richmond, Virginia 23218-1998
(804) 648-1636

CERTIFICATE

I hereby certify that, on this 25th day of September, 1996, a true copy of the foregoing Defendant Samuel Shands' Special Plea of the Statute of Limitations was mailed, first-class and postage prepaid, to James T. Edmunds, Esquire, McEachin and Gee, P.C., 700 East Main Street, Richmond, Virginia 23219, *counsel for the plaintiff*, and to William Joe Hoppe, Esquire, Senior Assistant City Attorney, City of Richmond, Office of the City Attorney, 900 East Broad Street, Suite 300, Richmond, Virginia 23219.



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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

GWENDOLYN L. JORDAN,

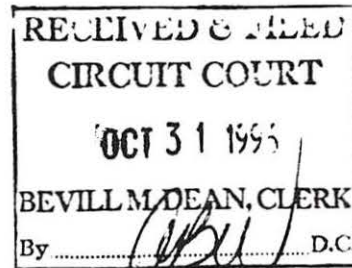
PLAINTIFF,

v.

SAMUEL SHANDS
MARY OLIVER,
D.L. WRIGHT,
CECIL RICHARDSON,
C.V. TOWNSEND
JOHN DOE
and
MARY DOE,

DEFENDANTS.

Case No. LB-1601-3



**DEFENDANT C. V. TOWNSEND'S GROUNDS OF DEFENSE
TO PLAINTIFF'S AMENDED MOTION FOR JUDGMENT**

Comes now the defendant, C. V. Townsend ("Townsend"), by counsel, and states the following as his Grounds of Defense to plaintiff's Amended Motion for Judgment:

1. Townsend has insufficient knowledge or information to admit or deny the allegations contained in paragraphs 1, 2, 3 and 4 of the Amended Motion for Judgment and, thus, denies these allegations and calls for strict proof thereof.

2. Townsend denies the allegations contained in paragraphs 5 and 6 of the Amended Motion for Judgment.

3. Townsend has insufficient knowledge or information to admit or deny the allegations contained in paragraphs 7, 6 [sic] (the second paragraph number 6 of the Amended

Motion for Judgment alleges: "JORDAN was then searched, finger printed and her personal belongings were taken from her and she was placed in a holding cell to await transportation to the City Jail."), 7 [sic] (the second paragraph number 7 of the Amended Motion for Judgment alleges: "At about 7:00 pm JORDAN was finally able to call home to report that she was in jail and to get someone to pick up her son."), 8 and 9 of the Amended Motion for Judgment and, thus, denies these allegations and calls for strict proof thereof.

4. Townsend denies the allegations contained in paragraph 10 of the Amended Motion for Judgment.

5. Townsend has insufficient knowledge or information to admit or deny the allegations contained in paragraphs 11 and 12 of the Amended Motion for Judgment and, thus, denies these allegations and calls for strict proof thereof.

6. Townsend denies the allegations contained in paragraph 13 of the Amended Motion for Judgment.

7. Townsend has insufficient knowledge or information to admit or deny the allegations contained in paragraph 14 of the Amended Motion for Judgment and, thus, denies these allegations and calls for strict proof thereof.

8. Townsend denies the allegations contained in paragraphs 15, 16, 17, 18, 19, 20, 21 and 22 of the Amended Motion for Judgment.

9. Townsend denies being indebted to the plaintiff in the amount of \$250,000.00 in compensatory damages and \$250,000.00 in punitive damages, plus interest, plus costs, or in any other amount.

10. All allegations contained in the Motion for Judgment not previously responded to are hereby denied.

11. Townsend affirmatively avers the defenses of absolute, sovereign, qualified and/or judicial immunities or privileges.

12. Townsend affirmatively avers the defense of the applicable statute of limitations.

13. Townsend affirmatively avers that the plaintiff has failed to state a cause of action against him.

14. Townsend affirmatively avers the truth of any defamatory statements which have been attributed to him.

15. Townsend affirmatively avers the defense of probable cause.

16. Townsend affirmatively avers that he did not publish or commit any defamatory statements of or concerning the plaintiff.

17. Townsend affirmatively avers the defense of guilt as an affirmative defense to plaintiff's malicious prosecution action.

18. Townsend affirmatively avers that he did not institute criminal proceedings against the plaintiff.

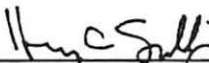
19. Townsend affirmatively avers that the plaintiff has failed to mitigate her damages, if any.

20. Townsend reserves the right to amend, modify or supplement this Grounds of Defense at any time.

WHEREFORE, the defendant, C. V. Townsend, by counsel, moves this Court to dismiss this action against him and to award him his costs incurred therein.

C. V. TOWNSEND


By Counsel



C. Michael DeCamps
Henry C. Spalding III
SANDS ANDERSON MARKS & MILLER
P.O. Box 1998
Richmond, Virginia 23218-1998
(804) 648-1636

CERTIFICATE

I hereby certify that, on this 29th day of October, 1996, a true copy of the foregoing Grounds of Defense was mailed, first-class and postage prepaid, to James T. Edmunds, Esquire, McEachin and Gee, P.C., 700 East Main Street, Richmond, Virginia 23219, *counsel for the plaintiff*, and to William Joe Hoppe, Esquire, Senior Assistant City Attorney, City of Richmond, Office of the City Attorney, 900 East Broad Street, Suite 300, Richmond, Virginia 23219.



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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

GWENDOLYN L. JORDAN,

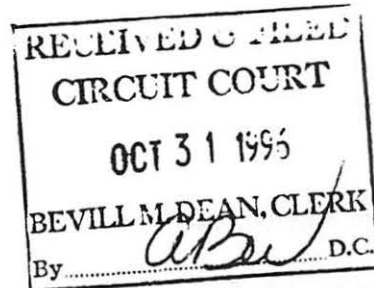
PLAINTIFF,

v.

SAMUEL SHANDS
MARY OLIVER,
D.L. WRIGHT,
CECIL RICHARDSON,
C.V. TOWNSEND
JOHN DOE
and
MARY DOE,

DEFENDANTS.

Case No. LB-1601-3



**DEFENDANT C. V. TOWNSEND'S DEMURRER TO
PLAINTIFF'S AMENDED MOTION FOR JUDGMENT**

Comes now the defendant, C. V. Townsend ("Townsend"), by counsel, and hereby demurs to plaintiff's Amended Motion for Judgment and states the following grounds in support thereof:

1. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because the defendant's actions cannot form the basis of a claim by the plaintiff based on the absolute, qualified, judicial and/or sovereign immunity enjoyed by the defendant.

2. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for defamation or insulting words because,

as a matter of law, the defamatory words alleged to have been made by Townsend are incapable of sustaining a defamatory meaning.

3. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for defamation or insulting words because any defamatory statements were absolutely, judicially, quasi-judicially and/or qualifiedly privileged.

4. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted under the Virginia insulting words statute, § 8.01-45 of the Code of Virginia, because the alleged defamatory statements do not tend to violence and breach of the peace.

5. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for libel, slander, or insulting words because plaintiff has failed to allege that the defendants defamed the plaintiff knowing the statements to be false, or negligently failing to ascertain whether or not they were false.

6. Plaintiff's Amended Motion for Judgment fails to state a course of action and/or fails to state facts upon which relief can be granted for defamation or insulting words because the plaintiff has not alleged that Townsend published defamatory statements of or concerning the plaintiff.

7. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for malicious prosecution because the plaintiff has not pled the elements of this tort, nor has she alleged facts to support the elements of a malicious prosecution action.

8. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted for intentional infliction of emotional distress because the plaintiff has failed to allege the elements of this tort, nor has she alleged facts to support the elements of intentional infliction of emotional distress.

9. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because no allegations have been made which would impose liability on the defendant.

10. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because plaintiff has combined multiple claims in the same count, rendering the Amended Motion for Judgment duplicitous.

11. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because plaintiff's claims are barred by the applicable statute of limitations. Townsend specifically incorporates herein by reference those grounds stated by him in his Special Plea of the Statute of Limitations.


12. Plaintiff's Amended Motion for Judgment fails to state a cause of action and/or fails to state facts upon which relief can be granted because no cause of action exists under Virginia law under these circumstances as against defendants "John Doe" and "Mary Doe" and, accordingly, no actions taken by them can be imputed to Townsend.

13. The defendant reserves the right to amend, modify or supplement this Demurrer at any time and for any reason.

WHEREFORE, the defendant, C. V. Townsend, by counsel, moves this Court to dismiss this action against him pursuant to this Demurrer.

C. V. TOWNSEND

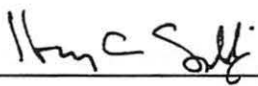
By Counsel



C. Michael DeCamps
Henry C. Spalding III
SANDS ANDERSON MARKS & MILLER
801 East Main Street, Suite 1400
P.O. Box 1998
Richmond, Virginia 23218-1998
(804) 648-1636

CERTIFICATE

I hereby certify that, on this 29th day of October, 1996, a true copy of the foregoing Demurrer was mailed, first-class and postage prepaid, to Donald J. Gee, Esquire, McEachin and Gee, P.C., 700 East Main Street, Richmond, Virginia 23219, *counsel for the plaintiff*, and to William Joe Hoppe, Esquire, Senior Assistant City Attorney, City of Richmond, Office of the City Attorney, 900 East Broad Street, Suite 300, Richmond, Virginia 23219.



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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

GWENDOLYN L. JORDAN,

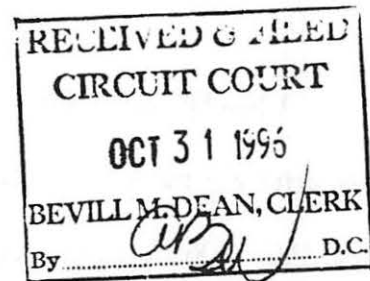
PLAINTIFF,

v.

SAMUEL SHANDS
MARY OLIVER,
D.L. WRIGHT,
CECIL RICHARDSON,
C.V. TOWNSEND
JOHN DOE
and
MARY DOE,

DEFENDANTS.

Case No. LB-1601-3



**DEFENDANT C. V. TOWNSEND'S
SPECIAL PLEA OF THE STATUTE OF LIMITATIONS**

Comes now the defendant, C. V. Townsend ("Townsend"), by counsel, and states the following as his Special Plea of the Statute of Limitations:

1. In this action, plaintiff is seeking \$250,000.00 in compensatory damages and \$250,000.00 in punitive damages based on the defendants' alleged intentional infliction of emotional distress, defamation and malicious prosecution of the plaintiff. All of the events which allegedly gave rise to these claims occurred on or before June 21, 1995. Amended Motion for Judgment at ¶¶ 1, 10 and 13.

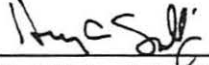
2. Virginia Code § 8.01-248 sets the limitations period for personal actions for which no limitation is otherwise prescribed as one year after the right to bring such action has accrued.

Although § 8.01-248 was amended in 1995 and extended this one-year period to two years, the amendment only affects personal actions accruing on or after July 1, 1995. Here, from the face of the Motion for Judgment, Ms. Jordan's causes of action, to the extent they exist, arose prior to July 1, 1995. Accordingly, Ms. Jordan was required to commence this action prior to June 21, 1996. The Motion for Judgment, however, was not filed until June 27, 1996. The Amended Motion for Judgment, adding as a defendant C. V. Townsend, was not filed until on or after September 16, 1996. Because this action was not commenced within one year of June 21, 1995, it is time-barred.

WHEREFORE, the defendant, C. V. Townsend, by counsel, requests that this Court sustain his Special Plea of the Statute of Limitations and dismiss this action with prejudice.

C. V. TOWNSEND

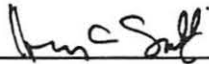
By Counsel



C. Michael DeCamps
Henry C. Spalding III
SANDS ANDERSON MARKS & MILLER
P.O. Box 1998
Richmond, Virginia 23218-1998
(804) 648-1636

CERTIFICATE

I hereby certify that, on this 29th day of October, 1996, a true copy of the foregoing Defendant C. V. Townsend's Special Plea of the Statute of Limitations was mailed, first-class and postage prepaid, to James T. Edmunds, Esquire, McEachin and Gee, P.C., 700 East Main Street, Richmond, Virginia 23219, *counsel for the plaintiff*, and to William Joe Hoppe, Esquire, Senior Assistant City Attorney, City of Richmond, Office of the City Attorney, 900 East Broad Street, Suite 300, Richmond, Virginia 23219.



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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

GWENDOLYN L. JORDAN,

Plaintiff,

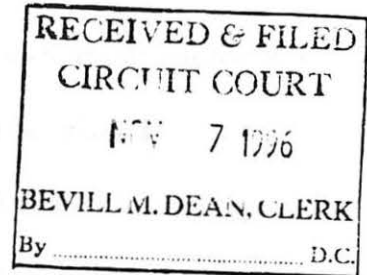
v.

SAMUEL SHANDS, et al.,

Defendants.

)
)
)
)
)
)
)

Case No. LB-1601-3



DEFENDANTS JERRY OLIVER
AND CECIL RICHARDSON'S DEMURRER

COME NOW the defendants Jerry Oliver and Cecil Richardson, by counsel, and hereby demur to plaintiff's amended motion for judgment and state that it fails to state a cause of action and/or fails to state facts upon which relief can be granted based upon the following grounds:

1. Chief Oliver cannot be held vicariously liable for Officer Richardson's or Officer Wright's alleged tortious conduct since no personal involvement of or actions by Chief Oliver have been alleged.

2. No factual predicate has been asserted to support the legal conclusion that Chief Oliver is the employer of Officer Richardson or Officer Wright and, in fact, such conclusion is contrary to law and is inconsistent with the allegations asserted in the original motion for judgment that the City of Richmond was the employer of the police officers.

3. The alleged actions of these defendants are protected by absolute, qualified, judicial quasi-judicial and/or sovereign immunity.

4. No basis has been pleaded to sustain an action for defamation since the alleged words are not capable of conveying a defamatory meaning.

5. The alleged actions of these defendants are protected by an absolute, qualified, judicial, and/or quasi-judicial privilege.

6. No basis has been alleged to sustain a cause of action under the Virginia insulting words statute, § 8.01-45 of the Code of Virginia, since the alleged defamatory statements do not tend to violence and breach of the peace.

7. Plaintiff has failed to allege the requisite factual predicate to sustain a cause of action based upon libel, slander, defamation and/or insulting words as to these defendants, or either of them.

8. Plaintiff has failed to allege the requisite factual predicate to state a cause of action for malicious prosecution as to these defendants, or either of them.

9. Plaintiff has failed to allege the requisite factual predicate to state a cause of action for intentional infliction of emotional distress as to these defendants, or either of them.

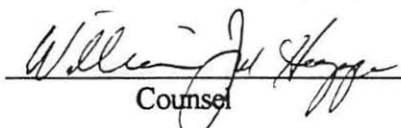
10. The amended motion for judgment sets forth multiple causes of action in the same count so as to render this action duplicitous.

11. Plaintiff's claims are barred by the applicable statute of limitations.

12. These defendants reserve the right to amend, modify or supplement their demurrer at any time and for any reason.

WHEREFORE, these defendants, by counsel, move this Court to sustain their demurrer, to dismiss this action as to them, to award them their expenses and costs incurred herein, including a reasonable attorney's fee, and to grant such further relief as may be appropriate.


JERRY A. OLIVER and
CECIL RICHARDSON

By: 
Counsel

William Joe Hoppe
Senior Assistant City Attorney
900 E. Broad Street, Room 300
Richmond, VA 23219
(804) 780-7951
Counsel for defendants Oliver and Richardson

CERTIFICATE

I hereby certify that on the 7th day of November, 1996, a true copy of the foregoing Defendants Jerry A. Oliver and Cecil Richardson's Demurrer was mailed, postage prepaid, to James T. Edmunds, Esquire, McEachin and Gee, P.C., 700 East Main Street, Richmond, Virginia 23219, counsel for plaintiff, and to Henry C. Spalding, III, Esquire, Sands, Anderson, Marks & Miller, The Ross Building, 801 East Main Street, Richmond, Virginia 23219, counsel for defendants Townsend and Shands.



GWENDOLYN L. JORDAN,

Plaintiff,

Case No. LB-1601-3

Defendants.

RECEIVED & FILED
CIRCUIT COURT
MAY 7 1996
BEVILL M. DEAN, CLERK
By LARDSON'S D.C.

1. In this action, plaintiff is seeking to impose liability upon these defendants based upon alleged intentional infliction of emotional distress, defamation, libel, slander, the Virginia Insulting Words Statute and/or false arrest and imprisonment of the plaintiff. All of the events upon which these causes of action are based occurred on or before June 21, 1995, as alleged in the Amended Motion for Judgment.

2. Virginia Code §§ 8.01-247.1 and 8.01-248 set forth the limitations period that applies to these causes of action, which is one year.

3. This amended motion for judgment was filed on or about September 16, 1996 and added these defendants at that time.

4. These purported causes of action are accordingly barred based upon the application of the appropriate statute or statutes of limitations.

WHEREFORE, these defendants, by counsel, request that this Court sustain their special plea of the statute of limitations and dismiss these purported causes of action with prejudice, award them their costs and expenses incurred herein, including a reasonable attorney's fee, and grant such other relief as may be appropriate.

JERRY A. OLIVER and
CECIL RICHARDSON

By: _____
Counsel

William Joe Hoppe
Senior Assistant City Attorney
900 E. Broad Street, Room 300
Richmond, VA 23219
(804) 780-7951
Counsel for defendants Oliver and Richardson

CERTIFICATE

I hereby certify that on the 7th day of November, 1996, a true copy of the foregoing Defendants Jerry A. Oliver and Cecil Richardson's Special Plea of the Statute of Limitations was mailed, postage prepaid, to James T. Edmunds, Esquire, McEachin and Gee, P.C., 700 East Main Street, Richmond, Virginia 23219, counsel for plaintiff, and to Henry C. Spalding, III, Esquire, Sands, Anderson, Marks & Miller, The Ross Building, 801 East Main Street, Richmond, Virginia 23219, counsel for defendants Shands and Townsend.



VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

GWENDOLYN L. JORDAN,

Plaintiff,

v.

SAMUEL SHANDS, et al.,

Defendants.

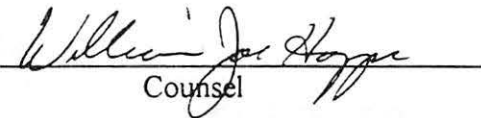
Case No. LB-1601-3

NOTICE

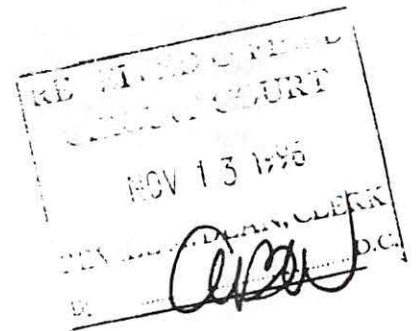
PLEASE TAKE NOTICE that on the 31st day of January, 1997, at 3:00 p.m., or as soon thereafter as counsel can be heard, counsel for defendants Jerry Oliver and Cecil Richardson, will appear in the above-named court upon their Demurrer and Special Plea of the Statute of Limitations, which were previously filed, and move for entry of an order or orders on behalf of defendants herein.

JERRY A. OLIVER and
CECIL RICHARDSON

By:


Counsel

William Joe Hoppe
Senior Assistant City Attorney
Room 300 - City Hall
900 E. Broad Street
Richmond, Virginia 23219
(804) 780-7951
Counsel for Defendants Jerry Oliver
and Cecil Richardson



CERTIFICATE

I hereby certify that on the 14th day of November, 1996, a true copy of the foregoing Notice was mailed, postage prepaid, to James T. Edmunds, Esquire, McEachin and Gee, P.C., 700 East Main Street, Richmond, Virginia 23219, counsel for plaintiff, and to Henry C. Spalding, III, Esquire, Sands, Anderson, Marks & Miller, The Ross Building, 801 East Main Street, Richmond, Virginia 23219, counsel for defendants Shands and Townsend.

William J. Hope

Circuit Court
OF THE
City of Richmond
John Marshall Courts Building

T. J. MARKOW
JUDGE

400 NORTH NINTH STREET
RICHMOND, VIRGINIA 23219-1999

February 3, 1997

James T. Edmunds, Esq.
McEachin & Gee, P.C.
700 East Main Street, Suite 1201
Richmond, VA 23219

Henry C. Spalding III, Esq.
Sands Anderson Marks & Miller
Post Office Box 1998
Richmond, VA 23216-1998

William Joe Hoppe, Esq.
Senior Assistant City Attorney
900 East Broad Street, Suite 300
Richmond, VA 23219

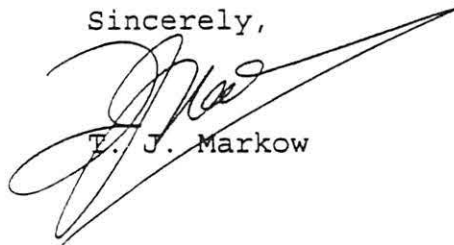
Gentlemen:

Re: Case No. LB-1601-3
Gwendolyn L. Jordan v. City of Richmond
and Samuel Shands

Because of the number of causes of actions, parties, and intricate fact pattern, it would be helpful if you would summarize your positions and provide your authority with respect to each cause of action as it applies to each defendant.

Defendants should file their memoranda on or before February 11. Plaintiff should respond by February 18. Reply memoranda are unnecessary as each of you has heard the positions of the other. Memoranda should be limited to less than ten pages. There is no need to address the demurrer as to Chief Oliver as it is clear that there is no cause of action stated as to him.

Sincerely,


T. J. Markow

sac

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

GWENDOLYN L. JORDAN,

PLAINTIFF,

v.

SAMUEL SHANDS
MARY OLIVER,
D.L. WRIGHT,
CECIL RICHARDSON,
C.V. TOWNSEND
JOHN DOE
and
MARY DOE,

DEFENDANTS.

Case No. LB-1601-3

CLERK
APW

BRIEF IN SUPPORT OF DEFENDANTS' DEMURRER
AND SPECIAL PLEA OF THE STATUTE OF LIMITATIONS

INTRODUCTION

Come now the defendants, Samuel Shands ("Shands") and C.V. Townsend ("Townsend"), by counsel, and submit this brief in support of their demurrer and special plea of the statute of limitations.

FACTS

This is an action for defamation, false arrest, intentional infliction of emotional distress and malicious prosecution arising out of Gwendolyn L. Jordan's allegedly wrongful arrest on June 21, 1995. Jordan alleges she was arrested by Officer Cecil Richardson of the Richmond police department on June 21, 1995. According to Jordan's amended motion for judgment, her arrest was based on an outstanding capias which had been issued from the Dinwiddie County Juvenile and Domestic Relations Court. Amended Motion for Judgment at ¶ 3. The warrant for Jordan's arrest was, according to the plaintiff, intended for Gwendolyn M. Jordan, 231-B S. Jefferson Street, Petersburg, Virginia 23803. The plaintiff lives at a different address and has a different middle initial. The plaintiff further charges

that Townsend, along with two unknown individuals, John and Mary Doe, placed certain unspecified "incorrect information" on the warrant issued for Gwendolyn M. Jordan. Amended Motion for Judgment at ¶ 5. Plaintiff further alleges that defendant Officer D. L. Wright of the Richmond police department transferred "personal and confidential data" from plaintiff's driver's license to Townsend, John Doe and Mary Doe, and that they then entered this data on the warrant intended for Gwendolyn M. Jordan. Amended Motion for Judgment at ¶¶ 13 and 14. Plaintiff goes on to charge that her social security number was placed on Gwendolyn M. Jordan's warrant by the Richmond police. Amended Motion for Judgment at ¶ 9.

After Jordan was arrested, she was taken into custody by the Richmond police and held for several hours until she was released. On July 11, the plaintiff appeared before the Dinwiddie Juvenile and Domestic Relations Court, at which time the charges against her were dismissed.

Based on the above facts, Jordan now charges that defendants Shands and Townsend defamed her, intentionally inflicted emotional distress on her, and participated in a malicious prosecution against her. This brief is respectfully submitted in support of the demurrers and special pleas of the statute of limitations filed by Shands and Townsend in response to plaintiff's amended motion for judgment.

ARGUMENT

- A. PLAINTIFF HAS FAILED TO STATE A CAUSE OF ACTION AGAINST THE DEFENDANTS FOR DEFAMATION BECAUSE SHE HAS NOT ALLEGED THAT THE DEFAMATORY STATEMENT WAS OF OR CONCERNING HER, THAT THE STATEMENTS WERE MADE WITH KNOWLEDGE OF THEIR FALSITY OR BASED ON A NEGLIGENT FAILURE TO ASCERTAIN THE TRUTH OF THE STATEMENTS, AND BECAUSE THIS COUNT IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

Jordan bases her defamation count against Townsend on the following statement, which she claims he made on June 21, 1995: "Subject still wanted by this jurisdiction. Have warrant in hand for failure to appear. Use this confirmation as a detainer to hold subject." Prior to the hearing on the demurrer, counsel for the plaintiff and counsel for Shands and Townsend stipulated that this statement, and plaintiff's basis for her defamation count, is found entirely within a document entitled

"Confirmation Response," a copy of which is attached hereto as Exhibit 1. It is appropriate for the Court to consider this document on demurrer based on this stipulation. *Flippo v. F & L Land Co.*, 241 Va. 15, 17 (1991) ("A court in ruling upon a demurrer may consider documents not mentioned in the challenged pleading when the parties so stipulate"). It is important to note that the plaintiff has confined her defamation case to those statements contained in the Confirmation Response, and that these words alone form the basis of the defamation count. Amended Motion for Judgment ¶ 10. It is clear from reading the Confirmation Response that the statements which Jordan attributes to Townsend relate not to the plaintiff, but rather to Gwendolyn M. Jordan. Accordingly, since this statement is not "of or concerning" the plaintiff, it cannot form the basis of a defamation claim by Gwendolyn L. Jordan. *See, e.g., Ewell v. Boutwell*, 138 Va. 402, 409 (1924) ("Of course, it is fundamental that the plaintiff must himself have the right to sue. However actionable the words may be, unless they refer to the plaintiff, he cannot maintain an action therefore.").

Not only has the plaintiff failed to allege any facts to suggest that the purported defamatory statements were of or concerning herself, the plaintiff has also failed to state that Townsend made these statements with the requisite state of mind. Defamation is not a strict liability tort. Rather, under Virginia law, a defamation plaintiff is required to prove that the publication was false, and that the defendant either knew it to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based. *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 151 (1985). No such allegations have been made in this case.

Not only has the plaintiff failed to state the basic allegations for a defamation claim and failed entirely to raise any facts which could support such a claim, her defamation action is barred by the applicable one-year statute of limitations. Prior to 1995, courts consistently applied the one-year limitations period found in Virginia Code § 8.01-248 to defamation actions. *See, e.g., Weaver v.*

Beneficial Finance Co., 199 Va. 196 (1957); *Morrissey v. William Morrow & Co.*, 739 F.2d 962, 967 (4th Cir. 1984) ("The Virginia Supreme Court has consistently applied the one year statute of limitation in Va. Code 8.01-248 to defamation actions."). In 1995, this principle was codified at Virginia Code § 8.01-247.1, which states, "Every action for injury resulting from libel, slander, insulting words or defamation shall be brought within one year after the cause of action accrues." Jordan's cause of action for defamation accrued on June 21, 1995, the date the statements were allegedly made, and the date plaintiff claims to have suffered damages by having been falsely accused of a crime. Amended Motion for Judgment at ¶ 10. Plaintiff did not commence this action against Shands until June 27, 1996, more than one year after her defamation cause of action accrued. Townsend was not added as a defendant until September 16, 1996, and the plaintiff had conceded that her defamation action against him is time-barred. Because suit was not commenced against Shands until more than one year after the plaintiff's cause of action accrued, her defamation count is defeated by the one-year limitations period found in Virginia Code § 8.01-248.

Plaintiff's reliance on Judge Bach's unpublished letter opinion in the case of *Daniels v. Melart Jewelers* as authority to the contrary is misplaced. In that case, Judge Bach apparently ruled that the plaintiff's defamation cause of action did not fully accrue until she was acquitted of the charges brought against her as a result of the defendants' false accusations. The statements that gave rise to these charges did not become false until after the plaintiff was acquitted. In the present case, however, there has been no allegation that either Shands or Townsend ever accused the plaintiff of a crime, but rather that they confirmed there was an outstanding capias for Gwendolyn M. Jordan, which was a true statement. Indeed, plaintiff's reliance on Judge Bach's decision underscores the fact that no false statement was ever made concerning the plaintiff, but rather that she was allegedly arrested on a warrant meant for someone else.

B. THE PLAINTIFF HAS FAILED TO STATE A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BECAUSE SHE HAS NOT SET FORTH ANY FACTS WHICH WOULD SUPPORT THE ELEMENTS OF THIS TORT, BECAUSE SHE HAS NOT ALLEGED A SPECIFIC ELEMENT OF THE TORT, AND BECAUSE THIS CLAIM IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

In her amended motion or judgment, Jordan alleges that defendants Townsend, John Doe and Mary Doe "intentionally inflicted emotional distress on JORDAN by entering her personal and confidential data on a warrant that they knew, or should have known, was intended for another person. Amended Motion for Judgment at ¶ 13. Jordan also alleges that defendant Wright transferred "personal and confidential data" from the plaintiff's driver's license to Townsend, John Doe and Mary Doe, who then inserted this information on the warrant intended for Gwendolyn M. Jordan. In other words, the genesis of this data and plaintiff's ultimate arrest rests with defendant Wright, not with anyone affiliated with the Dinwiddie sheriff's department.

The Virginia Supreme Court looks upon the tort of intentional infliction of emotional distress with disfavor. *See, e.g., Ruth v. Fletcher*, 237 Va. 366, 373 (1989) ("Because of the risks inherent in torts where injury to the mind or emotions is claimed, we declared such torts 'not favored' in the law."). The court first recognized this tort in *Womack v. Eldridge*, 215 Va. 338 (1974), adopting the following test:

We adopt the view that a cause of action will lie for emotional distress, unaccompanied by physical injury, provided four elements are shown: One, the wrongdoer's conduct was intentional or reckless. This element is satisfied where the wrongdoer had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result. Two, the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality. This requirement is aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved. Three, there was a causal connection between the wrongdoer's conduct and the emotional distress. Four, the emotional distress was severe.

Id. at 342.

The Supreme Court has also articulated specific pleading requirements for this tort. In *Ely v. Whitlock*, 238 Va. 670 (1989), the Virginia Supreme Court considered the sufficiency of allegations supporting an intentional infliction of emotional distress claim. Specifically, the court held that the plaintiff was required to plead the defendants' requisite state of mind with specificity:

The [plaintiffs] do not allege [the defendant] instituted the ethics complaint for the specific purpose of inflicting emotional distress upon them, or that she intended her specific conduct and knew or should have known that emotional distress would likely result. We have held that such proof is necessary to establish a cause of action based on intentional infliction of emotion distress. . . . Since a plaintiff must allege all facts necessary to establish a cause of action, and the Whitlocks have not done so, their claim fails.

Id. at 677.

The court reached this conclusion despite the plaintiff's allegations that the defendants acted "intentionally and/or recklessly, were outrageous and intolerable and offend against generally accepted standards of decency and morality, and have proximately caused severe emotional distress to your plaintiff." The court specifically held that failing to allege that the defendants' actions were taken with the specific purpose of inflicting emotional distress, or intending the specific conduct knowing that emotional distress would likely result, was a pleading requirement necessary to state a valid claim for intentional infliction of emotional distress. *Ibid.*

The plaintiff's allegations in the amended motion for judgment fall short of what must be alleged in an intentional infliction of emotional distress case. At most, the plaintiff has stated, in conclusive fashion and without any factual support, that Townsend's actions were intentional, grossly negligent, reckless, outrageous and intolerable and malicious. Amended Motion for Judgment at ¶¶ 17-21. These are the same sorts of allegations which the Supreme Court specifically held to be inadequate for purposes of pleading an intentional infliction of emotional distress claim in *Ely*. Accordingly, this count should be dismissed.

In addition, plaintiff's claims under this count are barred by Virginia Code § 8.01-248's one-year statute of limitations. At least two circuit courts have held that torts such as these are governed by a one-year limitations period. In *Ramsay v. Roanoke Memorial Hosp.*, 33 Va. Cir. 21 (City of Roanoke 1993), for example, attached hereto as Exhibit 2, the court held that plaintiff's claims for emotional distress, embarrassment and mental anguish were governed by the one-year statute of limitations set forth in § 8.01-248. *Id.* at 22. Similarly, in *McHenry v. Adams*, 32 Va. Cir. 1 (Essex Co. 1993), attached hereto as Exhibit 3, the court applied the one-year limitations period of § 8.01-248 to the plaintiff's emotional distress claim. *Id.* at 3. Accordingly, Jordan was required to commence her claim for intentional infliction within one year of June 21, 1995, and she did not do so.

C. THE PLAINTIFF HAS FAILED TO STATE A CAUSE OF ACTION FOR MALICIOUS PROSECUTION BECAUSE SHE HAS NOT ALLEGED THE REQUISITE ELEMENTS OF THIS TORT, NOR ARE THERE ANY FACTS WHICH WOULD SUPPORT SUCH ALLEGATIONS.

In her amended motion for judgment, the plaintiff charges that the defendants "participated in a malicious prosecution of JORDAN." Amended Motion for Judgment at ¶ 15. She has not, however, adequately pled the elements of this cause of action, nor are there any facts which could support such an allegation. Like intentional infliction of emotional distress, malicious prosecution is a disfavored tort. As stated by the Virginia Supreme Court in *Lee v. Southland Corp.*, 219 Va. 23, 26 (1978):

Malicious prosecution actions are not favored in Virginia and the requirements for maintaining such actions are more stringent than those applying to most other tort claims. The reason for this disfavor is that criminal prosecutions are essential for the maintenance of an orderly society and people should not be discouraged from bringing such actions for fear of subsequent civil proceedings against them.

Ibid.

As with intentional infliction of emotional distress, the Supreme Court has enunciated specific pleading requirements in order to maintain a malicious prosecution cause of action. Specifically, the Supreme Court requires:

For a plaintiff to prevail in a suit for malicious prosecution, he must *allege* and prove (1) that the prosecution was instituted by, or with the cooperation of, the defendant; (2) that the prosecution was terminated in a manner not unfavorable to the plaintiff; (3) that it was without probable cause; and (4) that it was malicious.

Ibid. (emphasis added).

Based on the above, a malicious prosecution action will fail absent allegations and proof that, among other things, the prosecution was instituted by, or with the cooperation of, the defendant, and that it was without probable cause. In the present case, the plaintiff has made no such allegations, nor has she raised any facts which could support such an accusation. For example, the plaintiff is not claiming that criminal proceedings taken against her were instituted by Shands or Townsend. Rather, the City of Richmond police officers arrested the plaintiff on an outstanding capias which had been issued from the Dinwiddie County Juvenile and Domestic Relations Court. At most, Townsend is charged with entering the plaintiff's "personal and confidential data," which he is alleged to have received from Officer Wright, on the warrant intended for Gwendolyn M. Jordan. There is no suggestion that the Dinwiddie County sheriff's department requested that the plaintiff be arrested, or otherwise participated in this arrest.

Similarly, there is no allegation that Townsend or Shands acted without probable cause. At best, the plaintiff has alleged that Townsend, in the Confirmation Response, confirmed that Gwendolyn M. Jordan, not the plaintiff, was still wanted by Dinwiddie and that Townsend inserted information which he received from Officer Wright on the capias intended for Gwendolyn M. Jordan.

On demurrer, the facts as alleged must be taken as true even though the court may be of opinion that it is improbable they are true. *Ames v. American Nat'l Bank of Portsmouth*, 163 Va. 1, 37 (1934). However, a demurrer does not admit the correctness of the conclusions of law stated in the motion for judgment, or that the inferences of fact drawn by the pleader from facts alleged may be fairly and justly drawn therefrom. *Id.* at 38. In the present case, the only allegations supporting


plaintiff's claim for malicious prosecution are stated conclusively and without any factual support. Indeed, plaintiff's bald assertion that the defendants acted with malice is not supported by the facts set forth in the amended motion for judgment and need not be accepted by this Court as true in ruling on this demurrer. In any event, there is simply no allegation whatsoever that Townsend or Shands instituted the criminal proceedings against Jordan or that they acted without probable cause in doing so. Accordingly, under the clear mandate of *Lee v. Southland Corp.*, *supra*, the plaintiff has failed to state a cause of action for malicious prosecution.

CONCLUSION

For the reasons stated above, the defendants, Samuel Shands and C.V. Townsend, by counsel, move this Court to dismiss this action against them pursuant to their demurrer and special plea of the statute of limitations.

SAMUEL SHANDS
and
C.V. TOWNSEND

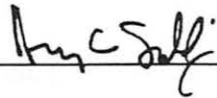
By Counsel



C. Michael DeCamps
Henry C. Spalding III
SANDS ANDERSON MARKS & MILLER
P.O. Box 1998
Richmond, Virginia 23218-1998
(804) 648-1636

CERTIFICATE

I hereby certify that, on this 11th day of February, 1997, a true copy of the foregoing was mailed, first-class and postage prepaid, to James T. Edmunds, Esquire, McEachin and Gee, P.C., 700 East Main Street, Richmond, Virginia 23219, and to William Joe Hoppe, Esquire, Senior Assistant City Attorney, City of Richmond, Office of the City Attorney, 900 East Broad Street, Suite 300, Richmond, Virginia 23219.



0621) 43678 1911 DNSO
YR. R161, DNSO.

***** HIT CONFIRMATION RESPONSE *****

THE RECORD BELOW IS CONFIRMED

DOA/9410042.VIC/200425394.

***WANTED/MISSING PERSON**

NAM/JORDAN, GWENDOLYN M. DOB/100759. SEX/F.

NAME OF CONFIRMER:SGT CV TOWNSEND.CONFIRMING AGENCY:DINWIDDIE CO SHERIFFS OFFICE.

PHONE:(804)469-4550.FAX:(804)469-4555.

REMARKS:SUBJECT STILL WANTED BY THIS JURISDICTION.HAVE WARRANT IN HAND FOR FAILURE TO APPEAR.USE THIS CONFIRMATION AS A DETAINER TO HOLD SUBJECT.

#153876

21 JUN 95 19 12

CIRCUIT COURT OF THE CITY OF ROANOKE

Claudia Ramsey,
Adm'x of the estate of
William Kenneth Ramsey, Jr.

v.

Roanoke Memorial Hospitals

June 1, 1993

Case No. CL92-662

HEADNOTE: The right to bury the dead is a quasi property right; such a right is governed by a five-year statute of limitations.

Claims for emotional distress, embarrassment, and mental anguish are governed by a one-year statute of limitations.

BY JUDGE DIANE MCQ. STRICKLAND

I have reviewed the memoranda and accompanying authority submitted to the Court addressing the issue of the applicable statute of limitations for the above-captioned case. Plaintiff's motion for judgment alleges that defendant's negligent dropping of the body of the deceased, William Kenneth Ramsey, Jr., caused damage to the corpse and resulted in emotional distress, embarrassment, and mental anguish to the plaintiff. Plaintiff contends that § 8.01-243(B) which provides for a five-year limitation for filing suits for injury to property is applicable. Defendant argues that § 8.01-248, "personal actions for which no other limitation is specified," governs. It is the opinion of this Court that both parties are correct in part.

The most instructive Virginia case on this issue is *Sanford v. Ware*, 191 Va. 43, 60 S.E.2d 10 (1950), wherein the plaintiff sued for negligent disinterring of the body of her deceased husband. The Supreme Court stated:

Although there is no right of property in a commercial sense in the dead body of a human being, the right to bury and preserve the remains is recognized and protected as a *quasi* property right. 191 Va. at 48.

Plaintiff further cites for the Court's consideration many cases collected in 53 A.L.R. 4th 360 and 53 A.L.R. 4th 394 which discuss the "quasi property rights" of survivors to control a loved one's remains. Based on the authority cited, it is the ruling of this Court that the plaintiff has a *quasi* property right in the remains of William Kenneth Ramsey, Jr., permitting recovery for any pecuniary damage proximately caused by negligence of the defendant. To this *quasi* property right, the Court applies the five-year statute of limitations as provided in § 8.01-243(B).

However, the Supreme Court in *Sanford* further stated:

But it is universally held that where a personal tort such as that with which we are here concerned, has been committed which will support an action to recover some damages, compensation for mental suffering may be recovered in addition thereto if such suffering is a natural and probable result of the act. 191 Va. at 49.

Similarly, in the present case, to the extent that the plaintiff seeks recovery for emotional distress, embarrassment, and mental anguish, we are concerned with a "personal tort." For such cause of action, § 8.01-248, governing personal actions for which no other limitation is specified, provides the appropriate one-year period of limitation.

Accordingly, it is the opinion of this Court that plaintiff's claims for emotional distress, embarrassment, and mental anguish are barred by the one-year statute of limitations set forth in § 8.01-248. Plaintiff's claim for any pecuniary damages sustained for injury to her *quasi* property rights in the corpse of William Kenneth Ramsey, Jr., are not time-barred, and she is granted a period of twenty-one days from this date to file an amended motion for judgment.

CIRCUIT COURT OF ESSEX COUNTY

Hugh McHenry

v.

Mary E. Adams et al.

January 12, 1993

HEADNOTE: An action for the infliction of emotional distress caused by the negligent burial of a deceased relative is governed by a one-year period of limitation.

A cause of action accrues when any injury, however slight, is complete at the time the wrongful act or omission is completed.

BY JUDGE JOSEPH E. SPRUILL, JR.

We have for consideration pleas of the statute of limitations filed by all defendants in this case.

The plaintiff, Hugh McHenry, seeks compensatory and punitive damages for emotional distress allegedly incurred as a result of a defective vault used in the burial of his mother. He has brought suit against the owner (Mary Adams) and manager (Brooks) of the funeral home; the owners (Mr. and Mrs. Stevens) of the company that manufactured the vault; and two employees of the funeral home (Anthony Adams, Mary's son, and Ambrose Bailey) who participated in arrangements for the funeral.

In his Motion for Judgment, filed August 9, 1990, plaintiff alleges negligence, breach of warranty, and intentional misrepresentation (fraud) against all defendants. He also alleges violations by all defendants of the Virginia Consumer Protection Act.

On April 15, 1988, plaintiff's mother died. Her funeral on April 19, 1988, was conducted by C. W. Edwards Funeral Home, owned by Mary Adams. Stevens' company provided a Citation Model burial vault purchased by plaintiff through the funeral home. Following the burial, at McHenry's request, Stevens provided a vault purchase agreement guaranteeing that the vault would protect the body and contents within from damage caused by water leakage. The pleadings alleged that "over the next two years following the sealing and burial, the plaintiff noticed large holes in the ground beside the grave and flies coming from inside the holes." On March 20, 1990, the plaintiff had

the body exhumed, and it was discovered that the vault leaked and water was in the casket, giving rise to plaintiff's injuries.

1. *Which is the applicable statute of limitations?*

Although the primary issue here is when the cause of action accrues, it is necessary first to determine the applicable statute of limitations. The defendants contend this is a personal action for which no limitation is otherwise prescribed, and therefore, Virginia Code § 8.01-248 applies requiring that the action be brought within one year after the right to bring such action has accrued. They argue that there was no personal injury to the plaintiff here but rather an injury to the plaintiff's right to bury his mother properly.

Thus, the question is whether the plaintiff has sustained "personal injuries" within the meaning of § 8.01-243 which provides for a two-year period within which to bring suit. If he has not, § 8.01-248 must govern.

The Supreme Court has held that the latter statute applies to cases of wrongful discharge, malicious prosecution, defamation, and claims involving special education programs. In none of these cases is the plaintiff personally injured; rather, there is in each some deprivation of an entitlement which results in damage in one form or another. For example, one has a right or entitlement not to be defamed or maliciously prosecuted. A violation of that right gives rise to a cause of action. By analogy, one has the right to bury the dead properly and with dignity. These types of actions seem fundamentally similar in principle, and it would seem illogical to impose a one-year limitation in one case and not the other.

The Supreme Court, in *Sanford v. Ware*, 191 Va. 439 (1950), recognized that the right to bury and preserve the remains of a dead body is a quasi-property right. There, it was held "an action *ex delicto* will lie against the wrongdoer for the unlawful invasion of a near-relative's rights with respect to a dead body, such as committing an act of indignity upon it or for a breach of duty in respect to it."

The plaintiff's injuries here are not to his person in the sense that he has sustained a direct personal injury. Rather, he has suffered an unlawful invasion of his right to afford his mother a proper burial, a right first recognized as such in *Sanford*. The indignities resulting from this invasion have caused the plaintiff emotional distress.

The Court therefore concludes that Virginia Code § 8.01-248 is the applicable statute of limitations in this case, requiring the filing of the action within one year after the right to bring such action has accrued.

2. *When did the cause-of action accrue?*

This burial occurred April 19, 1988. For two years thereafter, according to the Motion for Judgment, plaintiff noticed holes and flies at the grave site, and on March 20, 1990, he had the remains exhumed. On August 9, 1990, this action was filed.

The plaintiff advances several theories of recovery. In tort or products liability actions, the statute runs from the time of injury. In actions for fraud or mistake, the cause of action accrues when such fraud or mistake is discovered or should have been, in the exercise of reasonable diligence. Virginia Code § 8.01-249. (The plaintiff argues in his memorandum that § 8.01-243 and § 8.01-249 *extend* the statute of limitations in actions based upon fraud. The extension set forth in § 8.01-243(C)(2) applies only in actions for malpractice against a health care provider. Section 8.01-249 provides for the time of accrual, not extension of such time.)

Thus, the questions are: (1) when did the plaintiff sustain injury; and (2) when should any fraud or mistake have been discovered in the exercise of due diligence.

Plaintiff's suffering appears to have evolved through three stages. The first was bereavement over his mother's death. The second phase began when he noticed the holes and flies at the grave on or about July 15, 1988, and for the first time realized something "was wrong." (See page 49 of plaintiff's October 5, 1992, deposition.) His grief at that time intensified. (*Id.* at p. 222.) Thereafter, the exhumation in March, 1990, triggered the third stage, wherein his then existing anguish was further aggravated.

No right of action accrues until the plaintiff is hurt. *Locke v. Johns-Manville Corp.*, 221 Va. 951 (1981). Injury means "positive, physical or mental hurt."

The plaintiff here testified that upon seeing the holes and flies at the gravesite in July, 1988, his emotional problems began and intensified. He stated that seeing the flies around his mother's grave made his condition "a lot worse." This testimony is corroborated in the deposition testimony of the plaintiff's son. Of course, these problems were exacerbated when the remains were exhumed, but the plaintiff says his

mental condition began to deteriorate when he observed the condition of the gravesite in July, 1988.

In *Caudill v. Wise Rambler*, 210 Va. 11 (1969), the Supreme Court held:

Where an injury, though slight, is sustained in consequence of the wrongful or negligent act of another and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act should have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date. p. 14.

The plaintiff is bound by his deposition testimony; such testimony indicates his emotional distress intensified in July, 1988; therefore, his cause of action is deemed to have accrued as of that time. From that point forward, plaintiff had a "legally provable injury." See, *Locke v. Johns-Manville Corp.*, 221 Va. 951 (1981).

The plaintiff's memorandum states that while plaintiff "may have had some fears and mental discomfort" prior to the disinterment, the injuries for which he seeks to recover accrued solely after March 20, 1990. This assertion contradicts plaintiff's testimony. Plaintiff states that as of July, 1988, he knew something "was wrong." Even though he may not have known then what he knew after the vault was unearthed, he knew enough to be suspicious, to solicit the aid of various agencies, and what he knew or suspicioned was enough to intensify his emotional distress. To adopt plaintiff's argument on this point would be contrary to the holding in *Caudill* and *Locke*.

Plaintiff further argues defendants must establish with certainty that the flies and holes were the result of water leaking into the vault. I disagree. It is enough that plaintiff assumed this to be the case, and this assumption caused him the trauma of which he complains.

Plaintiff relies on *Louisville and Nashville Railroad v. Saltzer*, 151 Va. 165 (1928). There the Supreme Court held "whenever any injury, however slight it may be, is complete at the time the act or omission is completed, the cause of action then accrues." In *Saltzer*, the plaintiff's injury came 27 years after the channel was changed. Here, it came when plaintiff observed the holes and flies.

The crucial question here, as in *Locke*, is when was the plaintiff hurt. He himself provides the answer in his deposition.

With reference to the plaintiff's claims of fraud, in his pre-trial deposition, he states: "I didn't find out until July 15 what was wrong." (See page 49 of the October 5, 1992, deposition.) It was subsequent to this date that the plaintiff began his various reports to agencies and officials in a vain attempt to correct the problem. The import of the plaintiff's deposition testimony is that he realized there was a problem as of July 15, 1988. This acknowledgment indicates that he knew then, or should have, that the vault was not functioning as expected.

Pursuant to Virginia Code § 8.01-243, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues. We have found that this cause of action accrued as of July 15, 1988. We have also concluded that § 8.01-248 is the applicable statute, prescribing a one-year time limitation, but even if the two-year statute provided for in § 8.01-243 were applicable, we find that the plaintiff's claim is time-barred.

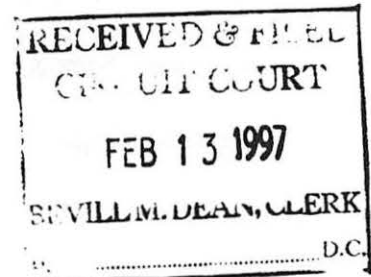
For the foregoing reasons, the pleas of the statute of limitations are sustained.

REPORTER'S NOTE: This case is cited in *Walker v. Small Funeral Home* (1993), which is printed below at page 258.

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

Defendants.

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) Case No. LB-1601-3
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79

and false imprisonment. With regard to alleged malicious prosecution, a necessary element of this cause of action is that the prosecution was instituted by or procured by the cooperation of Officer Richardson. See Giant of Virginia, Inc. v. Pigg, 207 Va. 679 (1967) and one of the cases that is relied upon by plaintiff, Samuel v. Rose's Stores, Inc., 907 F.Supp. 159 (E.D. Va. 1995).

But the allegations in the amended motion for judgment as to Officer Richardson assert only that he arrested and transported plaintiff to the City lock-up. The amended motion for judgment fails to suggest that Officer Richardson participated, in any way, in the procurement of the capias or otherwise in the institution of these proceedings. This failure alone should defeat this cause of action. And, while plaintiff conclusorily attempts to claim that all defendants "participated" in her alleged malicious prosecution in order to avoid this deficiency, the relevant facts set forth in the amended motion for judgment contradict this conclusion. Accordingly, the purported cause of action for malicious prosecution should fail.

With regard to the purported cause of action for false imprisonment, the facts alleged as to Officer Richardson fail to support this cause of action and further establish that he acted in good faith. In a case relied upon by the plaintiff, Samuel v. Rose's Stores, Inc., 907 F.Supp. at 164, even the U.S. District Court recognized that "false imprisonment" is the restraint of a person's liberty without any sufficient cause or illegal detention without lawful process. See Zayre of Va., Inc. v. Gowdy, 207 Va. 47, 147 S.E.2d 710 (1966) and Montgomery Ward & Co. v. Wickline, 188 Va. 485, 50 S.E.2d 387 (1948).

In this case, Officer Richardson is alleged to have arrested plaintiff on an outstanding capias from Dinwiddie County. It is further alleged that the "warrant", which was faxed to Richmond, had the information from plaintiff's driver's license on it. This incorrect information had allegedly been

inserted on the "warrant" by defendant Townsend and others, who were employees of defendant Shands, Sheriff of Dinwiddie County.¹

Officer Richardson's arrest of plaintiff accordingly was based upon a "warrant" that set forth plaintiff's name (except for a different middle initial), her personal statistics, including her birth date, and her social security number. To suggest that the arrest upon this process was without sufficient cause therefore defies logic and common sense. Further, the Virginia Supreme Court, in DeChene v. Smallwood, 226 Va. 475 (1984), held that a good faith and reasonable belief in the validity of the arrest is sufficient to protect a police officer from liability for either a mistake of fact or law. Accordingly, based upon the facts set forth in the amended motion for judgment, even when viewed most favorably for plaintiff, this Court can only find that Officer Richardson's arrest of plaintiff was lawful.

The one-year limitation period that was in effect at the time this cause of action for false arrest or imprisonment accrued provides a second basis for dismissing this cause of action as to Officer Richardson. Code § 8.01-248, as applicable at the time this cause of action accrued, provided for a one-year limitation period for all personal actions for which no limitation is otherwise provided. A "personal action" is defined in Code § 8.01-228 as "an action wherein a judgment for money is sought, whether for damages to person or property".

While the case of Purcell v. Tidewater Construction Corp., 250 Va. 93, 458 S.E.2d 291 (1995) (a case with which this Court should be familiar), involved a determination of the applicable statute of

¹ While it is alleged that the Dinwiddie Clerk stated that the "Richmond Police" placed plaintiff's social security number on this "warrant", no allegations state or even suggest that Officer Richardson participated in this activity or was aware of it. In fact, the suggestion is that Officer Wright provided this information to defendant Townsend and other employees of the Dinwiddie County Sheriff, who placed the information on the capias before it was faxed to Officer Richardson.

limitations in a wrongful termination action, it does provide guidance as to the Virginia Supreme Court's interpretation of Code § 8.01-248 before the 1995 amendment. In Purcell, the Supreme Court rejected an effort to interpret Code § 8.01-248 as applying only to personal actions for injury to property, since such an interpretation would have rendered § 8.01-248 meaningless. The Supreme Court further indicated that direct mental or physical injury to the body is required for a personal injury action under Code § 8.01-243. The Supreme Court distinguished personal actions such as fraud and defamation, which did not involve such injury, from such "personal injury" actions.

In this case, plaintiff has claimed the same emotional damages, whether such damages resulted from defamation, malicious prosecution or false imprisonment. The alleged damages for false imprisonment in this case are therefore the same type of damages that would result from defamation or malicious prosecution, both of which have been held to be personal actions governed by the one-year limitation period set forth in Code § 8.01-248. Accordingly, a similar conclusion should apply to this cause of action for false imprisonment.

In trying to thwart the application of § 8.01-248 to this cause of action for false imprisonment, plaintiff has offered the federal court decision of Samuel v. Rose's Stores, Inc., 907 F.Supp. 159 (E.D. Va. 1995). But this federal decision admitted that it had no legal precedent from the Commonwealth and further, in a footnote, admitted that it was not following a contrary unpublished decision of its Fourth Circuit Court of Appeals that had applied the one-year limitation period found in Code § 8.01-248 to a cause of action for false imprisonment. And this federal court decision, while mentioning Purcell, appears to have failed to appreciate the Virginia Supreme Court's discussion of the importance of the nature of the injuries to its decision.

In any event, the cause of action set forth in the amended motion for judgment clearly aligns the alleged emotional damages claimed by plaintiff for alleged false imprisonment with those that would follow from either defamation or malicious prosecution. Since causes of action for defamation and malicious prosecution were governed by the one-year period of limitation set forth in § 8.01-248, the cause of action for the false imprisonment should also be subject to the same one-year period of limitation. The cause of action for false imprisonment accrued on June 21, 1995, and the amended motion for judgment was not filed until September 1996. Accordingly, this cause of action should be time-barred based upon the application of Code § 8.01-248.

For the foregoing reasons, Officer Richardson respectfully requests that this Court sustain his Special Plea and Demurrer and dismiss this action as to him, with prejudice.

Respectfully submitted,

OFFICER CECIL RICHARDSON

By:


Counsel

William Joe Hoppe
Senior Assistant City Attorney
900 E. Broad Street, Room 300
Richmond, VA 23219
(804) 780-7951
Counsel for defendant Richardson

CERTIFICATE

I hereby certify that on the 11th day of February, 1997, a true copy of the foregoing Memorandum Filed on Behalf of Defendant Officer Richardson was delivered by hand to James T. Edmunds, Esquire, McEachin and Gee, P.C., 700 East Main Street, Richmond, Virginia 23219, counsel for plaintiff; and to Henry C. Spalding, III, Esquire, Sands, Anderson, Marks & Miller, The Ross Building, 801 East Main Street, Richmond, Virginia 23219, counsel for defendants Shands and Townsend.



V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Courts Building

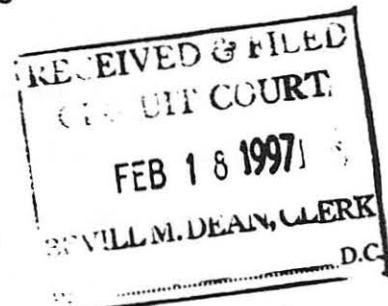
GWENDOLYN L. JORDAN,
Plaintiff,

v.

Case No. LB-1601-3

SAMUEL SHANDS, et al.,
Defendants.

REPLY MEMORANDUM ON BEHALF OF PLAINTIFF
GWENDOLYN L. JORDAN



FACTS

This cause of action arises out of an incident which occurred on June 21, 1995, wherein the plaintiff, Gwendolyn L. Jordan, was wrongfully arrested based on a capias issued by the Dinwiddie County Juvenile and Domestic Relations District Court. On that day, the plaintiff was involved in an automobile accident in the City of Richmond which was investigated by Officer D.L. Wright of the City Police Department. The plaintiff was injured and taken to Richmond Metropolitan Hospital. Officer Wright arrived at the hospital and informed the plaintiff that she was wanted on an outstanding capias from Dinwiddie County. The capias was intended for Gwendolyn M. Jordan of 231 B South Jefferson Street, Petersburg, Virginia 23803. The plaintiff herein has a middle initial of "L" rather than "M", and a Blackstone, rather than a Petersburg, address. Despite plaintiff's protestations that she was not the individual wanted

in Dinwiddie, she was subsequently arrested at the hospital by Officer Cecil Richardson of the Richmond City Police and taken to the Third Precinct. Officer Richardson went into the Third Precinct, staying for approximately fifteen minutes, and upon his return, the plaintiff was taken to the city lockup for incarceration. The jail personnel, however, would not place the plaintiff in jail without a warrant. Officer Richardson produced a paper described as a "hit", (Exhibit 1), and the jail personnel contacted the Dinwiddie Sheriff's Department requesting that the warrant be faxed to the jail. The capias which the jail personnel received reflected the typewritten name and address of Gwendolyn M. Jordan, but with the race, sex, date of birth, height, weight, eye and hair color, and social security number of the plaintiff handwritten below (Exhibit 2). The handwritten data is information which also appears on the plaintiff's drivers license. Upon receipt of the erroneous capias, the jail personnel placed the plaintiff in lockup and held her for several hours. That evening, she was released on bond under terms that prohibited her from leaving the state. On July 11, 1995, the plaintiff appeared before the Dinwiddie Juvenile and Domestic Relations District Court and the Court recognized that the wrong person had been processed for arrest, and dismissed the charges against her. Plaintiff thereafter filed a Motion for Judgment, and Amended Motion for Judgment alleging defamation, malicious prosecution, false imprisonment, and intentional infliction of emotional distress. These demurrers and pleas of the statutes of

limitation followed.

The standard for evaluating a motion for judgment at the demurrer stage is set forth in Catecorp, Inc. v. Catering Concepts, Inc., 246 Va. 22 (1993). Quoting the case of Rosillo v. Winters, 235 Va. 268, 270 (1988), the court says, "A demurrer admits the truth of all material facts properly pleaded. Under this rule, the facts admitted 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." It is not necessary, therefore, for the plaintiff to offer details toward proving the allegations made in his motion for judgment. In order to withstand demurrer, the plaintiff need only make allegations of material facts sufficient to inform a defendant of the nature and character of the claim against him. Catecorp at 24. Therefore, only conclusions of law may be challenged at the demurrer stage of litigation.

ARGUMENT

A. Defendants Shands and Townsend argue that plaintiff has failed to state a cause of action for defamation because (1) she has not alleged that the defamatory statement was of or concerning her, (2) that the statements were made with knowledge of their falsity or based on a negligent failure to ascertain the truth of the statements, and (3) because this count is barred by the applicable statute of limitations.

A (1) The elements for the tort of defamation in Virginia are found at 12A Michies Jurisprudence, Libel and Slander, § 12. One such element is that the defamatory statement is "of or concerning" the plaintiff. The subject statement was made by

defendant Townsend, and appears in the "Hit Confirmation Report" (Exhibit 3). The statement reads, "Subject still wanted by this jurisdiction. Have warrant in hand for failure to appear. Use this confirmation as a detainer to hold subject." Defendants Shands and Townsend argue that this statement does not relate to the plaintiff, but rather to Gwendolyn M. Jordan. According to the case of Gazette, Inc. v. Harris, 229 Va. 1, 37 (1985), a plaintiff satisfies the "of or concerning" element if he shows that the publication was intended to refer to him or her and would be so understood by others. The plaintiff must establish either that the publication on its face applies to her, or that the allegations and supporting contemporaneous facts connect the libelous words to the plaintiff. Ewell v. Boutwell, 138 Va. 402, 413 (1924). Clearly, the contemporaneous facts of this case, along with defendant Townsend's reference to plaintiff as "subject" indicate that his words were indeed "of or concerning" plaintiff. Clearly, Officer Richardson, and jail personnel who heard or read Deputy Townsend's statement reasonably understood the plaintiff to be the person intended.

A (2) Defendants Shands and Townsend further argue that the plaintiff failed to allege that the statements were made "with knowledge of their falsity or were based on a negligent failure to ascertain the truth of the statements." Defendants' argument relates to the negligence standard to which every private individual is held when seeking compensatory damages in a defamation case. See The Gazette v. Harris, 229 Va. 1, 15

(1985). However, defendants' argument is not appropriate at the demurrer stage of this case where one must accept all properly pleaded material facts, and any logical inferences drawn therefrom. See Supra, p. 3. Plaintiff alleged at ¶16 of her Amended Motion for Judgment that "at all times, each of the defendants had access to information that clearly demonstrated that JORDAN was not the person charged in the Dinwiddie capias." At the demurrer stage of these proceedings, this is certainly enough to establish that "the statements were based on a negligent failure to ascertain the truth of the statements." (Defendants, Shands and Townsend's, Brief, p. 2) Further, this statement is ample to inform the defendants of the nature of the claim against them which is all that is required at the demurrer stage of a case.

Furthermore, the Rules of the Virginia Supreme Court, 3:16 state that "An allegation of negligence... is sufficient without specifying the particulars of the negligence." In plaintiff's original Motion for Judgment, ¶11, she alleged that the actions of the defendants were grossly negligent. She reiterated this allegation in ¶18 of her Amended Motion for Judgment. Therefore, Rule 3:16 has also been satisfied. Defendants' assertion that plaintiff has failed to state a cause of action for defamation because she did not allege that the statements were made with knowledge of their falsity, or based on a negligent failure to ascertain the truth of the statements is without merit.

A (3) Defendant Shands further argues that plaintiff's

defamation claim is barred by the statute of limitation. Since plaintiff has previously conceded that her defamation claim is barred as to Townsend, the following argument relates to Shands only. The recent case of Daniels, et al. v. Melart Jewelers, et al., Law No. 151896 (Cir. Va. Aug. 30, 1996) (Exhibit 4), establishes that a defamation cause of action, where the subject defamation is the accusation of a crime, does not accrue until the plaintiff's acquittal of that crime. The court reasoned that accrual did not occur until acquittal because the charges did not become false until that time. Applying that reasoning to the case under consideration, plaintiff's defamation cause of action did not accrue until her acquittal on July 11, 1995. Under 8.01 247.1, she then had one year to bring suit, and did so by filing her original Motion for Judgment on June 27, 1996. Plaintiff, therefore, satisfied the statute, and is not time-barred as to her defamation claim. Defendant Shands attempts to distinguish Daniels from the case under consideration on the grounds that the defamatory words in this case do not accuse the plaintiff of a crime. However, the plain meaning of the defamatory words stated in paragraph A (1) is to accuse the plaintiff of the crime of failing to appear before the Court on a non-support charge. Defendant's distinction, therefore, is without merit.

B. Defendants Shands and Townsend argue that the plaintiff has failed to state a cause of action for intentional infliction of emotional distress because (1) she has not set forth any facts which would support the elements of this tort, (2) because she has not alleged a specific element of the tort, and (3) because this claim is barred by the

applicable statute of limitations.

B (1) The case of Womack v. Eldridge, 215 Va. 338 (1974) was the first to recognize a claim for emotional distress unaccompanied by physical injury. That case sets out a four pronged test wherein, in order to recover, the plaintiff must prove that 1) the wrongdoer's conduct was intentional or reckless, 2) the conduct was outrageous and intolerable, 3) the wrongful conduct and the emotional distress are causally connected, and 4) the distress is severe. To restate the relevant portions of the pleadings in this brief would be duplicitous. Plaintiff refers the Court, therefore, to Paragraphs 13-22 of her Amended Motion for Judgment where a simple reading will reveal that the four prongs of Womack have indeed been satisfied.

B (2) Defendants Shands and Townsend further argue that plaintiff's claim for intentional infliction of emotional distress fails because she has not pleaded defendants' state of mind with sufficient specificity. Defendants cite Ely v. Whitlock, 238 Va. 670 (1989) for the proposition that the plaintiff's must allege a specific purpose of inflicting emotional distress upon the plaintiffs or that the defendants intended its conduct and knew or should have known that emotional distress would likely result. Id. at 677. Plaintiff has satisfied the intent and knowledge requirements under Ely. In her Motion for Judgment, plaintiff pleaded at Paragraph 11 that "the joint actions of the defendants were intentional..." She

further alleged in her Amended Motion for Judgment, ¶17 that "each of the defendants acted intentionally to harm [her]." Therefore, she has satisfied the "intent" portion of the pleading requirement under Ely. The "knowledge" portion of Ely is also satisfied due to the rule that "A demurrer confesses the truth of the facts alleged and accepts all reasonable inferences therefrom." Lyons v. Grether, 218 Va. 630, 631 (1977). One may reasonably infer from the facts alleged that defendants knew or should have known that their actions would cause the plaintiff emotional distress. According to the case of Peterson v. Fairfax Hospital Systems, Inc., 21 Va. Cir. 70, 74 (1990), plaintiff has satisfied the requirements of Womack v. Eldridge so as to withstand demurrer.

B (3) Defendants Shands and Townsend argue additionally that plaintiff's claim for intentional infliction of emotional distress is barred by the one year statute of limitation articulated in the Code of Virginia, § 8.01-248 (1992). The defendants rely on two Circuit Court cases in support of their argument. Plaintiff, however, argues that the two year statute found at 8.01-243 (A), applicable to actions for personal injuries, is the appropriate statute. According to Purcell v. Tidewater Constr. Corp., 250 Va. 93, 95 (1995), quoting Locke v. Johns-Manville Corp., 221 Va. 951, 957 (1981), a personal injury is "[a] positive, physical or mental hurt to the claimant." Emotional distress clearly falls within this definition. Plaintiff's position is supported by Samuel v. Rose's Stores,

Inc., 907 F. Supp. 159 (E.D. Va. 1995) (Exhibit 5) wherein the Court considered the statute of limitations applicable to a claim of false imprisonment. The court likened the tort of false imprisonment to the tort of intentional infliction of emotional distress, and held that both torts involved "personal injury" as provided for by 8.01-243(A), and as such were subject to a two year statute of limitation. This position is supported by Luddeke v. Amana Refrigeration, Inc., 239 Va. 203 (1990), and Welch v. Kennedy Piggly Wiggly, 63 Bankr. 888 (W.D. Va. 1986) (Exhibit 6). Therefore, while defendants were able to find Circuit Court authority for their position that this tort is governed by Va. Code § 8.01-248, the greater weight of authority among higher courts is that Va. Code § 8.01-243(A) is the relevant statute.

C. Defendants Shands Townsend and Richardson argue that the plaintiff has failed to state a cause of action for malicious prosecution because she has not alleged the requisite elements of this tort, nor are there any facts which would support such allegations.

C. Plaintiff concedes this point as to all defendants and will not pursue her claim for malicious prosecution any further.

D. Defendant Richardson argues that (1) the facts alleged as to him fail to support a cause of action for false imprisonment, and (2) that plaintiff is barred by the statute of limitation.

D (1) According to the case of Zayre v. Gowdy, 207 Va. 47, 50 (1966), "False imprisonment is restraint of one's liberty without any sufficient cause therefor." Citing Montgomery Ward &

Co. v. Wickline, 188 Va. 485, 490, the court further states that the good faith and probable cause of the defendant in causing the arrest is no defense in an action for false imprisonment. In the case at bar, there was clearly no sufficient and legitimate reason for Officer Richardson to arrest and incarcerate the plaintiff since she was not the individual wanted by the Court in Dinwiddie. According to Zayre, even if Officer Richardson acted without malice, and with the best intentions, this is not a valid defense to plaintiff's claim for false imprisonment.

While Zayre is still good law, the defendant Richardson cites the case of DeChene v. Smallwood, 226 Va. 475 (1984) which holds that police officers may sometimes be insulated from liability in certain instances of mistake of fact or law. These instances, however, are to be judged according to whether the arresting officer acted "in good faith and with probable cause." Pierson v. Ray, 386 U.S. 547, 555 (1967) (Exhibit 7). Officer Richardson's actions in arresting and falsely imprisoning the plaintiff were not of this nature so as to be protected under DeChene. Specifically lacking in his actions was the element of probable cause which is defined as the reasonable belief of an ordinarily prudent person at the time when the action complained of occurred. F.B.C. Stores v. Duncan, 214 Va. 246 (1973). Given plaintiff's protestations of innocence, the anomalies on the face of the Capias, the difference in the middle initials, and the fact that plaintiff's driver's license bore a different address from the wanted individual, an "ordinarily prudent" person would

have investigated further before falsely imprisoning plaintiff. One factually similar case is Giant v. Pigg, 207 Va. 679 (1967) where the court found that the defendant security guard lacked probable cause where plaintiff was arrested for shoplifting. The plaintiff in that case repeatedly told defendant that she had purchased the subject items and had a receipt in her car which was just outside in the parking lot. Defendant refused, however, to walk with her to the car to see the receipt. The court found the defendant's disregard of the information communicated to him to be an aggravated circumstance which supported a finding of a lack of probable cause. Like the security guard in Giant, Officer Richardson also disregarded information communicated to him which could have easily been verified, and which would have confirmed the plaintiff's story. Therefore, even if one accepts the rationale of DeChene that good faith and probable cause will sometimes insulate a police officer from liability, Officer Richardson's actions do not fall within this exception since he did not act with probable cause.

D (2) Defendant Richardson argues that plaintiff's claim for false imprisonment is barred by the one year statute of limitation articulated in Va. Code § 8.01-248. In support of his position, he relies on Purcell v. Tidewater Construction Corp., 250 Va. 93 (1995) wherein the Court ruled that a cause of action for wrongful termination is governed by the one year statute of limitation. The Court reasoned that, with the exception of federally created rights, Va. Code § 8.01-243(A), prescribing a

two year statute of limitation for "personal injuries", has only been applied to causes of action involving mental or physical injury to the body. According to the Court, there must be "[a] positive, physical or mental hurt to the claimant" (Locke v. Johns-Manville Corp., 221 Va. 951, 957 (1981)) in order for Va. Code § 8.01-243(A) to apply. The Court cites a number of cases by way of example. The case at bar may be easily rationalized under Purcell, however, because the case at bar does indeed involve a mental or physical injury to the body. In its discussion, the Purcell court cites Glascock v. Laserna, 247 Va. 108 (1994) for the proposition that a claim for wrongful birth involved a direct emotional injury to the parents so as to qualify as a "personal injury" under Va. Code § 8.01-243(A). Surely, the plaintiff herein experienced no less of a "positive, physical or mental hurt" as a result of her false imprisonment than did the Glascock plaintiffs for the wrongful birth of their child. In the interest of consistency, the Court must accept false imprisonment as involving a "personal injury" under Va. Code § 243(A) if it so accepts wrongful birth.

The plaintiff's position has found favor with the federal bench as well. The case of Samuel v. Rose's Stores, Inc., 907 F. Supp. 159 (E.D. Va. 1995) also involves a claim for false imprisonment. In that case, the defendant asserted that the plaintiff's cause of action was barred as untimely because the one year statute of limitation articulated by Va. Code § 8.01-248 applied. The Court, however, ruled in the plaintiff's favor and

held that false imprisonment involved a "personal injury" under Va. Code § 8.01-243(A). It based its holding in part on cases interpreting unlawful search and seizure (Cramer v. Crutchfield, 496 F. Supp. 949 (E.D. Va. 1980) (Exhibit 8)) and infliction of emotional distress (Welch v. Kennedy Piggly Wiggly Stores, Inc., 63 B.R. 888 (Bankr. W.D. Va. 1986), and Luddeke v. Amana Refrigeration, Inc., 239 Va. 203 (1990)) as involving "personal injury" under Va. Code § 8.01-243(A). In referring to a cause of action for intentional infliction of emotional distress, the court stated that the injuries complained of in a case for false imprisonment were sufficiently analogous to warrant application of the same statute of limitation to both causes of action.

Defendant Richardson argues that the importance of Samuel should be diminished because the opinion fails to appreciate the distinctions discussed in Purcell. When read in light of the previous discussion, however, there is no conflict between the two cases. Purcell makes a distinction between torts that cause injury to the body and those that do not, and Samuel honors this distinction. The Samuel court simply places false imprisonment in that category of torts which involve mental or physical injury to the body.

CONCLUSION

For the reasons stated above, the plaintiff, by counsel, asks this Court to overrule defendants' demurrers and pleas of statutes of limitation.

GWENDOLYN L. JORDAN

By 

A. Donald McEachin
James T. Edmunds
McEachin & Gee, P.C.
700 E. Main St., Ste. 1201
Richmond, VA 23219
(804)775-2374

Counsel for Plaintiff

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing document was mailed, postage prepaid, to William Joe Hoppe, Senior Assistant City Attorney, 900 E. Broad Street, Room 300, Richmond, VA 23219, and to Henry C. Spalding, III, Sands, Anderson, Marks & Miller, P.O. Box 1998, Richmond, VA 23218-1998 this 18th day of February, 1997.

A handwritten signature in black ink, featuring a large, stylized 'H' and 'S' that are intertwined. The signature is written over a horizontal line.

Unit#: 273

Officer/Destination: INFO DESK 273 M 8 RERES

Addressee:RIP4

ORI/or UNIT#: 273

Rcvd:06/21/95 1517 Hours

RIP4 273 VCIN REPLY

VA12200P4

RE: NAM/JORDAN, GWENDOLYN L SEX/F RAC/U DOB/100759

RESPONSE NUMBER 01

WANTED PERSON

OFFENSE - 5015-FAILURE TO APPEAR

NAM/JORDAN, GWENDOLYN M SEX/F RAC/B DOB/100759

HGT/506 WGT/140 EYE/BRO HAI/BLK

SOC/228867745

MIS/ORG CHG NON SUPPORT

* * CONFIRM WITH ORI/VA0270000 VIC/200485394 OCA/9410042

DOW/091994 DRE/021695

VERIFY DATA

#125820



CAPIAS: ATTACHMENT OF THE BODY

VA. CODE ANN §§18.2-456, 19.2-358, 16.1-69.24

Dividdie

CITY OR COUNTY

☐

General District Court

☒

Juvenile and Domestic Relations District Court

TO ANY AUTHORIZED OFFICER: You are hereby commanded in the name of the Commonwealth forthwith to arrest the Respondent, and to produce the Respondent in this Court when found, or as soon thereafter as this Court may be in session, to show cause, if any, why Respondent should not, pursuant to

18.2-456

Va. Code §

☐

serve the sentence previously suspended on

DATE

because

☒

be imprisoned, fined or otherwise punished for:

☒

failure to appear in this Court on

9-9-94

at 11:00am

DATE AND TIME

☐

failure to pay fines and/or restitution or an installment thereof; payment due:

\$ on

☐

failure to provide support as ordered: \$ per with

\$ arrearage as of

☐

failure to obey an order of this court

☐

ordering

(Other-Explain) fail to appear after being served a show cause support

(CONTINUED ON BACK)

The following information is provided to the Judicial Officer in determining bail:

9-19-94

DATE ISSUED

Deborah

CLERK

JUDGE

HEARING DATE

11-4-94 9:00am

CASE NO.

A-4155-02

ARREST THIS RESPONDENT:

Jordan, Gwendolyn M.

LAST NAME, FIRST NAME, MIDDLE INITIAL

231 -B S. Jefferson Street

Petersburg, Virginia 23803

COMPLETE DATA BELOW IF KNOWN

RACE	SEX	MO	BORN DAY	YR	HT IN	WT	EYES	HAIR
B	F	10	7	59	5	6	140	B
SSN 228-86-7745								

CAPIAS: ATTACHMENT OF THE BODY

In connection with the case of

Commonwealth of Virginia

101

Gwendolyn M. Jordan

DEFENDANT(S)

COMPANION CASE FILE NO.

EXECUTED by arresting the Respondent named above on this day:

DATE AND

OFFICER

BADGE NO., AGENCY AND JURISDICTION

FOR

SHERIFF



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7 m

0621 63878 1911 DNSO.
VR.R181, DNSO.
****HIT CONFIRMATION RESPONSE****

THE RECORD BELOW IS CONFIRMED

DOA/9410042.VIC/200425394.

WANTED/MISSING PERSON

NAM/JORDAN, GWENDOLYN M. DOB/100759. SEX/F.

NAME OF CONFIRMER:SGT CV TOWNSEND. CONFIRMING AGENCY:DINWIDDIE CO SHERIFFS OFFICE.
E.

PHONE:(804)469-4550.FAX:(804)469-4555.

REMARKS:SUBJECT STILL WANTED BY THIS JURISDICTION.HAVE WARRANT IN HAND FOR
FAILURE TO APPEAR.USE THIS CONFIRMATION AS A DETAINER TO HOLD SUBJECT.

4163878

21 JUN 95 19 12





NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009
(703) 248-2221 Fax (703) 386-4432

096-8-375

COUNTY OF FAIRFAX

CITY OF FAIRFAX

DR. MARK A. ZAFFARANO
DIRECTOR, JUDICIAL OPERATIONS

F. BRUCE BACH
J. HOWE BROWN
JACK B. STEVENS
MICHAEL P. MCWEENY
THOMAS S. KENNY
MARCUS D. WILLIAMS
GERALD BRUCE LEE
STANLEY P. KLEIN
ROBERT W. WOOLDRIDGE, JR.
ARTHUR B. VIEREGO, JR.
JANE MARLON ROUSH
M. LANGHORNE KEITH
DENNIS J. SMITH
DAVID T. STITT
LESLIE M. ALDEN
JUDGES

JAMES KEITH
LEWIS D. MORRIS
BURCH MILLSAP
BARNARD F. JENNINGS
LEWIS K. GRIFFITH
WILLIAM G. PLUMMER
THOMAS J. MIDDLETON
THOMAS A. FORTKORT
OURLAN H. MANCOCK
RICHARD J. JAMBORSKY
RETIRED JUDGES

August 30, 1996

S. Howard Woodson, III, Esq.
Douglas M. Temple, P.C.
1200 G Street, N.W., Suite 370
Washington, D.C. 20005

John D. McGavin, Esq.
Trichilo, Bancroft, McGavin, Horvath & Judkins, P.C.
Fairfax, Virginia 22030-0022

Re: *Daniels, et al. v. Melart Jewelers, et al.*
Law No. 151896

Dear Counsel:

This matter comes before this Court on Defendants' Demurrer. The sole issue at hand is whether Count III of Plaintiff's motion for judgment alleging defamation, is barred by the statute of limitations. Upon consideration of the arguments and evidence presented, I deny the Defendants' plea of statute of limitations.

On January 8, 1995, a Melart store employee allegedly told a Fairfax County police officer that Mr. Daniels stole a watch. Mr. Daniels was subsequently convicted of petty larceny in the Fairfax County General District Court on May 3, 1995. Mr. Daniels appealed his conviction to the Fairfax County Circuit Court. On October 10, 1995 the Plaintiff was acquitted of the petty larceny charges.

Plaintiff's claim of personal defamation is based on the alleged statements made by a Melart's employee that the Plaintiff "stole the watch," *see* Plaintiff's Motion for Judgment, paragraphs thirteen and thirty-one. While it is true that the first allegedly defamatory statement



James Daniels, et al. v. Melart Jewelers, et al.

At Law No. 151896

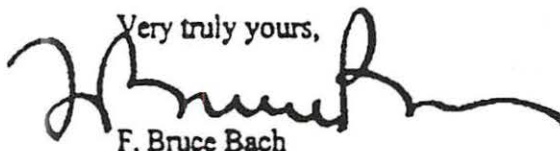
August 30, 1996

Page 2

occurred on January 8, 1995, the accrual for the cause of action before this Court did not begin until the date of the Plaintiff's acquittal, October 10, 1995.

Had the Plaintiff's appeal resulted in a conviction, the Plaintiff would be estopped from pursuing his claim of defamation since the Defendants' assertions would have been adjudged valid. Accordingly, it was only after the Plaintiff's acquittal on October 10, 1995, that Mr. Daniels' action for defamation fully accrued. *See Warren v. Bank of Marlon*, 618 F. Supp. 317 (W.D. Va. 1985). The Plaintiff's filing of his motion for judgment on April 29, 1996 was within the one year statute of limitation as required by Section 8.01-247.1. The Defendants' Demurrer as to Count III of the Motion for Judgment is denied.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'F. Bruce Bach', with a stylized, flowing script.

F. Bruce Bach

SAMUEL v. ROSE'S STORES, INC.

Cite as 907 F.Supp. 159 (E.D.Va. 1995)

159

rents which had been assigned to Lincoln/West.

III.

Though the contract is governed by federal common law, the Court's attention has not been directed to any material difference between the federal common law and the law of Virginia on the legal issues here involved. The contract required the government to give notice to Mortgagee if it determined to cancel the lease or to make repairs and deduct the costs thereof from the rents which had been assigned to Mortgagee. It was a notice in addition to the notice required to be given Lessor, and specifically provided that Mortgagee be afforded not less than 30 days opportunity, in addition to the 30 days allowed the landlord, to commence the repairs. The government was not entitled to make the repairs and deduct the costs from accruing rents "unless" and "until" it gave the notice to Mortgagee, and an opportunity to correct the default. As the court said in *Business Bank v. F.W. Woolworth Company*, 244 Va. 333, 421 S.E.2d 425, 427 (1992), the "letter, informing Green that the Bank was 'proceeding to replace the [air conditioning] units' did not give the lessor the opportunity to repair, replace or 'to somehow do something that would still fulfill its [his] obligation under article 10 [of the lease],' which may have been something other than replacing the entire air conditioning system."

Numerous cases have come before the courts where a contractor has been denied recovery for additional work under a contract because of failure to give the required notice of the costs before the work was done. In such cases the courts have generally held that giving the notice requires strict compliance and giving of the notice is a condition precedent. See *McDevitt & Street Company v. Marriott Corporation*, 713 F.Supp. 906 (E.D.Va.1989); *United States v. Centex Construction Co., Inc.*, 638 F.Supp. 411 (W.D.Va. 1985); *Service Steel Erectors Co. v. SCE, Inc.*, 573 F.Supp. 177 (W.D.Va.1983); *Lord v. State Farm Insurance Corp.*, 224 Va. 283, 295 S.E.2d 796 (1982); *Liberty Mutual Insurance v. Safeco, Inc.*, 223 Va. 317, 288 S.E.2d 469 (1982).

Postal Service relies upon *Little Beaver Enterprises v. Humphreys Railways*, 719 F.2d 75 (4th Cir.1983) and similar cases. However, the facts of those cases are entirely different from the facts of this case. In many of them, the court found the party had waived the requirement of the giving of notice in the specific manner or in writing had been waived.

[6] Postal Service breached the contract by failing to give plaintiff the required notice and is therefore not entitled to offset the costs of repairing the heating and air conditioning against any rent due to the Mortgagee, but only against any rents due the landlord.

IV.

This is an action for declaratory judgment in which plaintiff seeks to have the Court declare his rights under the lease. In the order of December 6, 1994, the Court determined the right of plaintiff to certain rents being deducted by Postal Service for repairs to the roof. Here, it determined plaintiff's right to certain funds deducted for repairs to the heating and air conditioning.

It would seem that under 28 U.S.C. § 2202 and 39 U.S.C. § 409, whatever relief plaintiff may be entitled to can be determined in this action. Counsel are requested to confer and attempt to agree on such relief and to submit an order on judgment.



Marco SAMUEL, Plaintiff,

v.

ROSE'S STORES, INC., d/b/a
Rose's Department Store,
et al., Defendants.
Civ. A. No. 2:95cv834.

United States District Court,
E.D. Virginia,
Norfolk Division.

Oct. 23, 1995.

Customer at store who had been detained and charged with theft of shoes

PLAINTIFF'S
EXHIBIT

5

need not be confined in jail or placed in custody.

See publication Words and Phrases for other judicial constructions and definitions.

11. False Imprisonment \S 2, 5, 6

Under Virginia law, plaintiff makes out case for compensatory damages based on false imprisonment when he shows that he has been illegally detained without lawful process; it is enough that person be placed in reasonable apprehension that unless he willingly submits, force will be used, and if he does so submit, to extent that he is denied freedom of action, restraint constitutes false imprisonment.

12. False Imprisonment \S 4

Under Virginia law, it is not necessary to show malice, ill will, or slightest wrongful intention in order to recover in action for false imprisonment, and neither good faith of defendant nor that of his employee will defeat plaintiff's right to recover.

13. False Imprisonment \S 20(1)

Under Virginia law, allegations by customer that upon leaving store, he was restrained and placed in handcuffs without any legal excuse or justification by security guard and other store employees, taken to back room against his will, accused and charged with theft of shoes he was wearing, and forced to turn over shoes were sufficient to state claim for false imprisonment, even though customer characterized detention and restraint as negligent in original complaint and did not specifically allege intentional conduct.

14. False Imprisonment \S 20(1)

Under Virginia law, allegation of intentional conduct is not necessary to maintain action for false imprisonment.

15. Malicious Prosecution \S 55

Under Virginia law, plaintiff in order to prevail on claim of malicious prosecution must allege and prove that prosecution was "set on foot" by defendant and that it terminated in manner not unfavorable to plaintiff, that prosecution was instituted, or procured by cooperation of, defendant, that prosecu-

tion was without probable cause, and that prosecution was malicious.

16. Malicious Prosecution \S 35(1)

Under Virginia law, entry of order of nolle prosequi in underlying criminal proceeding constitutes termination in manner not unfavorable to plaintiff, and will allow recovery by plaintiff in action for malicious prosecution.

17. Malicious Prosecution \S 32

Under Virginia law, trier of fact may infer malice, for purposes of malicious prosecution action, from determination of absence of probable cause in underlying criminal proceeding.

18. Malicious Prosecution \S 47

Under Virginia law, allegations by customer that store and its agents and employees falsely, maliciously, and without any reasonable or probable cause issued or cooperated in issuance of criminal summons charging customer with petty larceny and that store's motion to nolle prosequi charge was granted by court were sufficient to state claim for malicious prosecution.

Mary Elizabeth Thomas, Kalfus & Nachman, P.C., Norfolk, VA, for Marco Samuel.

Richard Joshua Cromwell, Robert William McFarland, David Michael Young, McGuire, Woods, Battle & Boothe, Norfolk, VA, for Rose's Stores, Inc.

Deborah M. Casey, Edward James Powers, Vandeventer, Black, Meredith & Martin, Norfolk, VA, for Little Creek Investment Corporation.

MEMORANDUM OPINION
AND ORDER

JACKSON, District Judge.

INTRODUCTION

This action arises from the restraint and detention of Plaintiff upon leaving Defendant Rose's store in Norfolk, Virginia on July 5, 1994. On that date, the store security guard detained Plaintiff for the alleged theft of shoes from the store. Plaintiff alleges that

the security officer detained Plaintiff for approximately one hour and took the shoes. Plaintiff also alleges that he was subsequently turned over to his employer, the United States Navy. Plaintiff filed a Motion for Judgment in state court on July 24, 1995.

Defendant Rose's removed this action from state court on August 10, 1995 and filed a motion to dismiss the original complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on August 30, 1995. The Court later granted Plaintiff leave to amend the complaint, and Plaintiff filed an amended complaint on October 2, 1995. Defendant Rose's now moves to strike the amended complaint because, Defendant Rose's argues, it goes beyond the scope the Court's leave to amend. Defendant Rose's also moves to dismiss the amended complaint, reiterating its defenses to the original complaint. After oral argument on October 18, 1995, this matter is now ripe for decision.

For the reasons that follow, the Court DENIES Defendant Rose's motion to strike the amended complaint and DENIES Defendant's motion to dismiss.

I. LEGAL STANDARDS

[1, 2] Rule 12(b)(6) of the Federal Rules of Civil Procedure provides a defense to a lawsuit where the plaintiff fails to state a claim upon which relief can be granted. When "passing on a motion to dismiss ... for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). The facts set forth in the complaint must be assumed to be true. *Johnson v. Mueller*, 415 F.2d 354, 355 (4th Cir.1969). Furthermore, "a motion to dismiss for failure to state a claim for relief should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)).

II. DISCUSSION

A. Striking the Amended Complaint

By order of September 29, 1995 this Court (Magistrate Judge Miller) granted Plaintiff

leave to amend the complaint "by adding as defendant(s) the identified security guard and/or his employer." Defendant Rose's moves to strike the amended complaint filed October 2, 1995 because in addition to adding defendants, Plaintiff deleted "key allegations which form the basis for Rose's motion to dismiss." (Mem. to Strike at 1.) Plaintiff deleted references to "negligent" conduct on the part of Rose's, presumably addressing Rose's defense in its motion to dismiss that Plaintiff has not alleged intentional conduct, but rather negligent conduct, and thus has failed to state a cause of action for which the Court may grant relief. (See Mem. to Dismiss at 3-4.)

Plaintiff admits that the order of September 29, 1995 granted leave only to add defendants, but argues that the scope of the order is slightly broader than Defendant Rose's contends. Plaintiff does not object to the Court considering Defendant Rose's motion to dismiss based only on the original complaint. (Mem. Opp. to Strike at 2.) Plaintiff, however, maintains that the amended complaint is not defective. Plaintiff argues that he is entitled to change his allegations to address the conduct of the new defendants. Plaintiff also argues that the deletion of references to "negligent" conduct represented a change in form rather than substance because deleting the term does not change "the substance of what plaintiff must allege and prove to prevail and adequately advises defendant of the nature of the claim against him." (*Id.* at 3.)

[3] Plaintiff did exceed the scope of the leave to amend the complaint. As the discussion below indicates, however, the changes in the complaint do not affect the substance of the claims against the Defendant. Plaintiff does not allege any new causes of action nor does Defendant argue that the change prejudices it in any way. Thus, within its discretion, the Court DENIES Defendant Rose's motion to strike the amended complaint.

B. False Imprisonment

In resisting Plaintiff's claim of false imprisonment, Defendant asserts two defenses:

First, Defendant's statute of limitations. Defendant alleges the element of

1. Application

[4] Defendant's § 8.01-248 personal action is specified. to dismiss the statute of limitations. CODE ANN. Plaintiff cites F.Supp. 949 943 (4th Cir. In *Cramer*, search of his detector was lice officer gave a screw driver plaintiff locked the vehicle. lawful search that under V and seizure injury, not a Thus the approximately two years under *Michie* 1992

Plaintiff argues position to I Amended Complaint imprisonment of personal injury and seizure of miss Am. Court that *Cramer* instant case under 42 U.S.C. *Cramer*, nor injury. (Defendant's

Plaintiff's Plaintiff does this case. Defendant

In an unpublished without any applicable statute § 8.01-248. WL 209862 (unanimous). The

First, Defendant contends that the applicable statute of limitations of one year has expired. Defendant also argues that Plaintiff does not allege the elements of a claim of false imprisonment.

1. Applicable Statute of Limitations

[4] Defendant argues that VA CODE ANN. § 8.01-248 (Michie Supp.1995), applies to personal actions for which no other limitation is specified. Plaintiff responds to the motion to dismiss by arguing that the applicable statute of limitations is two years under VA CODE ANN. § 8.01-243(A) (Michie 1992). Plaintiff cites *Cramer v. Crutchfield*, 496 F.Supp. 949 (E.D.Va.1980), *aff'd*, 648 F.2d 943 (4th Cir.1981), in support of his position. In *Cramer*, the plaintiff claimed that the search of his vehicle and seizure of his radar detector was unlawful. *Id.* at 951. The police officer gained access to the vehicle using a screw driver on the vent window lock after plaintiff locked the doors and refused to exit the vehicle. In addressing this claim of unlawful search and seizure, the Court held that under Virginia law, an unlawful search and seizure is characterized as a personal injury, not an injury to property. *Id.* at 952. Thus the applicable statute of limitations is two years under VA CODE ANN. § 8.01-243(A) (Michie 1992). *Id.*

Plaintiff argues in his Memorandum in Opposition to Defendant's Motion to Dismiss Amended Complaint that "plaintiff's false imprisonment claim in this case is likewise a personal injury action for the unlawful search and seizure of his person." (Mem. Opp. Dismiss Am. Compl. at 2.) Defendant responds that *Cramer* is inapposite because in the instant case Plaintiff does not assert a claim under 42 U.S.C. § 1983 as the plaintiff did in *Cramer*, nor does Plaintiff allege physical injury. (Def's. Reply Mem. at 2.)

Defendant's motion and subsequent reply to Plaintiff's opposition emphasizes that Plaintiff does not allege physical injury in this case. Defendant's summary of *Cramer*

states that "[u]ndeterred, the trooper broke the cab window with a tire billy and gained entry to the cab," (*Id.* at 3), and on that basis Defendant Rose's presumably attempts to distinguish the two cases. The Court, however, notes that although the plaintiff in *Cramer* alleged that the officer broke the window of the vehicle with a tire billy, at the time of the disposition of *Cramer*, both parties in that action agreed that the officer gained entry by using a screw driver on a window lock. Thus, the court's statement of law did not depend upon a set of facts involving force or physical injury in the lay sense. Despite Defendant's inaccurate characterization of *Cramer*, a liberal reading of the amended complaint in the instant action does not indicate that Plaintiff pled an unlawful search and seizure of his person. If Plaintiff's action is to survive, it must be classified as a personal injury under another theory.

[5, 6] Case law nor the statute clearly indicate which statute of limitations should apply to a claim of false imprisonment.* Thus the question appears to be whether false imprisonment is properly characterized as a personal injury when no physical injury, i.e., battery or assault, is alleged. The Supreme Court of Virginia has held that "in applying Code § 8.01-243(A), we interpret 'injury' in the same manner as that word is construed to determine when a cause of action for personal injuries accrues: '[a] positive, physical or mental hurt to the claimant.'" *Purcell v. Tidewater Constr. Corp.*, 250 Va. 93, 458 S.E.2d 291, 293 (1995) (quoting *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900, 904 (1981)). Plaintiff alleges that he was "personally injured in his reputation and credit in the community and with his employer and was subjected to public ridicule, and was caused great mental anguish and anxiety." (Am. Compl. ¶9.) Plaintiff alleges that he was handcuffed outside the store and that following the detention he was turned over to his employer, the U.S. Navy. (Am. Compl. ¶6.) These are

*In an unpublished opinion, the Fourth Circuit without any discussion or analysis stated that the applicable statute of limitations is one year under § 8.01-248. *Lord v. Riley*, No. 89-1479, 1990 WL 209862 at **3 (4th Cir. Jan. 23, 1991) (per curiam). The Fourth Circuit apparently assumed

that the cause of action of false imprisonment is one "for which no limitation is otherwise prescribed." VA CODE ANN. § 8.01-248 (Michie Supp.1995). This Court will address whether § 8.01-243(A) otherwise prescribes the limitation as two years.

the type of injuries against which this cause of action protects. *E.g.*, *W.T. Grant Co. v. Owens*, 149 Va. 906, 141 S.E. 860, 866 (1928) (holding mental pain and suffering, indignity, and humiliation compensable).

[7-9] The tort of false imprisonment protects an interest which is in large part a mental or emotional one. *See, e.g.*, *W. PAGE KEETON ET AL. PROSSER AND KEETON ON THE LAW OF TORTS* § 11, at 47 (5th ed.1984) ("the interest is in a sense a mental one"). For an action of false imprisonment, "mental pain and suffering, and the indignity and humiliation inflicted upon the plaintiff constitute just basis for compensatory damages." *W.T. Grant Co. v. Owens*, 149 Va. 906, 141 S.E. 860, 866 (1928); *S.H. Kress & Co. v. Roberts*, 143 Va. 71, 129 S.E. 244, 245 (1925) (citing *Bolton v. Vellines*, 94 Va. 393, 26 S.E. 847, 850 (1897) ("compensatory damages may be had 'for the loss of time; [and] for the suffering, bodily and mental, sustained by reason of such wrongful acts or act'")). Federal and state courts applying the law of the Commonwealth of Virginia have held that the personal injuries governed by § 8.01-243(A) include causes of action for infliction of emotional distress. *E.g.*, *Welch v. Kennedy Piggy Wiggly Stores, Inc.*, 63 B.R. 888, 898 (Bankr.W.D.Va.1986); *Moore v. Allied Chemical Corp.*, 480 F.Supp. 364, 369 (E.D.Va.1979); *Glascock v. Laserna*, 247 Va. 108, 439 S.E.2d 380, 381 (1994); *Luddeke v. Amana Refrigeration, Inc.*, 239 Va. 203, 387 S.E.2d 502, 504 (1990). Section 8.01-243(A) provides for claims of personal injury "whatever the theory of recovery." In the instant action the theory of recovery is false imprisonment. Although the emotional injury may not rise to the level of "intentional infliction of emotional distress" as provided for in the state of Virginia, the injuries complained of are sufficiently analogous to apply the same statute of limitations to both causes of action.

Alternatively, Plaintiff may argue that the false imprisonment constituted a physical injury of the type recognized as a personal injury under § 8.01-243(A). Plaintiff alleges that he was restrained, handcuffed, and forced to go to the back room of Defendant Rose's store. (Am. Compl. ¶ 6.) He alleges that he was forced to turn over the shoes he

was wearing, which he alleges were his property. He also alleges that he was detained for approximately one hour. (*Id.*) Just as in *Cramer*, Plaintiff in the instant case makes no allegations of physical injury such as lacerations or bruises. Yet Plaintiff's physical interests are more directly implicated in his action for false imprisonment than the interests which are typically at stake in an action for illegal search and seizure. Assuming the allegations of the amended complaint to be true, Plaintiff was denied freedom of action; his liberty was physically restrained by force and/or threat of force. Taking note that the Commonwealth has held that an unlawful search and seizure in the absence of the use of force is a personal injury action to which § 8.01-243 applies and that the infliction of emotional distress is as well, this Court concludes that the applicable statute of limitations for a claim of false imprisonment is two years.

2. *Prima Facie Elements of False Imprisonment*

[10-12] "False imprisonment is restraint of one's liberty without any sufficient cause therefor." *Zayre of Va., Inc. v. Gonody*, 207 Va. 47, 147 S.E.2d 710, 713 (1966). The person need not be confined in a jail or placed in custody. *Id.*; *Kress v. Musgrove*, 153 Va. 348, 149 S.E. 453, 455 (1929). "The plaintiff makes out a case for compensatory damages when he shows that he has been illegally detained without lawful process." *Montgomery Ward & Co. v. Wickline*, 188 Va. 485, 50 S.E.2d 387, 389 (1948). It is enough that the person be placed in reasonable apprehension that unless he willingly submits, force will be used. *Zayre*, 147 S.E.2d at 713. If he does so submit to the extent that he is denied freedom of action, this restraint constitutes false imprisonment. *Id.*; *Montgomery Ward & Co. v. Freeman*, 199 F.2d 720, 723 (4th Cir.1952) (citing *W.T. Grant Co. v. Owens*, 149 Va. 906, 141 S.E. 860, 865 (1928) ("any restraint by fear or force upon the action of another is unlawful, and constitutes false imprisonment unless a showing of justification makes it a true or legal imprisonment"). "[I]t is not necessary to show malice, ill will or the slightest wrongful intention, and neither the good faith of a

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defendant nor that of his employee will defeat plaintiff's right to recover." *Id.* (citations omitted).

[13, 14] In the amended complaint, Plaintiff alleges that upon leaving the Rose's store, he was "restrained and placed in hand cuffs [sic] without any legal excuse or justification by security guard Thomas E. Scotting and other currently unidentified employees and/or agents of defendant Rose's, taken to a back room against his will, accused and charged with the theft of the shoes he was wearing from the store, [and] forced to turn over said shoes...." (Am. Compl. ¶ 6.) Defendant argues that the complaint fails to allege intentional conduct and thus fails to allege a cause of action under the law of Virginia. (Mem. to Dismiss at 2, 3.) The original complaint characterizes the detention and restraint as negligent, (Compl. ¶ 4), but this characterization is not fatal for the allegation. A review of the case law does not suggest that an allegation of intentional conduct is necessary to maintain an action for false imprisonment. Defendant Rose's has not answered that the confinement was incidental to some other conduct or accidental. Defendant or its agent/employee was certain that confinement would result, and therefore "it can scarcely be said that defendant did not intend it." *W. PAGE KEETON ET AL. PROSSER AND KEETON ON THE LAW OF TORTS* § 11, at 53 (5th ed.1984). Defendant Rose's is on sufficient notice of the charge against it: false imprisonment. Accordingly, the Court DENIES Defendant Rose's motion to dismiss the claim of false imprisonment.

C. Malicious Prosecution

[15-17] In order to prevail on a claim of malicious prosecution, Plaintiff must allege and prove the following:

1. the prosecution was "set on foot" by Defendant and that it terminated in a manner not unfavorable to Plaintiff,
2. the prosecution was instituted, or procured by the cooperation of, Defendant,
3. the prosecution was without probable cause, and
4. the prosecution was malicious.

Cramer v. Crutchfield, 496 F.Supp. 949, 952 (E.D.Va.1980) (citing *Ayyildiz v. Kidd*, 220 Va. 1080, 266 S.E.2d 108, 110 (1980)). "Entry of an order of *nolle prosequi* constitutes termination 'in a manner not unfavorable to the plaintiff.'" *Lewis v. McDorman*, 820 F.Supp. 1001, 1006 (W.D.Va.1992) (quoting *Niese v. Klos*, 216 Va. 701, 222 S.E.2d 798, 801 (1976)). The trier of fact may infer malice from the absence of probable cause. *Id.* (citing *Ozenham v. Johnson*, 241 Va. 281, 402 S.E.2d 1, 5 (1991)).

[18] In the amended complaint, Plaintiff alleges that "each of the defendants, their agents and/or employees, falsely, maliciously, and without any reasonable or probable cause whatsoever, issued or cooperated in the issuance of a criminal summons to the plaintiff, charging him with petty larceny...." (Am. Compl. ¶ 11.) Plaintiff also alleges that "the defendants, their agents and/or employees, moved to *nolle prosequi* the charge, which motion was granted by the Court." (Am. Compl. ¶ 13.) In its Grounds of Defense, Defendant Rose's admits that either the charge was "dismissed or *nolle prosequi*". (Gr. Def. ¶ 10.) Thus it appears that Plaintiff has alleged the elements of malicious prosecution as required by *Cramer*. Construing the allegations in a light most favorable to Plaintiff, the Court DENIES Defendant Rose's motion to dismiss the claim of malicious prosecution.

CONCLUSION

For the foregoing reasons, the Court DENIES Defendant Rose's motion to strike the amended complaint and DENIES Defendant Rose's motion to dismiss.

The Clerk is DIRECTED to send a copy of this order to counsel for the parties.

It is so ORDERED.



Donald L. WELCH, Plaintiff,

v.

KENNEDY PIGGLY WIGGLY
STORES, INC., Defendant.

Donald L. WELCH, Plaintiff,

v.

KENNEDY PIGGLY WIGGLY STORES,
INC., National Security Assn., Inc., and
Herman L. Mullins, t/a National Secur-
ity Assn., Inc., Defendants.

Civ. A. Nos. 84-0163-B, 85-0195-B.

United States District Court,
W.D. Virginia,
Big Stone Gap Division.

Aug. 5, 1986.

Former employee, who had filed for bankruptcy, brought actions against, inter alia, former employer, and security association and its agent, that allegedly acted as employer's agent in helping to bring about employer's alleged scheme of preventing employee from being entitled to unemployment compensation. After consolidation of actions, defendants moved to dismiss and security association's agent moved for sanctions. The District Court, Glen M. Williams, J., held that: (1) under Virginia law, former at-will employee did not state cause of action against employer, or against security association and its agent for tortious interference as result of employee's being fired or for emotional distress as result of being fired, but (2) under Virginia law, employee did state cause of action for tortious interference with his economic opportunity and/or contractual relations from alleged scheme that allegedly prevented employee from obtaining unemployment benefits and for intentional infliction of emotional distress as a result thereof.

Motions for dismissal granted in part and denied in part; sanctions imposed.

1. Bankruptcy §293(1)

Debtor's civil actions against former employer and others alleging conspiracy, common-law and statutory libel and slander, tortious interference with prospective economic advantage, and outrageous conduct, based on allegations that former employer conspired with security association to provide supposed polygraph operator who made false statements concerning his investigation of an interview with debtor, resulting in debtor's loss of job and any reasonable chance of obtaining unemployment compensation benefits, were so related to bankruptcy proceeding of employee-debtor as to give district court jurisdiction over state law claims. 28 U.S.C.A. § 1334(b).

2. Libel and Slander §86

Virginia statutory libel and slander claim against former employer had to be dismissed, where complaint failed to allege that employer uttered any statements to or about plaintiff. Va.Code 1950, § 8.01-45.

3. Master and Servant §341

Under Virginia law, former employer was not liable to former employee on claim of tortious interference based on his being fired; act of tortious interference must be committed by intervening party with respect to subject relationship between others, and thus, employer by definition could not have tortiously interfered with employment relationship between itself and employee.

4. Master and Servant §30(1)

Under Virginia law, former employee who had been at-will employee did not have cause of action for wrongful discharge against former employer.

5. Torts §26(1)

Under Virginia law, former employee stated cause of action with claim that former employer tortiously interfered with his economic opportunity and/or contractual relations by alleging that former employer prevented him from obtaining unemployment benefits as result of employer's scheme involving supposed polygraph operator and operator's false statements, even

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though employee had been at-will employee.

6. Damages \S 50.10

Under Virginia law, at-will employee had not stated cause of action for emotional distress as result of being fired.

7. Damages \S 50.10

Under Virginia law, former at-will employee who alleged intentional infliction of emotional distress based on former employer's alleged intentional interference with employee's right to unemployment compensation resulting from employer's scheme involving supposed polygraph operator stated cause of action; context of the claim went beyond employment relationship, arising not as result of employee's termination, but rather over employer's alleged efforts to prevent employee from collecting unemployment benefits by manufacturing through its agent false information about him.

8. Damages \S 50.10

To extent tortious interference with former employee's right to collect unemployment benefits was proven, former employee could recover damages under Virginia law for any emotional distress suffered as result thereof under normal evidentiary standard for such damages, without proving that former employer's conduct was "extreme and outrageous," where employee had stated causes of action both for tort of intentional interference with prospective economic opportunity or contractual relationship and for intentional infliction of emotional distress.

9. Libel and Slander \S 76

Libel and slander claim against security association which was first made party defendant in July 1985 when second complaint was filed was barred by Virginia statute of limitations, where date of affidavit that was given to State Employment Commission that contained alleged false information was August 1983. Va.Code 1950, \S 8.01-248.

10. Torts \S 26(1)

Former employee's claim of tortious interference against security association, based on allegations that employer decided to fire employee and hired security association to assist employer in bringing about employee's termination in such a way that employer would not be subject to increased unemployment compensation taxes, did not state cause of action against security association under Virginia law; it could not be said that security association induced or caused employer to make decision to terminate employee.

11. Torts \S 26(1)

Under Virginia law, former employee stated cause of action for interference with prospective economic opportunity and/or contractual relationship with respect to employee's right to unemployment benefits by alleging that security association acted as former employer's agent in helping to bring about employer's alleged scheme of preventing employee from being entitled to unemployment compensation.

12. Limitation of Actions \S 32(1)

Under Virginia law, action by former employee against security association for interference with prospective economic opportunity and/or contractual relationship with respect to employee's right to unemployment benefits, based on security association's allegedly acting as employer's agent in helping to bring about employer's alleged scheme of preventing employee from being entitled to unemployment compensation was governed by statute of limitations applicable to actions for injury to property, rather than by statute providing limitations period for personal actions not otherwise governed, and action was thus timely. Va.Code 1950, $\S\S$ 8.01-243, 8.01-248.

13. Damages \S 149

Employee stated cause of action for emotional distress against security association based on interference with his right to collect unemployment compensation, but not for his termination of employment, under Virginia law, where employee alleged

that security association acted as employer's agent in helping to bring about employer's alleged scheme of preventing employee from being entitled to unemployment compensation.

14. Limitation of Actions ¶31

Former employee's action for emotional distress against security association, based on allegation that security association acted as employer's agent in helping to bring about employer's alleged scheme of preventing employee from being entitled to unemployment compensation, was governed by Virginia statute of limitations governing actions for personal injury rather than by statute providing limitations period for personal actions not otherwise governed, and was therefore timely. Va.Code 1950, §§ 8.01-243, 8.01-248.

15. Principal and Agent ¶159(2)

Both security association and its agent were potentially liable for agent's alleged tortious conduct, notwithstanding agent's claim that he could not be held personally liable because he was acting at all relevant times within scope of his agency.

16. Attorney and Client ¶24

Federal Civil Procedure ¶1837

Action would be dismissed with prejudice as to individual defendant, and plaintiff's counsel would be required to pay defense counsel for travel expenses, lodging, meals, and attorney fees for trip for hearing on motions to dismiss, where suit against individual defendant that had been dismissed had been refiled as act of spite by plaintiff's counsel due to his anger at dismissal of corporate defendant, fault for dismissal lay with plaintiff's counsel, and defendant did not appear on date scheduled for oral arguments on motions to dismiss or personally contact court or defense counsel on that day.

S. Strother Smith, III, Abingdon, Va., for plaintiff.

David Nagle, Richmond, Va., for National Security.

John E. Kieffer, Bristol, Va., for Kennedy Piggly Wiggly.

MEMORANDUM OPINION

GLEN M. WILLIAMS, District Judge.

The consolidated civil actions, 84-0163-B and 84-0195-B, are now before this court on each of the defendants' motions to dismiss and defendant Herman Mullins' motion for sanctions. Plaintiff, Donald Welch, instituted these actions in bankruptcy court after filing a petition for bankruptcy in the United States Bankruptcy Court for the Western District of Virginia. Because the bankruptcy court was without jurisdiction over the matters, which involve only state law causes of action, the cases were transferred to this court's docket. This court's jurisdiction is contended under 28 U.S.C. § 1334.

I.

BACKGROUND

Plaintiff filed his first complaint in bankruptcy court on September 20, 1983 against defendants Herman Mullins (Mullins), t/a National Security Association, Kennedy Piggly Wiggly Stores, Inc. (Piggly Wiggly), Bruce Hayes (Hayes) and Delmer Province (Province). As alleged, plaintiff was employed by Piggly Wiggly until July 25, 1983. Sometime prior to that date, the Norton, Virginia Piggly Wiggly store where plaintiff was working began to become less profitable so management decided to reduce the store's payroll by releasing certain employees. The plan was for the store to release the employees in such a way that the employees would not be entitled to unemployment compensation, thereby enabling the store to avoid any increase in unemployment compensation taxes. Subsequently, defendants Hayes and Province, as agents of Piggly Wiggly, conspired with defendant Mullins, trading as the National Security Association of Richmond, Virginia, in furtherance of the plan. Piggly Wiggly hired Mullins "to come to Norton supposedly to conduct certain polygraph examinations" of a number of Piggly

Wiggly employees. Mullins instituted this action in 1983. Following the filing of the complaint, Piggly Wiggly moved to dismiss the action on the grounds that the action was barred by the statute of limitations. The court granted the motion. On August 10, 1983, the court entered its judgment. The court's ruling was based on the fact that the action was filed more than two years after the date of the alleged tortious conduct. The court's ruling was based on the fact that the action was filed more than two years after the date of the alleged tortious conduct. The court's ruling was based on the fact that the action was filed more than two years after the date of the alleged tortious conduct.

On September 20, 1983, the court, after determining that it had jurisdiction over the matter, transferred the matter to this court. On October 10, 1983, the court entered its judgment. The court's ruling was based on the fact that the action was filed more than two years after the date of the alleged tortious conduct. The court's ruling was based on the fact that the action was filed more than two years after the date of the alleged tortious conduct. The court's ruling was based on the fact that the action was filed more than two years after the date of the alleged tortious conduct.

1. Were these court's rulings

Wiggly employees, including the plaintiff. Mullins interviewed plaintiff on July 25, 1983. Following the interview, Mullins "being fully cognizant of what Kennedy Piggly Wiggly was trying to do and being involved in a conspiracy with them to carry out their purpose wrote a report to Kennedy Piggly Wiggly ... and made statements in that report which were totally and completely untrue concerning his investigation of and interview with Donald Welch." Among the false statements made was the allegation that plaintiff admitted to Mullins that he had violated company policy by mishandling coupons and allowing employees under his supervision to mishandle coupons. Mullins also submitted the false statements to the Virginia Employment Commission through his affidavit dated August 10, 1983. "As a result of [those statements] ... [plaintiff] lost his job and any reasonable chance of obtaining benefits before the Virginia Employment Commission." Based on these factual allegations, plaintiff sought damages against each of the defendants on theories of conspiracy, common law and statutory libel and slander, tortious interference with prospective economic advantage, and outrageous conduct.

On September 30, 1983, the bankruptcy court, after determining that it was without jurisdiction over the matter, transferred the matter to this court. After the transfer, this court took the following action. On October 26, 1983, the court granted plaintiff's motion to amend his complaint by changing the name of defendant Mullins to Mullins National Security Association, Inc. (National Security) and by including Herman Mullins individually as a defendant. On December 15, 1983, the court granted plaintiff's motion to dismiss Herman Mullins as a defendant in the case. Upon defendant Piggly Wiggly's Fed.R. Civ.P. 12(b)(6) motion, the court granted on January 9, 1984 the motion to dismiss as to allegations against Piggly Wiggly of common law libel and slander. Plaintiff's mo-

tion to dismiss defendants Hayes and Province was granted on October 9, 1984. On June 17, 1985, the court issued a memorandum opinion and order granting defendant Piggly Wiggly's motion to dismiss as to allegations of conspiracy under VA. CODE § 18.2-499 (1965 added vol.). Finally, on July 17, 1985, the court granted the motion by National Security to dismiss the corporation as a named defendant on the ground that service of process had not been made upon it.

Plaintiff subsequently filed his second complaint in bankruptcy court on July 24, 1985. The defendants originally named in this action were Mullins, National Security, Piggly Wiggly and Murray Guard, Inc. of Virginia (Murray Guard) as successor to National Security. With the exception of deleting the names of Hayes and Province as conspirators with Mullins, plaintiff alleges the same set of facts as were alleged in his first complaint. He also seeks damages based upon the same theories of relief with the addition of claiming interference with an economic opportunity and/or contractual relations and not just interference with prospective economic advantage.

As before, this action was also transferred to this court's docket based on a finding that the bankruptcy court lacked jurisdiction over the subject matter. The court's only disposition since the action was transferred has been to grant a motion consented to by all parties to dismiss Murray Guard as a named defendant.

Thus, the only remaining defendant from plaintiff's action filed on September 20, 1983 is Piggly Wiggly, and the defendants remaining in his action filed on July 24, 1985 are Piggly Wiggly, Mullins and National Security. Because the allegations in the complaints filed in the two actions are virtually identical and the remaining defendant in the first action is named in the second, the court will consolidate these actions and treat the second complaint as an amendment to the first.¹ Having so consol-

gly in the original action would nevertheless be

1. Were these actions not treated as one, the court's rulings on the claims against Piggly Wig-

idated the actions, the court will now address defendants' motions to dismiss and defendant Mullins' motion for sanctions.

II.

DEFENDANTS' MOTIONS TO DISMISS

A. Jurisdiction

The court will first briefly address as a preliminary consideration the issue of jurisdiction. Each of the defendants has moved to dismiss this action based on the contention that the court is without subject matter jurisdiction over state law claims that come to the court only because they were raised in a complaint by the plaintiff as a petitioner in bankruptcy, with no other independent basis of jurisdiction attaching, i.e. diversity of citizenship. Defendants Mullins and National Security argue that, in conferring such jurisdiction on the federal district courts, Title 28 U.S.C. § 1334 (as amended July 10, 1984)², which Congress revised in response to the *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), exceeds the proper scope of subject matter jurisdiction permissible under Article III, § 2 of the United States Constitution.

[1] In making their argument, these defendants failed to recognize that the plurality in *Marathon*, citing *Williams v. Austrian*, 331 U.S. 642, 67 S.Ct. 1443, 91 L.Ed. 1718 (1947) and *Schumacher v. Beeler*, 293 U.S. 367, 55 S.Ct. 230, 79 L.Ed. 433 (1934), reaffirmed the principle that a case such as the one at bar may be adjudicated in federal court (but not bankruptcy court) because of its relationship to the petition in bankruptcy. *Marathon*, 458 U.S. at 72 n. 26, 102 S.Ct. at 2872 n. 26. The cases involving this issue have thus been decided on whether the action in question is "related"

res judicata as to the same claims raised in the second action.

2. Title 28 U.S.C. § 1334 provides in pertinent part under subsection (b) as follows:

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or

to the pending bankruptcy case. One commentator explains as follows:

As another court put it, related proceedings are 'those civil proceedings that, in the absence of bankruptcy, could have been brought in a district court or state court.'

.

These definitional cases adopt a rationale which looks to whether the proceeding in question could have been brought absent a case under the Code. It has been proposed above as a working hypothesis that the only proceedings which fit this formulation are suits owned by the debtor when the [bankruptcy] case was filed—causes of action based upon facts then in existence—and suits between third parties. It should not be surprising, then, that the following matters have been held to be 'related': an action by a debtor alleging breach of a prepetition contract; an action to collect a prepetition account; an action seeking an injunction prohibiting violation of a covenant not to compete; an action by a debtor alleging breach of warranty; and an action by a debtor alleging tortious interference with a contractual relationship, breach of contract, and like matters. Such a formulation is not only in accordance with the cases, but seems to comport with notions of the constitutional mandate set out in *Marathon*.

1 COLLIER ON BANKRUPTCY ¶ 3.01[1][c][v] (15th ed. 1986) (footnotes omitted). Based on this authority, the court concludes that the present case bears such a relationship to plaintiff's bankruptcy proceedings so as to give this court jurisdiction over plaintiff's state law claims against the defendants.

B. Claims Against Piggly Wiggly

[2] As to Piggly Wiggly, the claims remaining against it are for statutory libel

courts other than district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or relating to cases under title 11.

and slander (1984 repl. economic relations at same reason claim against law libel a fails to allow any statement the court n libel and slighly must : however, v claims aga somewhat : ginia, parti interference remaining c of action ur

Plaintiff tiously intertunity and Piggly Wig with Mullin denied him ployment b ployment C ence with ex ence with p as it is also tort from th tractual rel similar in n tion depend acterization. interference yet been re preme Cour cause of ac spective" co ness "expect Holbert, 22 (1984); Cha 335 S.E.2d 9 example, the

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and slander under VA. CODE § 8.01-45 (1984 repl. vol.), tortious interference with economic opportunity and/or contractual relations and outrageous conduct. For the same reason that the court dismissed the claim against Piggly Wiggly for common law libel and slander—that the complaint fails to allege that Piggly Wiggly uttered any statements to or about the plaintiff—the court now concludes that the statutory libel and slander claim against Piggly Wiggly must also be dismissed. The court, however, will not dismiss the other two claims against Piggly Wiggly. Though somewhat novel in kind and context in Virginia, particularly the claim for tortious interference, the court finds that the two remaining claims do state individual causes of action under Virginia law.

Plaintiff claims that Piggly Wiggly tortiously interfered with his economic opportunity and/or contractual relations when Piggly Wiggly, as a result of its scheme with Mullins, fired him from his job and denied him the opportunity to obtain unemployment benefits from the Virginia Employment Commission. Tortious interference with economic opportunity or interference with prospective economic advantage, as it is also called, is actually a separate tort from the tort of interference with contractual relations. But typical of torts so similar in nature and origin, their distinction depends much upon a particular characterization. In Virginia, only the tort of interference with contractual relations has yet been recognized, but the Virginia Supreme Court has included within such a cause of action interference with a "prospective" contractual relationship or a business "expectancy." *Allen Realty Corp. v. Holbert*, 227 Va. 441, 318 S.E.2d 592, 597 (1984); *Chaves v. Johnson*, 230 Va. 112, 335 S.E.2d 97, 102 (1985). In *Chaves*, for example, the court stated:

The elements required for a prima facie showing of the tort are: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach

or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.

Id.

Professor Prosser, on the other hand, in his treatment of the subject, characterizes interference with future contractual relations under the heading of tortious interference with prospective advantage. W. Prosser, *HANDBOOK OF THE LAW OF TORTS* § 130 (4th ed. 1971). Prosser explains the development of this tort and its reach beyond the context of existing contractual relations as follows:

Tort liability for interference with prospective advantage seems to have developed at a very early date in cases having to do with the use of physical violence, or threats of it, to drive away customers from the plaintiff's market, or those who might make donations to his church.... There was even a case in England in 1844 in which an actor was allowed to recover against a defendant who had succeeded in having him hissed off of the stage, as a result of which he was unable to obtain further employment.

The real source of the modern law, however, may be said to be the case of *Temperton v. Russell*, in which the Court of Queen's Bench declared that the principles of liability for interference with contract extended beyond existing contractual relations, and that a similar action would lie for interference with relations which were merely prospective or potential.

Upon this foundation, a rather formidable body of law has been erected, which in general has followed along the lines of interference with contract. It has been said that 'in a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his effort to acquire it; and that since a large part of what is most valuable in modern life depends upon

'probable expectancies,' as social and industrial life becomes more complex the courts must do more to discover, define and protect them from undue interference.

Id. (footnotes omitted). As to the elements of a cause of action for this tort, Prosser proceeds to explain that the action parallels tortious interference with existing contracts. Consequently, the cases turn "almost entirely upon the defendant's motive or purpose [where there has been intent to interfere], and the means by which he has sought to accomplish it. As in the cases of interference with contract, any manner of intentional invasion of the plaintiff's interests may be sufficient if the purpose is not a privileged one." *Id.*

Finally, in a comment to the RESTATEMENT (SECOND) OF TORTS § 766B (1979),³ a section entitled "Intentional Interference with Prospective Contractual Relation," it is explained that:

The expression, prospective contractual relation, is not used in this Section in a strict, technical sense. It is not necessary that the prospective relation be expected to be reduced to a formal, binding contract. It may include prospective quasi-contractual or other restitutionary rights or even the voluntary conferring of commercial benefits in recognition of a moral obligation.

[3, 4] With respect to plaintiff's claim of tortious interference of one kind or another against Piggly Wiggly as a result of his being fired, plaintiff fails to state a cause of action. As his employer, Piggly Wiggly by definition could not have tortiously interfered with the employment relationship between itself and plaintiff; the act must be committed by an intervening party to the subject relationship between others. See *Chaves*, 335 S.E.2d at 102;

3. Section 766B of the RESTATEMENT (SECOND) OF TORTS provides:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

Stauffer v. Fredericksburg Ramada, Inc., 411 F.Supp. 1136 (E.D.Va.1976). An appropriate action in tort by an employee against his employer arising over a firing would be an action for wrongful discharge, but such an action is not available to plaintiff here, nor has he made such a claim, since it has been conceded that plaintiff was an at-will employee. See *Hoffman Specialty Co. v. Pelouze*, 158 Va. 586, 164 S.E. 397, 399 (1932) (under employment-at-will doctrine, at-will-employment relationship may be terminated at any time by either party).

[5] In view of the authority above, however, the court finds that plaintiff does state a cause of action by his claim that Piggly Wiggly tortiously interfered in his economic opportunity and/or contractual relations when Piggly Wiggly, as a result of its scheme with Mullins, prevented him from obtaining unemployment benefits. Contrary to Piggly Wiggly's contention by counsel at oral argument that *Chaves* precludes plaintiff from such a cause of action since he was an at-will employee, this portion of his claim goes beyond his employment relationship with Piggly Wiggly. Here, plaintiff seeks damages against Piggly Wiggly not for the act of firing but for Piggly Wiggly's alleged intentional interference by way of Mullins' false statements, with his right to pursue the unemployment benefits after his employment with Piggly Wiggly was terminated. The court recognizes that the action arises in a somewhat novel context, seemingly falling somewhere within the spectrum between a straight forward claim for interference with an existing contract and one for interference with economic opportunity where no contract exists. It does appear to the court, however, that plaintiff can be viewed as a third-party beneficiary to the unemployment compensation benefits adminis-

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

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tered by the Virginia Employment Commission of which he allegedly had a reasonable opportunity to collect but for the tortious acts committed by Piggly Wiggly through its agent, Mullins. But if the action cannot be characterized as one for interference with a contractual relationship, it certainly represents a legitimate claim of interference with an economic opportunity. Given the Virginia Supreme Court's recognition of a cause of action for interference with a "business expectancy," as well as a contractual relationship, this court is of the opinion that a state court in Virginia would find that plaintiff's "probable expectancy" in unemployment benefits is the kind of expectancy that would be protected against unjustified interference by a third party. Cf. *Rosenberg & Sons v. Craft*, 182 Va. 512, 29 S.E.2d 375, 380 (1944) ("a creditor has a right to use all reasonable means to collect any just obligation due him, but he has no right to unduly interfere with the relation existing between an employer and the employee who may owe the debt").

The court now turns to plaintiff's claim of outrageous conduct. Under Virginia law, such a claim is subsumed within a cause of action for intentional infliction of emotional distress, which the Virginia Supreme Court has recognized as an exception to the state's general rule that damages for emotional distress are not recoverable "unless they result directly from tortiously caused physical injury." *Naccash v. Burger*, 223 Va. 406, 290 S.E.2d 825, 830 (1982). In bringing an action for emotional distress unaccompanied by physical injury, the plaintiff must make the following showing:

One, the wrongdoer's conduct was intentional or reckless. This element is satisfied where the wrongdoer had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result. Two, the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality. This requirement is aimed at limiting frivolous suits and avoiding

litigation in situations where only bad manners and mere hurt feelings are involved. Three, there was a causal connection between the wrongdoer's conduct and the emotional distress. Four, the emotional distress was severe.

Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145, 148 (1974). And as this court has previously noted with respect to this cause of action, a preliminary question that must be resolved is:

Whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

Wise v. General Motors Corp., 588 F.Supp. 1207, 1209 (W.D.Va.1984) (quoting RESTATEMENT (SECOND) OF TORTS § 46, comment h (1965)).

[6] As with his claim of tortious interference, plaintiff essentially alleges that he suffered emotional distress as a result of Piggly Wiggly's intentional and unjustified interference with both his employment and his right to collect unemployment compensation, which he further contends were acts of outrageous conduct. Because plaintiff was an at-will employee, the court concludes that he has not stated a cause of action for emotional distress as a result of being fired. It has already been pointed out that the employment at-will doctrine is followed in Virginia. As evidenced by this court's recent opinion, *Thompson v. American Motor Inns, Inc.*, 623 F.Supp. 409 (W.D.Va.1985), exception to the doctrine has nevertheless been made under Virginia law, as well as the law of many other jurisdictions. The exception carved out in *Thompson*, however, was premised on the rule in Virginia that employment for no specific duration creates only a rebuttable presumption of employment-at-will status, with the court finding that there the presumption was in fact rebutted based on an

employee handbook creating an implied contract. *Id.* at 417. Conversely, for purposes of the present case the court is unable to find any authority from the decisions of the Virginia Supreme Court for opening the door even further on the employment at-will doctrine as applied in Virginia where the plaintiff is bringing an action in tort over his termination and was concededly an at-will employee.

[7] The court does find, however, that plaintiff states a cause of action for intentional infliction of emotional distress as a result of Piggly Wiggly's alleged intentional interference with his right to unemployment compensation. First, as the court explained above in its analysis of the tortious interference claim, the context of this claim also goes beyond the employment relationship. The action arises not as a result of plaintiff's termination, but rather over Piggly Wiggly's alleged efforts to prevent plaintiff from collecting unemployment benefits by manufacturing through its agent false information about him. Second, based on decisions addressing claims of intentional infliction of emotional distress under Virginia law, *see, e.g., Womack*, 210 S.E.2d 145; *Morgan v. American Family Life Assurance Co.*, 559 F.Supp. 477, 492 (W.D.Va.1983) (insured's allegations of insurer's bad faith refusal to pay insurance benefits stated cause of action for intentional infliction of emotional distress), the court concludes that "reasonable men may disagree as to whether defendant's conduct was extreme and outrageous and whether plaintiff's emotional distress was severe," thus presenting a question of fact for a jury. *Womack*, 210 S.E.2d at 148.

[8] But the court also finds that since plaintiff has stated a cause of action for the independent tort of intentional interference with a prospective economic opportunity or contractual relationship, based on the authority of *Sea-Land Service, Inc. v. O'Neal*, 224 Va. 343, 297 S.E.2d 647 (1982), he may, to the extent tortious interference is proven, recover damages for any emotional distress suffered as a result thereof

under the normal evidentiary standard for such damages. That is, he would not have to prove that Piggly Wiggly's conduct was "extreme and outrageous" to be entitled to recover for his alleged emotional suffering. In *Sea-Land*, the plaintiff employee, O'Neal, had brought an action against the defendant employer, Sea-Land Service, Inc., for its alleged breach of O'Neal's employment contract and fraud in inducing O'Neal to resign from one position in return for a promise, which was never fulfilled, of employment in another. *Id.* at 648. She sought damages for, *inter alia*, her embarrassment and humiliation resulting from the loss of employment. *Id.* at 652. On appeal, the Virginia Supreme Court upheld the jury instruction permitting an award of such "distress damages" after finding that Sea-Land had committed intentional fraud against O'Neal. The court reasoned:

We established in Part II, *supra*, that Sea-Land committed an intentional tort against O'Neal. Previously, in at least five classes of cases involving intentional torts, we have approved the recovery of damages for humiliation, embarrassment, and similar harm to feelings, although unaccompanied by actual physical injury, *where a cause of action existed independently of such harm*. The cases and the torts are:

Peshine v. Shepperson, 58 Va. (17 Gratt.) 472, 486 (1867) (deliberate trespass); *Ches. & Pot. Tel. Co. v. Carless*, 127 Va. 5, 9, 102 S.E. 569, 570 (1920) (wrongful suspension of telephone service); *W.T. Grant Co. v. Owens*, 149 Va. 906, 925, 141 S.E. 860, 866 (1928) (false imprisonment); *James v. Powell*, 154 Va. 96, 117, 152 S.E. 539, 547 (1930) (libel); and *Spitzer v. Clatterbuck*, 202 Va. 1001, 1006-07, 121 S.E.2d 466, 469-70 (1961) (malicious prosecution).

By way of comparison, the potential for distress to O'Neal from the loss of her job through Sea-Land's trickery was not substantially less than the harm caused by the torts involved in the cases

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cited above. Similarly, the wrong committed by Sea-Land was not materially less egregious than the conduct of at least several of the defendants involved in the earlier decisions.

Sea-Land, 297 S.E.2d at 653 (emphasis in original). Piggly Wiggly's alleged conduct is equally comparable in terms of its egregiousness and its potential for causing plaintiff emotional harm. Plaintiff therefore may be entitled to recover distress damages under this alternative basis of relief.

C. Claims Against National Security

The claims against National Security are for conspiracy under VA. CODE § 18.2-499 (1965 added vol.), common law and statutory libel and slander, tortious interference with an economic opportunity and/or contractual relations, and outrageous conduct. In the court's memorandum opinion and order dated June 17, 1985 dismissing the conspiracy claim against Piggly Wiggly, the court, unaware that process had not been made on National Security, dismissed the claim as to it as well. Now that National Security has been made a proper party defendant to this action, the court will dismiss the conspiracy claim against it for the reasons stated in the June 17, 1985 opinion. In short, the conspiracy provision has been construed to exclude employment from its scope. The two categories of "persons" protected by § 18.2-499 are corporations and individuals who own or operate a business. See *Campbell v. Board of Supervisors of Charlotte County*, 553 F.Supp. 644 (E.D.Va.1982); *Moore v. Allied Chemical Corp.*, 480 F.Supp. 364 (E.D.Va. 1979).

[9] As to the claim of libel and slander, both at common law and under Virginia's so-called "insulting words" statute, VA. CODE § 8.01-45 (1984 repl. vol.), the court will treat the claim as one cause of action. "The trial of an action for insulting words is completely assimilated to the common law action for libel and slander, and from the standpoint of the Virginia law it is an action for libel and slander." *Mills v.*

Kingsport Times-News, 475 F.Supp. 1005, 1007 (W.D.Va.1979) (quoting *Carwile v. Richmond Newspapers*, 196 Va. 1, 82 S.E.2d 588 (1954)). According to the complaint, this action arose on or before August 10, 1983, the date of Mullins' affidavit that was given to the Virginia Employment Commission and that contained the alleged false information concerning the plaintiff. National Security was first made a party defendant to this proceeding on July 24, 1985 when plaintiff filed his second complaint in bankruptcy court. This action is therefore barred by Virginia's one-year statute of limitations, VA. CODE § 8.01-248 (1984 repl. vol.), which is applicable to actions for defamation. *Morrissey v. William Morrow Co.*, 739 F.2d 962, 967 (4th Cir.1984).

[10] Plaintiff's claim of tortious interference against National Security is based on the same allegations that gave rise to this claim against Piggly Wiggly. As with Piggly Wiggly, the court finds that plaintiff fails to state such a cause of action against National Security with respect to his termination. It was previously explained that the tort occurs when an intervening party intentionally and unjustifiably induces or causes a breach or termination of a relationship or expectancy between other parties. Since plaintiff alleges that Piggly Wiggly first decided to fire him, with National Security then being hired to assist Piggly Wiggly in bringing about plaintiff's termination in such a way that the company would not be subject to increased unemployment compensation taxes, it cannot be said that National Security induced or caused Piggly Wiggly to make the decision to terminate plaintiff's employment. Cf. *International Union, UMWA v. Eastover Mining Co.*, 623 F.Supp. 1141, 1146 (W.D.Va.1985) (where this court found that third-party tortiously induced breach of contract between UMWA and signatory mining company).

[11,12] National Security was nevertheless acting as Piggly Wiggly's agent in helping to bring about Piggly Wiggly's alleged scheme of preventing plaintiff from

being entitled to unemployment compensation. Thus, for the same reasons that the court found that plaintiff states a cause of action against Piggly Wiggly for interference with a prospective economic opportunity and/or contractual relationship with respect to his right to unemployment benefits, the court now finds that plaintiff states a cause of action on the same claim against National Security. Based on plaintiff's allegations, National Security here fits the definition of an intervening party that induces or causes a breach or termination of a relationship or expectancy between other parties. Furthermore, contrary to National Security's contention that this action is barred under Virginia's one-year statute of limitations, VA. CODE § 8.01-248 (1984 repl.vol.), the court finds that the action is appropriately governed by Virginia's five-year statute of limitations for actions for injury to property, VA. CODE § 8.01-243 (1984 repl. vol.), and is therefore timely. See *Almond v. Kent*, 321 F.Supp. 1225 (W.D.Va.1970), rev'd on other grounds, 459 F.2d 200 (4th Cir.1972) (five-year limitations period governs actions for damages to one's property, estate or business).

[13,14] The court also finds, based on the same rationale that was applied as to Piggly Wiggly, that plaintiff states a cause of action for emotional distress against National Security over its interference with his right to collect unemployment compensation, but not over his termination of employment. And again, contrary to National Security's contention that this action is also barred by Virginia's one-year statute of limitations, the court finds, as it has previously so found, that such an action is governed by Virginia's two-year statute of limitations governing actions for personal injury, VA. CODE § 8.01-243 (1984 repl. vol.), and as such is timely. See *Warren v. Bank of Marion*, 618 F.Supp. 317, 324 (W.D.Va.1985).

D. Claims Against Mullins

[15] Each of the claims against National Security has also been alleged against

defendant Mullins. Furthermore, Mullins has conceded that he was at all relevant times an agent of National Security, and it is through the alleged conduct of Mullins, as agent of National Security, that National Security's alleged liability arises. Most of the analysis above regarding the claims against National Security is therefore applicable as to Mullins. Mullins argues that he cannot be held personally liable because he was acting at all relevant times within the scope of his agency, and he supports this contention by his sworn affidavit. The court, however, is unpersuaded by this argument. "From the standpoint of a person injured by the wrongful act of another, the relation of principal and agent is immaterial, and the status of the wrongdoer in that connection is of no consequence." 3 AM.JUR.2d AGENCY § 300 (1962); see *Wood v. Standard Products Co.*, 456 F.Supp. 1098, 1099 (E.D.Va.1978) (agent is responsible, as an independent party, for his tortious conduct). Both Mullins and National Security are thus potentially liable for Mullins' alleged tortious conduct.

Consequently, based on the analysis above regarding the claims against National Security, the court finds that plaintiff states causes of action against Mullins both for tortious interference with a prospective economic opportunity and/or contractual relationship over his right to employment compensation, but not over his employment termination, and for emotional distress. However, as with National Security, plaintiff fails to state a cause of action against Mullins for statutory conspiracy. Finally, plaintiff's claim against Mullins for libel and slander is also time-barred, as it was against National Security, by the one-year statute of limitations for actions for defamation. The action arose on or before August 10, 1983; Mullins was dismissed on December 15, 1983 from the adversary proceeding filed on September 20, 1983; Mullins was not made a party defendant again until July 24, 1985.

III. MULLINS' MOTION FOR SANCTIONS

[16] Defendant Mullins' motion for sanctions is based on the following events.

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The defen tions to dism oral argume Stone Gap, V for Mullins a to Duffield, 1985, spent court for th Smith, howe scheduled ti at any time of October 7 Smith's offic jury trial in carried over that he coul o'clock p.m. Smith's offic that Mr. Smi gina in state citation and Gap as previ informed, he that none of court that da in the Leban mately nev court or Mr. 7, 1985. F learned that Mr. Smith Building in ministrative which was

As described above, plaintiff dismissed Mullins as a defendant on December 15, 1983 from the action originally filed on September 20, 1983. A year and a half later, July 17, 1985, the court dismissed for lack of service of process the claims against National Security. Also, prior to National Security's dismissal, the court, unaware that the service of process had not been made, dismissed on the merits the claim against National Security for statutory conspiracy. Plaintiff's counsel, S. Strother Smith, III, who has conceded that he was angered over the dismissal of National Security, thereafter proceeded to reinstitute the same suit originally filed, and named as defendants, among others, Mullins and National Security.

The defendants subsequently filed motions to dismiss, which were scheduled for oral argument on October 7, 1985 at Big Stone Gap, Virginia. David Nagle, counsel for Mullins and National Security, traveled to Duffield, Virginia on Sunday, October 6, 1985, spent the night, and appeared in court for the hearing as scheduled. Mr. Smith, however, failed to appear at the scheduled time and indeed did not appear at any time that day. During the morning of October 7, the court was advised by Mr. Smith's office that he was completing a jury trial in Bristol, Virginia that had been carried over from the previous Friday, but that he could be in Big Stone Gap by 1 o'clock p.m. Then, at noon that day, Mr. Smith's office contacted the court to advise that Mr. Smith had to be in Lebanon, Virginia in state court for a contempt of court citation and could not appear in Big Stone Gap as previously advised. The court was informed, however, per a call to Lebanon, that none of the local judges were holding court that day, and that Mr. Smith was not in the Lebanon courthouse. Mr. Smith ultimately never personally contacted the court or Mr. Nagle at any time on October 7, 1985. Furthermore, the court later learned that on the afternoon of that day, Mr. Smith was actually in the Federal Building in Abingdon, Virginia for an administrative hearing. Oral argument, which was heard on the record, was re-

scheduled for the next day, October 8, 1985. At Mr. Smith's request, however, that portion of the hearing regarding sanctions for his failure to appear at the previously scheduled hearing was held in chambers without a court reporter.

Sanctions are unfortunately necessary in this case. Conduct such as that displayed by plaintiff's counsel cannot be tolerated. Accordingly, by way of sanctions, this case is dismissed with prejudice as to Mullins, individually, the suit against him having been dismissed on December 15, 1983 and then refiled on July 24, 1985 as an act of spite by Mr. Smith due to his anger at the dismissal of the corporate defendant, National Security, for lack of service of process. Most significantly, the fault for the dismissal lies with Mr. Smith, who was even advised by the defendants' counsel prior to dismissal that such service of process had not been obtained. Furthermore, as additional sanctions against Mr. Smith personally, Mr. Smith shall pay defendants' counsel, Mr. Nagle, for his travel expenses, two nights' lodging, meals, and sixteen hours of attorney's fees at seventy-five dollars per hour, for his three-day trip for the foregoing hearing.

IV.

SUMMARY

To summarize, defendant Piggly Wiggly's motion to dismiss is granted on the claim against it for statutory libel and slander (with the claims of common law libel and slander and statutory conspiracy having been previously dismissed), but denied as to plaintiff's claims against it for emotional distress and tortious interference with an economic opportunity and/or contractual relation as the claims relate to his rights to unemployment compensation; these two claims may not be made, however, in the context of his termination of employment. With respect to defendant National Security's motion to dismiss, the motion is granted on the claims against it for statutory and common law libel and slander and statutory conspiracy, but de-

nied as to plaintiff's claims against it for emotional distress and tortious interference with an economic opportunity and/or contractual relation, with these two claims limited against it, as well, to the context of plaintiff's rights to unemployment compensation. Finally, as to defendant Mullins, the court would treat the claims against him as it is treating the claims against National Security, but for Mullins' motion for sanctions. In light of this motion, however, Mullins is dismissed with prejudice as a party defendant to this suit, and further sanctions are imposed against plaintiff's counsel personally, as outlined above.



In re VYLENE ENTERPRISES,
INC., Debtor.

VYLENE ENTERPRISES, INC.,

v.

NAUGLES, INC.

Bankruptcy No. LA 84-14659-SB.

Adv. No. LA 85-4983-SB.

United States Bankruptcy Court,
C.D. California.

Aug. 13, 1986.

Matter came before court on motion of franchisor for preliminary injunction to prohibit debtor from infringing franchisor's federally registered trademarks and from otherwise unfairly competing with franchisor. The Bankruptcy Court, Samuel L. Bufford, J., held that: (1) right to negotiate renewal of franchise had not expired; (2) renewal clause of franchise agreement was not merely agreement to agree in future, but rather, required parties to bargain in good faith for reasonable terms for eight-year renewal period; and (3) both balancing of hardship and public-interest test

weighed strongly against preliminary injunction.

Motion denied.

1. Bankruptcy \Rightarrow 293(1)

Bankruptcy judge may hear and make final determination in core proceeding; in noncore proceeding, however, bankruptcy judge must submit proposed findings of fact and conclusions of law to district judge for final order or judgment. 28 U.S.C.A. § 157(b)(1), (c)(1).

2. Bankruptcy \Rightarrow 293(1)

Noncore proceeding must be otherwise related to bankruptcy case for bankruptcy court to have jurisdiction over proceeding at all.

3. Federal Courts \Rightarrow 5

Jurisdiction of all federal courts is limited to what is constitutionally provided by Congress.

4. Bankruptcy \Rightarrow 293(1)

Trademark holder's motion for preliminary injunction to prohibit debtor from infringing federally registered trademarks and otherwise unfairly competing with trademark holder was "core proceeding." 28 U.S.C.A. § 157(b)(2).

5. Bankruptcy \Rightarrow 217.3(6)

Exception to automatic stay for recovery of property by lessor after termination of nonresidential lease did not apply to franchisor's motion for preliminary injunction to prohibit debtor from infringing franchisor's federally registered trademarks, where franchise had not expired for all purposes. Bankr.Code, 11 U.S.C.A. § 362(b)(10).

6. Bankruptcy \Rightarrow 217.3(4)

Adversary proceeding against debtor seeking injunction, brought in court where bankruptcy case is pending, is not subject to automatic stay, and may be heard by bankruptcy court without obtaining relief from automatic stay. Bankr.Code, 11 U.S.C.A. § 362.

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Syllabus.

PIERSON ET AL. v. RAY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT.

No. 79. Argued January 11, 1967.—Decided April 11, 1967.*

Petitioners,† members of a group of white and Negro clergymen on a "prayer pilgrimage" to promote racial integration, attempted to use a segregated interstate bus terminal waiting room in Jackson, Mississippi, in 1961. They were arrested by respondent policemen and charged with conduct breaching the peace in violation of § 2087.5 of the Mississippi Code which this Court, in 1965, held unconstitutional in *Thomas v. Mississippi*, 380 U. S. 524, as applied to similar facts. Petitioners waived a jury trial and were convicted by respondent municipal police justice. On appeal one petitioner was accorded a trial *de novo* and, following a directed verdict in his favor, the cases against the other petitioners were dropped. Petitioners then brought this action in the District Court for damages (1) under 42 U. S. C. § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights, and (2) at common law for false arrest and imprisonment. The evidence showed that the ministers expected to be arrested on entering a segregated area. Though the witnesses agreed that petitioners entered the waiting room peacefully, petitioners testified that there was no crowd at the terminal, whereas the police testified that a threatening crowd followed petitioners. The jury found for respondents. On appeal the Court of Appeals held that (1) respondent police justice had immunity for his judicial acts under both § 1983 and the state common law and (2) the policemen had immunity under the state common law of false arrest if they had probable cause to believe § 2087.5 valid since they were not required to predict what laws are constitutional, but that, by virtue of *Monroe v. Pape*, 365 U. S. 167, they had no such immunity under § 1983 where the state statute was subsequently declared invalid. The court remanded the case against the officers for a new trial under § 1983 because of prejudicial cross-examination of petitioners, but ruled that they

*Together with No. 94, *Ray et al. v. Pierson et al.*, also on certiorari to the same court.

†See n. 3, *infra*.

could not recover if it were shown at the new trial that they had gone to Mississippi in anticipation that they would be illegally arrested. *Held*:

1. The settled common-law principle that a judge is immune from liability for damages for his judicial acts was not abolished by § 1983. Cf. *Tenney v. Brandhove*, 341 U.S. 367. Pp. 553-555.

2. The defense of good faith and probable cause which is available to police officers in a common-law action for false arrest and imprisonment is also available in an action under § 1983. *Monroe v. Pape*, *supra*, distinguished. Pp. 555-557.

3. Though the officers were not required to predict this Court's ruling in *Thomas v. Mississippi*, *supra*, that § 2087.5 was unconstitutional as applied, and the defense of good faith and probable cause is available in an action under § 1983, it does not follow that the count based thereon should be dismissed since the evidence was conflicting as to whether the police had acted in good faith and with probable cause in arresting the petitioners. Pp. 557-558.

4. Petitioners did not consent to their arrest by deliberately exercising their right to use the waiting room in a peaceful manner with the expectation that they would be illegally arrested. P. 558. 352 F. 2d 213, affirmed in part, reversed in part, and remanded.

Carl Rachlin argued the cause for petitioners in No. 79 and for respondents in No. 94. With him on the briefs was *Melvin L. Wulf*.

Elizabeth Watkins Hulen Grayson argued the cause for respondents in No. 79 and for petitioners in No. 94. With her on the brief was *Thomas H. Watkins*.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases present issues involving the liability of local police officers and judges under § 1 of the Civil Rights Act of 1871, 17 Stat. 13, now 42 U.S.C. § 1983.¹ Peti-

¹ "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

tioners in No. 79 white and Negro to use segregated national in Jackson. Mississippi by respondents R the City of Jackson of the Mississippi meanor anyone w place under circum may be occasioned ordered to do so by a jury trial and we ent Spencer, a mu given the maximum

rights, privileges, or laws, shall be liable to in equity, or other prop

"1. Whoever with under circumstances su sioned thereby:

"(1) crowds or congreg store, restaurant, lunch any other place of bus of the public, or in or of business or public b individual, or a corpora who fails or refuses to on, when ordered so to municipality, or county or by any law enforcer any other authorized pe duct, which is made a shall be punished by a (\$200.00), or imprisonment four (4) months, or by b

² The ministers involv tioners" throughout this in No. 94.

tioners in No. 79 were members of a group of 15 white and Negro Episcopal clergymen who attempted to use segregated facilities at an interstate bus terminal in Jackson, Mississippi, in 1961. They were arrested by respondents Ray, Griffith, and Nichols, policemen of the City of Jackson, and charged with violating § 2087.5 of the Mississippi Code, which makes guilty of a misdemeanor anyone who congregates with others in a public place under circumstances such that a breach of the peace may be occasioned thereby, and refuses to move on when ordered to do so by a police officer.² Petitioners³ waived a jury trial and were convicted of the offense by respondent Spencer, a municipal police justice. They were each given the maximum sentence of four months in jail and

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U. S. C. § 1983.

² "1. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

"(1) crowds or congregates with others in . . . any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, . . . or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or county, in which such act or acts are committed, or by any law enforcement officer of the State of Mississippi, or any other authorized person, . . . shall be guilty of disorderly conduct, which is made a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars (\$200.00), or imprisonment in the county jail for not more than four (4) months, or by both such fine and imprisonment . . ."

³ The ministers involved in No. 79 will be designated as "petitioners" throughout this opinion, although they are the respondents in No. 94.

a fine of \$200. On appeal petitioner Jones was accorded a trial *de novo* in the County Court, and after the city produced its evidence the court granted his motion for a directed verdict. The cases against the other petitioners were then dropped.

Having been vindicated in the County Court, petitioners brought this action for damages in the United States District Court for the Southern District of Mississippi, Jackson Division, alleging that respondents had violated § 1983, *supra*, and that respondents were liable at common law for false arrest and imprisonment. A jury returned verdicts for respondents on both counts. On appeal, the Court of Appeals for the Fifth Circuit held that respondent Spencer was immune from liability under both § 1983 and the common law of Mississippi for acts committed within his judicial jurisdiction. 352 F. 2d 213. As to the police officers, the court noted that § 2087.5 of the Mississippi Code was held unconstitutional as applied to similar facts in *Thomas v. Mississippi*, 380 U. S. 524 (1965).⁴ Although *Thomas* was decided years after the arrest involved in this trial, the court held that the policemen would be liable in a suit under § 1983 for an unconstitutional arrest even if they acted in good faith and with probable cause in making an arrest under a state statute not yet held invalid. The court believed that this stern result was required by *Monroe v. Pape*,

⁴ In *Thomas* various "Freedom Riders" were arrested and convicted under circumstances substantially similar to the facts of these cases. The police testified that they ordered the "Freedom Riders" to leave because they feared that onlookers might breach the peace. We reversed without argument or opinion, citing *Boynton v. Virginia*, 364 U. S. 454 (1960). *Boynton* held that racial discrimination in a bus terminal restaurant utilized as an integral part of the transportation of interstate passengers violates § 216 (d) of the Interstate Commerce Act. State enforcement of such discrimination is barred by the Supremacy Clause.

365 U. S. 167 (1961). The common law of Mississippi would not lead us to believe that the Mississippi law does not protect them at their peril which is not. Appellants' claim,⁵ the Court of Appeals for a new trial on the § 1983 claim because defense counsel argued that the ministers on various matters, particularly in their views on racial matters, Party. At the new trial the ministers could not go to Mississippi because they went to Mississippi and were illegally arrested without their consent to the arrest. *fit injuria*, he who comes

We granted certiorari because the local judge is liable for an unconstitutional conviction should be denied recusal if they acted with the knowledge of the illegally arrested. We granted the petition in No. 94 to correct the error correctly held that the

⁵ Respondents read the trial on this claim. The respondents are immune from liability not from liability for violation of civil rights. It therefore follows that a civil rights claim against them should be a determination of the facts invited or consented to them at 221.

365 U. S. 167 (1961). Under the count based on the common law of Mississippi, however, it held that the policemen would not be liable if they had probable cause to believe that the statute had been violated, because Mississippi law does not require police officers to predict at their peril which state laws are constitutional and which are not. Apparently dismissing the common-law claim,⁵ the Court of Appeals reversed and remanded for a new trial on the § 1983 claim against the police officers because defense counsel had been allowed to cross-examine the ministers on various irrelevant and prejudicial matters, particularly including an alleged convergence of their views on racial justice with those of the Communist Party. At the new trial, however, the court held that the ministers could not recover if it were proved that they went to Mississippi anticipating that they would be illegally arrested because such action would constitute consent to the arrest under the principle of *volenti non fit injuria*, he who consents to a wrong cannot be injured.

We granted certiorari in No. 79 to consider whether a local judge is liable for damages under § 1983 for an unconstitutional conviction and whether the ministers should be denied recovery against the police officers if they acted with the anticipation that they would be illegally arrested. We also granted the police officers' petition in No. 94 to determine if the Court of Appeals correctly held that they could not assert the defense of

⁵ Respondents read the court's opinion as remanding for a new trial on this claim. The court stated, however, that the officers "are immune from liability for false imprisonment at common law but not from liability for violations of the Federal statutes on civil rights. It therefore follows that there should be a new trial of the civil rights claim against the appellee police officers so that there may be a determination of the fact issue as to whether the appellants invited or consented to the arrest and imprisonment." 352 F. 2d, at 221.

good faith and probable cause to an action under § 1983 for unconstitutional arrest.⁶

The evidence at the federal trial showed that petitioners and other Negro and white Episcopal clergymen undertook a "prayer pilgrimage" in 1961 from New Orleans to Detroit. The purpose of the pilgrimage was to visit church institutions and other places in the North and South to promote racial equality and integration, and, finally, to report to a church convention in Detroit. Letters from the leader of the group to its members indicate that the clergymen intended from the beginning to go to Jackson and attempt to use segregated facilities at the bus terminal there, and that they fully expected to be arrested for doing so. The group made plans based on the assumption that they would be arrested if they attempted peacefully to exercise their right as interstate travelers to use the waiting rooms and other facilities at the bus terminal, and the letters discussed arrangements for bail and other matters relevant to arrests.

The ministers stayed one night in Jackson, and went to the bus terminal the next morning to depart for Chattanooga, Tennessee. They entered the waiting room, disobeying a sign at the entrance that announced "White Waiting Room Only—By Order of the Police Department." They then turned to enter the small terminal restaurant but were stopped by two Jackson police officers, respondents Griffith and Nichols, who had been awaiting their arrival and who ordered them to "move on." The ministers replied that they wanted to eat,

⁶ Respondents did not challenge in their petition in No. 94 the holding of the Court of Appeals that a new trial is necessary because of the prejudicial cross-examination. Belatedly, they devoted a section of their brief to the contention that the cross-examination was proper. This argument is no more meritorious than it is timely. The views of the Communist Party on racial equality were not an issue in these cases.

and refused to police captain a few minutes later arrest and taken

All witnesses the ministers engaged in no behavior. Petitioners at the station, the waiting room, and the terminal, that police satisfied and ugly and making unsatisfactory did not describe testified that the the crowd who "had determined violence if any were concededly not claim that it allegedly disorder were followed by

We find no d Appeals that Justice for damages for is barren of any Spencer played a other than to adj came before his c

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⁸ Petitioners attend Spencer and the pol

and refused to move on. Respondent Ray, then a police captain and now the deputy chief of police, arrived a few minutes later. The ministers were placed under arrest and taken to the jail.

All witnesses including the police officers agreed that the ministers entered the waiting room peacefully and engaged in no boisterous or objectionable conduct while in the "White Only" area. There was conflicting testimony on the number of bystanders present and their behavior. Petitioners testified that there was no crowd at the station, that no one followed them into the waiting room, and that no one uttered threatening words or made threatening gestures. The police testified that some 25 to 30 persons followed the ministers into the terminal, that persons in the crowd were in a very dissatisfied and ugly mood, and that they were mumbling and making unspecified threatening gestures. The police did not describe any specific threatening incidents, and testified that they took no action against any persons in the crowd who were threatening violence because they "had determined that the ministers was the cause of the violence if any might occur,"⁷ although the ministers were concededly orderly and polite and the police did not claim that it was beyond their power to control the allegedly disorderly crowd. The arrests and convictions were followed by this lawsuit.

We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions. The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court.⁸ Few doctrines were more solidly

⁷ Transcript of Record, at 347. (Testimony of Officer Griffith.)

⁸ Petitioners attempted to suggest a "conspiracy" between Judge Spencer and the police officers by questioning him about his reasons

established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." (*Scott v. Stansfield*, L. R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher*, *supra*, 349, note, at 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney v. Brandhove*, 341 U. S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and

for finding petitioners guilty in these cases and by showing that he had found other "Freedom Riders" guilty under similar circumstances in previous cases. The proof of conspiracy never went beyond this suggestion that inferences could be drawn from Judge Spencer's judicial decisions. See Transcript of Record, at 352-371.

we presume that it was provided had it wished.

The common law absolute and unqualified immunity in this case do not control. Their claim is rather that they acted in good faith making an arrest to be valid. Under a peace officer who is not liable for false arrest of the suspect is 1. Torts § 121 (1965); § 3.18, at 277-278 (1965) of *Maryland*, 179 F. policeman's lot is not between being charged not arrest when he has in damages if he is entirely free from doubt seem to require excuse under a statute that but that was later held as applied.

The Court of Appeals a limited privilege under and indicated that the privilege under § 1983 otherwise by our decision

⁹ Since our decision in *Briggs v. United States*, 380 U. S. 124 (1965), appeals have consistently been held to be an action under § 1983. 3d Cir. 1966), and cases.

¹⁰ See *Caveat*, Restatement (1965); *Miller v. Stinne*.

¹¹ See *Golden v. Thomas*.

we presume that Congress would have specifically so provided had it wished to abolish the doctrine.⁹

The common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one. Their claim is rather that they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid. Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. Restatement, Second, Torts § 121 (1965); 1 Harper & James, *The Law of Torts* § 3.18, at 277-278 (1956); *Ward v. Fidelity & Deposit Co. of Maryland*, 179 F. 2d 327 (C. A. 8th Cir. 1950). A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt,¹⁰ the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied.

The Court of Appeals held that the officers had such a limited privilege under the common law of Mississippi,¹¹ and indicated that it would have recognized a similar privilege under § 1983 except that it felt compelled to hold otherwise by our decision in *Monroe v. Pape*, 365 U. S.

⁹ Since our decision in *Tenney v. Brandhove*, *supra*, the courts of appeals have consistently held that judicial immunity is a defense to an action under § 1983. See *Bauers v. Heisel*, 361 F. 2d 581 (C. A. 3d Cir. 1966), and cases cited therein.

¹⁰ See Caveat, Restatement, Second, Torts § 121, at 207-208 (1965); *Miller v. Stinnett*, 257 F. 2d 910 (C. A. 10th Cir. 1958).

¹¹ See *Golden v. Thompson*, 194 Miss. 241, 11 So. 2d 906 (1943).

167 (1961). *Monroe v. Pape* presented no question of immunity, however, and none was decided. The complaint in that case alleged that "13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further allege[d] that Mr. Monroe was then taken to the police station and detained on 'open' charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him." 365 U. S., at 169. The police officers did not choose to go to trial and defend the case on the hope that they could convince a jury that they believed in good faith that it was their duty to assault Monroe and his family in this manner. Instead, they sought dismissal of the complaint, contending principally that their activities were so plainly illegal under state law that they did not act "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" as required by § 1983. In rejecting this argument we in no way intimated that the defense of good faith and probable cause was foreclosed by the statute. We also held that the complaint should not be dismissed for failure to state that the officers had "a specific intent to deprive a person of a federal right," but this holding, which related to requirements of pleading, carried no implications as to which defenses would be available to the police officers. As we went on to say in the same paragraph, § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U. S., at 187. Part of the background of tort liability, in the

case of police officers of good faith and probable cause.

We hold that the cause, which the Chicago officers in the complaint, is a cause of imprisonment, is a cause under § 1983. That the count based on the Court of Appeals' count on the theory required to predict on 380 U. S. 524. We charged with predictive law. But the officers argue that they were unconstitutional. That the police officers to use the "White Officer" present, and that not about to cause a disturbance on the theory that it is constitutional to arrest in a waiting room. Rather, prove that they did not purpose of preserving Mississippi, but solely for the officers. They testified, in court, that a crowd gathered and that the officers believed that the officers were disbelieved that of the officers that the officers realized that the arrest was unconstitutional. That the officers would follow the officers in favor of the officers.

case of police officers making an arrest, is the defense of good faith and probable cause.

We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983. This holding does not, however, mean that the count based thereon should be dismissed. The Court of Appeals ordered dismissal of the common-law count on the theory that the police officers were not required to predict our decision in *Thomas v. Mississippi*, 380 U. S. 524. We agree that a police officer is not charged with predicting the future course of constitutional law. But the petitioners in this case did not simply argue that they were arrested under a statute later held unconstitutional. They claimed and attempted to prove that the police officers arrested them solely for attempting to use the "White Only" waiting room, that no crowd was present, and that no one threatened violence or seemed about to cause a disturbance. The officers did not defend on the theory that they believed in good faith that it was constitutional to arrest the ministers solely for using the waiting room. Rather, they claimed and attempted to prove that they did not arrest the ministers for the purpose of preserving the custom of segregation in Mississippi, but solely for the purpose of preventing violence. They testified, in contradiction to the ministers, that a crowd gathered and that imminent violence was likely. If the jury believed the testimony of the officers and disbelieved that of the ministers, and if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional. The jury did resolve the factual issues in favor of the officers but, for reasons previously stated,

its verdict was influenced by irrelevant and prejudicial evidence. Accordingly, the case must be remanded to the trial court for a new trial.

It is necessary to decide what importance should be given at the new trial to the substantially undisputed fact that the petitioners went to Jackson expecting to be illegally arrested. We do not agree with the Court of Appeals that they somehow consented to the arrest because of their anticipation that they would be illegally arrested, even assuming that they went to the Jackson bus terminal for the sole purpose of testing their rights to unsegregated public accommodations. The case contains no proof or allegation that they in any way tricked or goaded the officers into arresting them. The petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under § 1983.¹²

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

I do not think that all judges, under all circumstances, no matter how outrageous their conduct are immune

¹² The petition for certiorari in No. 79 also presented the question whether the Court of Appeals correctly dismissed the count based on the common law of Mississippi. We do not ordinarily review the holding of a court of appeals on a matter of state law, and we find no reason for departing from that tradition in this case. The state common-law claim in this case is merely cumulative, and petitioners' right to recover for an invasion of their civil rights, subject to the defense of good faith and probable cause, is adequately secured by § 1983.

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The statute, wh Ku Klux Klan Act that "every persor tom "subjects, or to the deprivation secured by the Co the party injured other proper proce person" would mea judges. Despite t Court decided in that state legislato deprivation of civ occurred while th where legislators t at 379. I dissent exception as I do

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from suit under 17 Stat. 13, 42 U. S. C. § 1983. The Court's ruling is not justified by the admitted need for a vigorous and independent judiciary, is not commanded by the common-law doctrine of judicial immunity, and does not follow inexorably from our prior decisions.

The statute, which came on the books as § 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, provides that "every person" who under color of state law or custom "subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." To most, "every person" would mean *every person*, not every person *except* judges. Despite the plain import of those words, the Court decided in *Tenney v. Brandhove*, 341 U. S. 367, that state legislators are immune from suit as long as the deprivation of civil rights which they caused a person occurred while the legislators "were acting in a field where legislators traditionally have power to act." *Id.*, at 379. I dissented from the creation of that judicial exception as I do from the creation of the present one.

The congressional purpose seems to me to be clear. A condition of lawlessness existed in certain of the States, under which people were being denied their civil rights. Congress intended to provide a remedy for the wrongs being perpetrated. And its members were not unaware that certain members of the judiciary were implicated in the state of affairs which the statute was intended to rectify. It was often noted that "[i]mmunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." Cong. Globe, 42d Cong., 1st Sess., 374. Mr. Rainey of South Carolina noted that "[T]he courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity." *Id.*, at 394.

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Congressman Beatty of Ohio claimed that it was the duty of Congress to listen to the appeals of those who "by reason of popular sentiment or secret organizations or prejudiced juries or bribed judges, [cannot] obtain the rights and privileges due an American citizen" *Id.*, at 429. The members supporting the proposed measure were apprehensive that there had been a complete breakdown in the administration of justice in certain States and that laws nondiscriminatory on their face were being applied in a discriminatory manner, that the newly won civil rights of the Negro were being ignored, and that the Constitution was being defied. It was against this background that the section was passed, and it is against this background that it should be interpreted.

It is said that, at the time of the statute's enactment, the doctrine of judicial immunity was well settled and that Congress cannot be presumed to have intended to abrogate the doctrine since it did not clearly evince such a purpose. This view is beset by many difficulties. It assumes that Congress could and should specify in advance all the possible circumstances to which a remedial statute might apply and state which cases are within the scope of a statute.

"Underlying [this] view is an atomistic conception of intention, coupled with what may be called a pointer theory of meaning. This view conceives the mind to be directed toward individual things, rather than toward general ideas, toward distinct situations of fact rather than toward some significance in human affairs that these situations may share. If this view were taken seriously, then we would have to regard the intention of the draftsman of a statute directed against 'dangerous weapons' as being directed toward an endless series of individual objects: re-

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volvers, automatic pistols, daggers, Bowie knives, etc. If a court applies the statute to a weapon its draftsman had not thought of, then it would be 'legislating,' not 'interpreting,' as even more obviously it would be if it were to apply the statute to a weapon not yet invented when the statute was passed." Fuller, *The Morality of Law* 84 (1964).

Congress of course acts in the context of existing common-law rules, and in construing a statute a court considers the "common law before the making of the Act." *Heydon's Case*, 3 Co. Rep. 7 a, 76 Eng. Rep. 637 (Ex. 1584). But Congress enacts a statute to remedy the inadequacies of the pre-existing law, including the common law.¹ It cannot be presumed that the common law is the perfection of reason, is superior to statutory law (Sedgwick, *Construction of Statutes* 270 (1st ed. 1857); Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383, 404-406 (1908)), and that the legislature always changes law for the worse. Nor should the canon of construction "statutes in derogation of the common law are to be strictly construed" be applied so as to weaken a remedial statute whose purpose is to remedy the defects of the pre-existing law.

The position that Congress did not intend to change the common-law rule of judicial immunity ignores the fact that every member of Congress who spoke to the issue assumed that the words of the statute meant what they said and that judges would be liable. Many members of Congress objected to the statute because it im-

¹ "Remedial statutes are to be liberally construed." See generally, Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395 (1950); Llewellyn, *The Common Law Tradition*, Appendix C (1960).

posed liability on members of the judiciary. Mr. Arthur of Kentucky opposed the measure because:

"Hitherto . . . no judge or court has been held liable, civilly or criminally, for judicial acts . . . Under the provisions of [section 1] every judge in the State court . . . will enter upon and pursue the call of official duty with the sword of Damocles suspended over him . . ." Cong. Globe, 42d Cong., 1st Sess., 365-366.

And Senator Thurman noted that:

"There have been two or three instances already under the civil rights bill of State judges being taken into the United States district court, sometimes upon indictment for the offense . . . of honestly and conscientiously deciding the law to be as they understood it to be. . . .

"Is [section 1] intended to perpetuate that? Is it intended to enlarge it? Is it intended to extend it so that no longer a judge sitting on the bench to decide causes can decide them free from any fear except that of impeachment, which never lies in the absence of corrupt motive? Is that to be extended, so that every judge of a State may be liable to be dragged before some Federal judge to vindicate his opinion and to be mulcted in damages if that Federal judge shall think the opinion was erroneous? That is the language of this bill." Cong. Globe, 42d Cong., 1st Sess., Appendix 217.

Mr. Lewis of Kentucky expressed the fear that:

"By the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal court and subject to damages for his decision against a suitor. . . ." Cong. Globe, 42d Cong., 1st Sess., 385.

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The section's p deprivation of civi members of the ju and were partially edied. The parad that a similar cond Some state courts of civil rights. T means may have l be remedied still e

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² As altered by the 1878, and as printed "every person" rather

³ The opinion in *Ex v. Fisher*, 13 Wall. 33. liable for causing the court rolls. But in *B of the Civil Rights Ac*

Yet despite the repeated fears of its opponents, and the explicit recognition that the section would subject judges to suit, the section remained as it was proposed: it applied to "any person."² There was no exception for members of the judiciary. In light of the sharply contested nature of the issue of judicial immunity it would be reasonable to assume that the judiciary would have been expressly exempted from the wide sweep of the section, if Congress had intended such a result.

The section's purpose was to provide redress for the deprivation of civil rights. It was recognized that certain members of the judiciary were instruments of oppression and were partially responsible for the wrongs to be remedied. The parade of cases coming to this Court shows that a similar condition now obtains in some of the States. Some state courts have been instruments of suppression of civil rights. The methods may have changed; the means may have become more subtle; but the wrong to be remedied still exists.

Today's decision is not dictated by our prior decisions. In *Ex parte Virginia*, 100 U. S. 339, the Court held that a judge who excluded Negroes from juries could be held liable under the Act of March 1, 1875 (18 Stat. 335), one of the Civil Rights Acts. The Court assumed that the judge was merely performing a ministerial function. But it went on to state that the judge would be liable under the statute even if his actions were judicial.³ It is one thing to say that the common-law doctrine of

² As altered by the reviser who prepared the Revised Statutes of 1878, and as printed in 42 U. S. C. § 1983, the statute refers to "every person" rather than to "any person."

³ The opinion in *Ex parte Virginia*, *supra*, did not mention *Bradley v. Fisher*, 13 Wall. 335, which held that a judge could not be held liable for causing the name of an attorney to be struck from the court rolls. But in *Bradley*, the action was not brought under any of the Civil Rights Acts.

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judicial immunity is a defense to a common-law cause of action. But it is quite another to say that the common-law immunity rule is a defense to liability which Congress has imposed upon "any officer or other person," as in *Ex parte Virginia*, or upon "every person" as in these cases.

The immunity which the Court today grants the judiciary is not necessary to preserve an independent judiciary. If the threat of civil action lies in the background of litigation, so the argument goes, judges will be reluctant to exercise the discretion and judgment inherent in their position and vital to the effective operation of the judiciary. We should, of course, not protect a member of the judiciary "who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good." *Gregoire v. Biddle*, 177 F. 2d 579, 581. To deny recovery to a person injured by the ruling of a judge acting for personal gain or out of personal motives would be "monstrous." *Ibid.* But, it is argued that absolute immunity is necessary to prevent the chilling effects of a judicial inquiry, or the threat of such inquiry, into whether, in fact, a judge has been unfaithful to his oath of office. Thus, it is necessary to protect the guilty as well as the innocent.⁴

The doctrine of separation of powers is, of course, applicable only to the relations of coordinate branches of the same government, not to the relations between the

⁴ Other justifications for the doctrine of absolute immunity have been advanced: (1) preventing threat of suit from influencing decision; (2) protecting judges from liability for honest mistakes; (3) relieving judges of the time and expense of defending suits; (4) removing an impediment to responsible men entering the judiciary; (5) necessity of finality; (6) appellate review is satisfactory remedy; (7) the judge's duty is to the public and not to the individual; (8) judicial self-protection; (9) separation of powers. See generally Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263, 271-272 (1937).

branches of the States. See *Ba* ment that Congress judges for the c to be based upon theory of division State Government cases recognizing provisions of the who carry a burden v. *Pape*, 365 U. Congress, I can bility on a state and on a state constitutional (statutory interpretation

The argument not be subjected would have an more sophisticated no wrong." ⁵ C of the argument

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⁵ Historically judges Since the King could dispensing justice, " supposed corruption of the King." *Floy* 1305, 1307 (Star C personal delegates o alone. *Randall v. E*

branches of the Federal Government and those of the States. See *Baker v. Carr*, 369 U. S. 186, 210. Any argument that Congress could not impose liability on state judges for the deprivation of civil rights would thus have to be based upon the claim that doing so would violate the theory of division of powers between the Federal and State Governments. This claim has been foreclosed by the cases recognizing "that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State . . ." *Monroe v. Pape*, 365 U. S. 167, 171-172. In terms of the power of Congress, I can see no difference between imposing liability on a state police officer (*Monroe v. Pape*, *supra*) and on a state judge. The question presented is not of constitutional dimension; it is solely a question of statutory interpretation.

The argument that the actions of public officials must not be subjected to judicial scrutiny because to do so would have an inhibiting effect on their work, is but a more sophisticated manner of saying "The King can do no wrong."⁵ Chief Justice Cockburn long ago disposed of the argument that liability would deter judges:

"I cannot believe that judges . . . would fail to discharge their duty faithfully and fearlessly according to their oaths and consciences . . . from any fear of exposing themselves to actions at law. I am persuaded that the number of such actions would be infinitely small and would be easily disposed of.

⁵ Historically judicial immunity was a corollary to that theory. Since the King could do no wrong, the judges, his delegates for dispensing justice, "ought not to be drawn into question for any supposed corruption [for this tends] to the slander of the justice of the King." *Floyd & Barker*, 12 Co. Rep. 23, 25, 77 Eng. Rep. 1305, 1307 (Star Chamber 1607). Because the judges were the personal delegates of the King they should be answerable to him alone. *Randall v. Brigham*, 7 Wall. 523, 539.

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While, on the other hand, I can easily conceive cases in which judicial opportunity might be so perverted and abused for the purpose of injustice as that, on sound principles, the authors of such wrong ought to be responsible to the parties wronged." *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94, 110 (C. J. Cockburn, dissenting).

This is not to say that a judge who makes an honest mistake should be subjected to civil liability. It is necessary to exempt judges from liability for the consequences of their honest mistakes. The judicial function involves an informed exercise of judgment. It is often necessary to choose between differing versions of fact, to reconcile opposing interests, and to decide closely contested issues. Decisions must often be made in the heat of trial. A vigorous and independent mind is needed to perform such delicate tasks. It would be unfair to require a judge to exercise his independent judgment and then to punish him for having exercised it in a manner which, in retrospect, was erroneous. Imposing liability for mistaken, though honest judicial acts, would curb the independent mind and spirit needed to perform judicial functions. Thus, a judge who sustains a conviction on what he forthrightly considers adequate evidence should not be subjected to liability when an appellate court decides that the evidence was not adequate. Nor should a judge who allows a conviction under what is later held an unconstitutional statute.

But that is far different from saying that a judge shall be immune from the consequences of any of his judicial actions, and that he shall not be liable for the knowing and intentional deprivation of a person's civil rights. What about the judge who conspires with local law enforcement officers to "railroad" a dissenter? What about the judge who knowingly turns a trial into a "kangaroo" court? Or one who intentionally flouts the

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Constitution in or I think, concluded knowing deprivation outweighed the special attend an inquiry rights.⁶

The plight of the *City of Greenwood* cannot remove court from deprivation the rule announced damages for the d

⁶ A judge is liable for immunity the judge m e. g., *Ex parte Virginia*, of Torts 1642-1643 (19 tion to deprive a person the judicial function. ingly to deprive a per no discretion or individ but as a "minister" of l

Constitution in order to obtain a conviction? Congress, I think, concluded that the evils of allowing intentional, knowing deprivations of civil rights to go unredressed far outweighed the speculative inhibiting effects which might attend an inquiry into a judicial deprivation of civil rights.⁶

The plight of the oppressed is indeed serious. Under *City of Greenwood v. Peacock*, 384 U. S. 808, the defendant cannot remove to a federal court to prevent a state court from depriving him of his civil rights. And under the rule announced today, the person cannot recover damages for the deprivation.

⁶ A judge is liable for injury caused by a ministerial act; to have immunity the judge must be performing a judicial function. See, e. g., *Ex parte Virginia*, 100 U. S. 339; 2 Harper & James, *The Law of Torts* 1642-1643 (1956). The presence of malice and the intention to deprive a person of his civil rights is wholly incompatible with the judicial function. When a judge acts intentionally and knowingly to deprive a person of his constitutional rights he exercises no discretion or individual judgment; he acts no longer as a judge, but as a "minister" of his own prejudices.

L.Ed.2d 377 (1964). Abstention is appropriate when either the state court's construction of the statute or evaluation of its validity may eliminate any need to reach the issue of validity under the federal Constitution. See *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 79 S.Ct. 455, 3 L.Ed.2d 562 (1959); *Reetz*, supra. Abstention is improper if the state and federal constitutional provisions under which the statute is challenged are substantially similar. See 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, Section 4242 at 463 (1978).

[6] In this case the challenged statute is fairly susceptible of several interpretations. See *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979); *Harman v. Forssenius*, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965). The provisions which provide (1) that the books are only a loan from the state, (2) that the books may not present a particular religious philosophy, and (3) that the funds appropriated under the statute are to be kept separate from the common school funds are an attempt to ensure the statute's constitutionality. See *Sergeant, Separation of Church and State: Education and Religion in Kentucky*, N.Ky.L.Rev. 125 (1979). Whether this attempt will succeed is uncertain, and for the Kentucky courts to decide. This is a paradigm case for abstention. See *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972).

The federal and state constitutional provisions in question are quite different. The federal constitutional challenge relies on the broad and general language of the First and Fourteenth Amendments of the United States Constitution. In contrast, the question of validity under the state constitution principally concerns specific and detailed provisions about tax collection and school expenditures. Ky.Const. Sections 171, 184, 186, 189. Thus abstention is appropriate.

[7,8] Abstention does not mean that this Court loses jurisdiction over this case. The proper procedure is to retain jurisdiction pending completion of any state pro-

ceeding which the plaintiffs may choose to file or join. *American Trial Lawyers v. N.J. Supreme Court*, 409 U.S. 467, 93 S.Ct. 627, 34 L.Ed.2d 651 (1973). This is so that plaintiffs may then have their federal claims litigated in federal court. The plaintiffs must at least inform the state court of their federal claims. *Government Employees v. Windsor*, 353 U.S. 364, 77 S.Ct. 838, 1 L.Ed.2d 894 (1957). The plaintiffs, however, may submit their entire case to state court or reserve their federal claims for federal adjudication, if they choose. See *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). We note that an *England* reservation is a means of conclusively reserving federal claims, although not the sole means. See *England*, supra, at 421-422, 84 S.Ct. at 467-468.

IT IS THEREFORE ORDERED:

(1) That the motion of defendants to dismiss plaintiffs' complaint due to a lack of jurisdiction over the subject matter is hereby DENIED;

(2) That the request of defendants that the Court abstain from exercising jurisdiction is hereby GRANTED;

(3) That the Court retain jurisdiction pending resolution of any state proceedings on this action.



Robert CRAMER

v.

B. L. CRUTCHFIELD

Civ. A. No. 80-0267-R.

United States District Court,
E. D. Virginia,
Richmond Division.

18 Sept. 1980.

In a suit for malicious prosecution, abuse of process and unlawful search and



seizure, and on separate causes of action under the 1871 civil rights statute, the District Court, Warriner, J., held that: (1) the search and seizure claim was not timely; (2) conduct for which plaintiff instituted claims for malicious prosecution and abuse of process resulted in deprivation of liberty or property only as result of or attendant to constitutionally legitimate proceedings, and there was thus no deprivation of due process of law under Fourteenth Amendment and no claim was stated which would be actionable under 1871 civil rights statute; and (3) where plaintiff was taken before magistrate who certified probable cause and released plaintiff on bond, and, after full factual inquiry, plaintiff was convicted of offense in general district court, probable cause was established, under Virginia law, though charge was nol-prossed on motion of Commonwealth's attorney after plaintiff's appeal, there being no evidence of fraud or use of evidence known to be false.

Summary judgment granted to defendant, and complaint dismissed.

1. Searches and Seizures ⇐ 8

Unlawful search and seizure is characterized under Virginia law as personal injury, rather than injury to property, and applicable statute of limitations thus is two-year time limit for filing action. Code Va. 1950, § 8.01-243, subd. A.

2. Civil Rights ⇐ 13.10

Virginia's two-year statute of limitations for personal injuries has been adopted for use in all actions brought under 1871 civil rights statute. Code Va. 1950, § 8.01-243, subd. A; 42 U.S.C.A. § 1983.

3. Limitation of Actions ⇐ 55(1), 58(1)

Malicious prosecution claim, whether under Virginia state law or 1871 civil rights statute, accrued upon termination of criminal proceeding in question. Code Va. 1950, § 18.01-249; 42 U.S.C.A. § 1983.

4. Civil Rights ⇐ 13.12(7)

Conduct for which plaintiff instituted claims for malicious prosecution and abuse of process resulted in deprivation of liberty

or property only as result of or attendant to constitutionally legitimate proceedings, and there was thus no deprivation of due process of law under Fourteenth Amendment and no claim was stated which would be actionable under 1871 civil rights statute. U.S.C.A. Const. Amends. 5, 14; 42 U.S.C.A. § 1983.

5. Malicious Prosecution ⇐ 55

To maintain malicious prosecution action in Virginia, plaintiff must allege and prove that prosecution was set on foot by defendant and that it terminated in manner not unfavorable to plaintiff, that it was instituted by, or procured by cooperation of, defendant, that it was without probable cause and that it was malicious.

6. Malicious Prosecution ⇐ 51

Where plaintiff had been convicted in General District Court of Prince George County, Virginia, on radar detection device charge, plaintiff had appealed and charge was thereafter nol-prossed on motion of Commonwealth's attorney, it would be accepted, for purposes of determining sufficiency of complaint to state claim for malicious prosecution under Virginia law, that prosecution ended in manner favorable to plaintiff. Code Va. 1950, § 46.1-198.1.

7. Malicious Prosecution ⇐ 24(5)

Where plaintiff was taken before magistrate who certified probable cause and released plaintiff on bond, and, after full factual inquiry, plaintiff was convicted of offense in general district court, probable cause was established, under Virginia law, though charge was nol-prossed on motion of Commonwealth's attorney after plaintiff's appeal, there being no evidence of fraud or use of evidence known to be false.

8. Process ⇐ 171

Under Virginia law, plaintiff claiming abuse of process has burden of pleading existence of ulterior motive on part of defendant, and an act in use of process not proper in regular prosecution of proceeding.

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9. Process — 168

Allegations showing misbehavior on part of police officer did not show abuse of process under Virginia law.

John F. Rick, Richmond, Va., for plaintiff.

Ronald M. Ayers, Roanoke, Va., Henry H. McVey, III, Richmond, Va., for defendant.

MEMORANDUM

WARRINER, District Judge.

Robert Cramer, a citizen and resident of Delaware, brings this complaint and seeks damages in excess of \$10,000.00 for malicious prosecution, abuse of process, and unlawful search and seizure. He states separate causes of action under 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), and also 28 U.S.C. § 1332. With regard to the latter provision, it is uncontested that the defendant is a citizen and resident of Virginia, and that jurisdiction of the Court is properly founded upon diversity of citizenship.

This complaint arises from an incident which occurred on 5 September 1977. On that date, the plaintiff Cramer was driving a tractor and trailer on U.S. Route 301 in Prince George County, Virginia. The defendant Crutchfield was on duty as a Virginia State Trooper, and he stopped the vehicle which the plaintiff was operating. According to the plaintiff, Officer Crutchfield accused him of being in possession of a radar detection device, which was at the time an offense punishable under Va.Code Ann. § 46.1-198.1. The defendant then indicated his intention to search the vehicle. The plaintiff maintains that the defendant lacked probable cause to search because no detection device was visible from outside the vehicle and the device was not in operation at the time that the defendant forced him to stop.

Following the stop, and before alighting from his cab, Cramer locked the vehicle. He refused to open the truck cab for Officer Crutchfield without permission from his

supervisor or without a search warrant. He alleges that Crutchfield responded by threatening to break the cab window with a tire billy. However, the parties agree that Crutchfield obtained entry to the cab by using a screw driver on a vent window lock. Cramer relates further that during the course of their discussion Crutchfield threatened to charge him with interference with a police officer based on his refusal to open the cab door, and he was later charged with this offense.

A radar detection device was found under a mattress in Cramer's cab. Officer Crutchfield placed Cramer under arrest for possession of a radar detection device and interference with a police officer. The plaintiff was then taken before a magistrate; upon payment of the bond he was released. Cramer complains that after his release he was searched and taken to Petersburg for fingerprinting, but it is unclear whether Officer Crutchfield took part in these alleged actions.

Cramer acknowledges that he was subsequently convicted in Prince George County General District Court for equipping his vehicle with a radar detection device. The record contains no reference to the disposition on the charge of interfering with a police officer, and it cannot be assumed that Cramer was ever brought to trial on this offense. The plaintiff appealed his conviction on the radar detection device charge to the Circuit Court of Prince George County. On 19 September 1978, the charge was nol-prossed on motion of the Commonwealth's Attorney. The defendant alleges in support of his motion for summary judgment that the prosecutor's decision to forego prosecution was prompted by the invalidation of a portion of Va.Code Ann. § 46.1-198.1. See *Crenshaw v. Commonwealth*, 219 Va. 38, 245 S.E.2d 243 (1978). There is no statement from the Commonwealth's Attorney in the record verifying this assertion. It stands admitted, however, that Cramer was convicted in the General District Court on the radar detection device charge and then, for whatever reason, the Commonwealth's Attorney chose not to con-

tinue with the prosecution when Cramer appealed his conviction to the Circuit Court.

[1, 2] The plaintiff claims first that the search and seizure conducted by Officer Crutchfield was in violation of his rights under the United States Constitution and § 19.2-59 of the Code of Virginia. An unlawful search and seizure is characterized under Virginia law as a personal injury, rather than an injury to property. *McClanahan v. Chaplain*, 136 Va. 1, 116 S.E. 495, 499 (1923). The applicable statute of limitations provision contained in the Virginia code is therefore § 8.01-243(A) which sets a two-year time limit for filing an action. Virginia's two-year statute of limitations for personal injuries has also been adopted for use in all actions brought under 42 U.S.C. § 1983. *Almond v. Kent*, 459 F.2d 200, 203 (4th Cir. 1972); *Van Horn v. Lukhard*, 392 F.Supp. 384, 391 (E.D.Va.1975). In this case, the search and seizure of which the plaintiff complains occurred on 5 September 1977. The complaint herein was filed on 18 September 1979, more than two years after accrual of the cause of action on this issue. The plaintiff's search and seizure claim is thus raised out of time whether it is considered under Section 1983 or under State law, and the claim will therefore be dismissed.

[3] The plaintiff also charges the defendant with malicious prosecution and abuse of process. Again, he raises separate causes of action under Virginia State law and Section 1983. As an initial matter, these claims are not time-barred. Section 18.01-249 of the Virginia Code provides that claims for malicious prosecution and abuse of process do not accrue until the criminal proceeding in question is terminated. The Fourth Circuit has also held under Section 1983 that a malicious prosecution claim accrues upon termination of the proceeding, *Morrison v. Jones*, 551 F.2d 939, 940-941 (4th Cir. 1977), and this rule will also be applied to the abuse of process claim.

The Court will first consider the claims of malicious prosecution and abuse of process under Section 1983. As stated above, the

Fourth Circuit has previously considered a malicious prosecution claim raised under Section 1983 in *Morrison v. Jones*. There, the Circuit Court adopted the common law rule that termination of the proceedings in a manner not unfavorable to the plaintiff is a necessary element of a malicious prosecution claim. *Id.* at 940. The Fourth Circuit panel did not discuss the circumstances under which a malicious prosecution claim, normally a claim raised under State court law, rises to federal constitutional dimensions.

In two decisions issued prior to *Morrison*, the United States Supreme Court held that commission of a tort by a State officer did not automatically confer a § 1983 federal right of action. In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Supreme Court determined that a claim for defamation brought against a State official was not actionable under Section 1983, absent a showing of an injury to a liberty or property interest recognized under the Due Process Clause. *Id.* at 701. The Court stated in *Paul v. Davis* that the Due Process Clause is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* In *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Court also ruled that a State tort claim of medical malpractice "does not become a constitutional violation merely because the victim is a prisoner." *Id.* at 106, 97 S.Ct. at 292.

Shortly after the Fourth Circuit's decision in *Morrison*, the Supreme Court found that Eighth Amendment concerns were not applicable to disciplinary corporal punishment in public schools. *Ingraham v. Wright*, 430 U.S. 651, 664-671, 97 S.Ct. 1401, 1408-1410, 51 L.Ed.2d 711 (1977). Once again, the Court recognized that a State or common law tort may be committed by a State official and yet not assume constitutional significance merely by reason of the status of the State official. The Supreme Court, furthermore, has recently refused to constitutionalize the tort of false imprisonment under the specific facts in *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct.

2689, 61 L. the Court pressed: "violations of constitution, not arising out at 2695."

[4] This considered the malicious claims state United States *Baskerville* *aff'd* 620 under Sect F.Supp. 798 der the Fifth sions, this though a p under State constitution proceed with the present the plaintiff actionable from the full measure which he w Amendment liberty or p allege occurred proceedings into the mal process class

[5, 6] Th accordance whether the abuse of p under Virg malicious p plaintiff m prosecution ant and the unfavorable

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Cite as 496 F.Supp. 949 (1980)

2689, 61 L.Ed.2d 433 (1979). The basis for the Court's holding in *Baker* is simply expressed: "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Id.* at 146, 99 S.Ct. at 2695.¹

[4] This Court has already twice considered the question of whether particular malicious prosecution and abuse of process claims stated causes of action under the United States Constitution. *Pollard v. Baskerville*, 481 F.Supp. 1157 (E.D.Va.1979), *aff'd* 620 F.2d 294 (4th Cir. 1980) (action under Section 1983); *Riggs v. Miller*, 480 F.Supp. 799 (E.D.Va.1979) (direct action under the Fifth Amendment). On both occasions, this Court has concluded that, although a plaintiff may have stated a claim under State tort law, he failed to show a constitutional deprivation entitling him to proceed with his federal cause of action. In the present case, the Court again finds that the plaintiff has failed to state a claim actionable under Section 1983. It is clear from the record that he was accorded the full measure of the due process of law to which he was entitled under the Fourteenth Amendment. Therefore, any deprivation of liberty or property which the plaintiff may allege occurred only as a result of or attendant to constitutionally legitimate proceedings. This ends the Court's inquiry into the malicious prosecution and abuse of process claims under Section 1983.

[5, 6] The Court must also determine, in accordance with its diversity jurisdiction, whether the plaintiff has stated claims for abuse of process and malicious prosecution under Virginia State law. To maintain a malicious prosecution action in Virginia, a plaintiff must allege and prove (1) that the prosecution was set on foot by the defendant and that it terminated in a manner not unfavorable to the plaintiff; (2) that it was

instituted, or procured by the cooperation of, the defendant; (3) that it was without probable cause; and (4) that it was malicious. *Ayyildiz v. Kidd*, Va., 266 S.E.2d 108, 110 (1980). The Virginia Supreme Court has noted in recent opinions that malicious prosecution actions are not favored in Virginia. *Id.*; *Pallas v. Zaharopoulos*, 219 Va. 751, 250 S.E.2d 357, 359 (1979). In applying the four elements listed above to the present case, the Court finds that the role of the defendant in instituting the prosecution is clear; furthermore, it will be accepted that the prosecution ended in a manner favorable to the plaintiff. See *Niese v. Klos*, 216 Va. 701, 222 S.E.2d 798, 800-801 (1976). The plaintiff has failed to show, however, that the prosecution was instituted without probable cause, that is to say, it is clear from the facts alleged that probable cause existed as a matter of law.

[7] Probable cause was determined to exist at two separate stages in this criminal prosecution. First, the plaintiff was taken before a magistrate who certified probable cause and released the plaintiff on bond. Second, after a full factual inquiry, the plaintiff was convicted of the offense in the General District Court. It is clearly established under Virginia case law that a conviction for the offense charged, though subsequently reversed, dismissed, or vacated, is conclusive evidence of probable cause, unless such conviction was procured by the defendant through fraud or by means of evidence which he knew to be false. *Ricketts v. J. G. McCrory Co.*, 138 Va. 548, 121 S.E. 916 (1924); *Klauff v. Virginia Railway & Power Co.*, 120 Va. 347, 91 S.E. 173, 174 (1917).

There is nothing in the record to support a claim that the defendant at any time provided false testimony in order to further the prosecution. In his rebuttal, the plaintiff argues that the defendant must have lied in order for the magistrate and the

1. Indeed the very foundation of § 1983 liability, the seminal case of *Screws v. U. S.*, 325 U.S. 91, 108 09, 65 S.Ct. 1031, 1039, 89 L.Ed. 1495 (1945), noted that:

Violation of local law does not necessarily mean that federal rights have been invaded.

The fact that a prisoner is assaulted, injured, or even murdered by State officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.

trial court to have found probable cause for the search of the vehicle. This argument is feckless.

The Court concludes that the plaintiff has failed to show a necessary element of the malicious prosecution claim under Virginia state law. While it is not obligated to do so, the Court would also note that the plaintiff's showing on the fourth element of the claim, that of malice on the part of the defendant, is also inadequate as a matter of law. The defendant, therefore, is entitled to judgment as a matter of law on the malicious prosecution claim, and that claim will be dismissed.

[8, 9] Finally, a plaintiff claiming abuse of process has the burden of pleading (1) the existence of an ulterior motive on the part of the defendant; and (2) an act in the use of the process not proper in the regular prosecution of the proceeding. *Mullins v. Sanders*, 189 Va. 624, 54 S.E.2d 116, 121 (1949). In a case decided under Virginia law, the Fourth Circuit noted that

The crux of the tort of abuse of process, whether civil or criminal, lies in the malicious abuse or misuse of a process or writ which has been lawfully and properly issued; in other words, although the writ was issued upon the proper grounds and with probable cause, it was caused to issue and was used, not for the purpose for which it was intended but for some collateral object. [Citations omitted.] The regular use of process cannot constitute abuse even though the user was actuated by a wrongful motive, purpose, or intent, or by malice. [Citations omitted.]

Ross v. Peck Iron & Metal Co., 264 F.2d 262, 267-268 (4th Cir. 1959). The plaintiff has not alleged or shown an ulterior motive which led the defendant to institute the prosecution. Nor has he shown that the defendant intended or obtained any collateral consequences in bringing charges. The allegations show misbehavior on the part of the police officer, to be sure, but not an abuse of process. It is therefore appropriate to grant the defendant's motion for summary judgment as to all claims, and this complaint will be dismissed.

Warren RUPPERT, Keith D. Mann, and
David A. Hemond, adult individuals

v.

LEHIGH COUNTY, a political
subdivision.

Civ. A. No. 80-2479.

United States District Court,
E. D. Pennsylvania.

Sept. 19, 1980.

Two former and one present county employees brought suit to recover lost wages and to obtain reinstatement pendent lite. The District Court, Troutman, J., held that: (1) where employees failed to allege existence of any collective bargaining agreement and failed to cite any statutory provision granting them property right in their employment, employees had to be considered employees at will who could be discharged at any time under Pennsylvania law, and (2) although employees did not need to identify any liberty interests in order to vindicate alleged infractions of their right to free speech, where they alleged no more than summary conclusion that county violated their First Amendment right to freedom of speech and failed to specify when, where, and how they exercised their First Amendment free speech rights, employees would be given leave to file more specific complaint within ten days of date of order.

Ordered accordingly.

1. Constitutional Law ⇐46(1)

Whether county employees had constitutionally protected property interest in their employment with county was question of law which discovery process would not affect and court had to decide. U.S.C.A. Const. Amend. 14.

2. Federal Courts ⇐421

Sufficiency of claim that county employees had constitutionally protected prop-

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VIRGINIA:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

GWENDOLYN L. JORDAN

Plaintiff

v.

LB-1601

SAMUEL SHANDS,
JERRY OLIVER,
D. L. WRIGHT,
CECIL RICHARDSON,
C. V. TOWNSEND,
JOHN DOE, and
MARY DOE

Defendants

O R D E R

The parties came on the demurrer of all defendants to the amended motion for judgment and their pleas of the statute of limitations, and memoranda and argument were received and heard.

Plaintiff's claim is based on her mistaken arrest by the defendant Cecil Richardson of the Richmond Police Department, on June 21, 1995, based on a capias for the arrest of Gwendolyn M. Jordan issued by the General District Court of Dinwiddie County and information communicated to Richardson by Townsend of the Dinwiddie Sheriff's Department. Plaintiff's name is Gwendolyn L. Jordan.

Plaintiff's causes of action are grounded in false imprisonment, defamation, intentional infliction of emotional distress and malicious prosecution. In her brief, plaintiff concedes that she has failed to state a cause of action based on malicious prosecution.

The operative facts supporting the plaintiff's claims occurred on June 21, 1995. Her motion for judgment was filed on June 27, 1996. Plaintiff's causes of action arose prior to July 1, 1995. All carry a one year statute of limitations as provided in

Virginia Code Ann. § 8.01-248. Her claims are, therefore, time barred.

No cause of action is stated against either Chief Oliver or Sheriff Shands. As the statute of limitations disposes of all claims, the court does not address the merit of the arguments for and against the grounds for demurrer. The pleas of the statute of limitations are sustained.

It is, therefore, **ORDERED** that the amended motion for judgment is dismissed as to all defendants. Plaintiff's objections are noted.

A copy of this order was this day mailed to counsel of record.

ENTER

3/19/97

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V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Courts Building

GWENDOLYN L. JORDAN,
Plaintiff

v.

Civil Case No.: LB-1601-3

CITY OF RICHMOND, VIRGINIA
and
SAMUEL SHANDS
Defendants

APR 10 1997

DEVILBAND, CLERK
D.C.

NOTICE OF APPEAL

Gwendolyn L. Jordan, plaintiff in the above styled civil case, by counsel, does hereby appeal to the Supreme Court of Virginia, from the final Order of this Court entered on March 19, 1997, sustaining the the demurrers of the defendants on the basis that the claims asserted are time-barred.

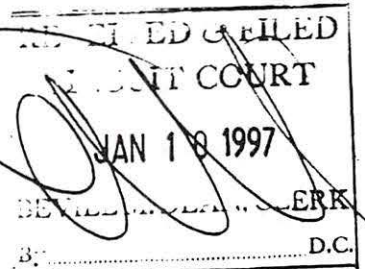
No transcript or other incidents of trial will be filed.

Gwendolyn L. Jordan

By

OF COUNSEL

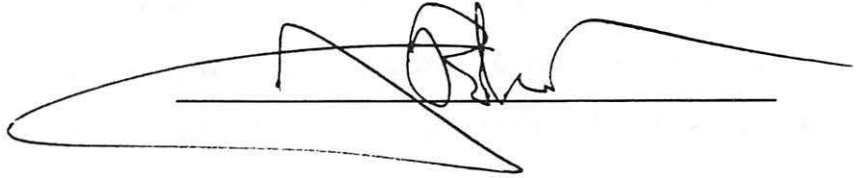
Donald J. Gee
James T. Edmunds
McEachin and Gee, P.C.
700 E. Main Street
Richmond, VA 23219
(804) 775-2374



CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was mailed, postage pre-paid, to Henry C. Spalding, III, Counsel for Sheriff Samuel Shands, et als, Sands, Anderson, Marks & Miller, 801 E. Main Street, Richmond, VA 23219 and to William Joe Hoppe, Senior Assistant City Attorney, Counsel for the City of Richmond et als, Room 300-City Hall, 900 E. Broad Street,

Richmond, VA 23219, this 8th day of April,
1997.

A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be a cursive name, possibly "John" or "Jonathan".

II. ASSIGNMENTS OF ERROR

A. The trial court erred in determining that Petitioner's cause of action alleging false imprisonment is barred by the statute of limitations. Petitioner's argument will establish that such an action is a "personal injury" as contemplated by Va. Code §8.01-243(A) rather than a "personal action" as contemplated by Va. Code §8.01-248. Therefore, a two year statute of limitation must apply.

B. The trial court erred in determining that Petitioner's cause of action alleging intentional infliction of emotional distress is barred by the statute of limitations. Petitioner's argument will establish that such an action is a "personal injury" as contemplated by Va. Code §8.01-243(A) rather than a "personal action" as contemplated by Va. Code §8.01-248. Therefore, a two year statute of limitation must apply.

C. The trial court erred in determining that Petitioner's cause of action alleging defamation is barred by the statute of limitations. While this tort is subject to a one year statute of limitation under Va. Code. §8.01-247.1, it does not accrue in the case of a defamatory statement imputing the commission of a crime, until a claimant is acquitted of that crime.

ASSIGNMENTS OF CROSS-ERROR

1. The trial court erred in failing to also hold, assuming arguendo that the statute of limitations did not bar the false imprisonment claim against Officer Richardson, that the facts alleged failed to support such cause of action against Officer Richardson and that the facts further established that he acted in good faith and with a reasonable belief in the validity of the arrest so as to render his actions lawful and protected by qualified immunity.

2. Assuming arguendo that the statute of limitations did not bar a cause of action for intentional infliction of emotional distress and, further, that Jordan is attempting to also assert such claim against Officer Richardson, the trial court erred by failing to further find that the amended motion for judgment failed to allege sufficient facts to properly state such cause of action.