VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

EDWARD DICKINSON TAYLOE, II,

Plaintiff,

v. Case No. CL19-868

C-VILLE HOLDINGS, LLC, *et al.*,

Defendants.

REPLY IN SUPPORT OF THE DEMURRER OF DEFENDANTS C-VILLE HOLDINGS, LLC AND LISA PROVENCE

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Defendants C-Ville Holdings, LLC d/b/a *C-Ville Weekly*, and Lisa Provence (together, the "*C-Ville* Defendants"), by and through counsel and pursuant to Rule 4:15(c) of the Supreme Court of Virginia, respectfully submit this Reply in support of their Demurrer to the Complaint.

INTRODUCTION

Plaintiff does not contend that *C-Ville Weekly* got any facts wrong in the article at issue. Instead, he is aggrieved by the truthful, if perhaps uncomfortable, presentation of his family history in connection with an accurate report on a subject of public concern. Tayloe argues that readers will infer from the article that he himself is racist, or that his participation in the litigation to preserve Confederate monuments is motivated by racist views. While it certainly is possible that some reader might draw such an inference, the legal test is whether the "reasonable reader" would do so, and—as a matter of law based on the content of the article as a whole—it is clear that no reasonable reader would draw such an inference from the article as published, which is the first of several independent reasons why the *C-Ville* Defendants' demurrer should be sustained. Plaintiff labors mightily in his Opposition to cast the Virginia Supreme Court's opinion in *Pendleton v. Newsome* as foreclosing a demurrer in a defamation-by-implication case. But Plaintiff misreads *Pendleton*, in which the Supreme Court reasserted, rather than abandoned, the gatekeeping function of courts at the demurrer stage in defamation cases, and left undisturbed the heightened showing required of defamation-by-implication plaintiffs in cases involving media defendants reporting on matters of public concern.

Nor is Plaintiff able to overcome the other grounds for demurrer raised by the *C-Ville* Defendants: Even if the article could be said reasonably to communicate any defamatory meaning, such meaning would constitute non-actionable opinion, and in any event is not "of and concerning" Tayloe. Finally, Plaintiff does not dispute that the article addresses issues of public

concern. As such, and because Plaintiff does not and cannot allege any fact sufficient to show that the *C-Ville* Defendants published the article with constitutional malice, the Court also can and should dismiss the claim pursuant to Virginia's new immunity statute.

ARGUMENT

I. PLAINTIFF HAS NOT STATED A CLAIM FOR DEFAMATION BY IMPLICATION

To state a claim for defamation by implication in this case, Tayloe must demonstrate both that the challenged publication reasonably conveys the alleged implication, and that the publication on its face shows that the defendant intended to convey or endorsed the implication, both of which are questions of law. Mem. in Supp. of *C-Ville* Defs.' Demurrer ("*C-Ville* Mem.") at 9-13 (citing cases). Plaintiff can do neither. First, he proffers a strained, unreasonable reading of the article to reach the three purported implications of intentional racism he alleges here, Pl.'s Opp. to Defs.' Demurrer ("Opp.") at 1, 6, a common tactic by would-be plaintiffs that has consistently been rejected by the courts. Next, he is flatly mistaken when he asserts that the Virginia Supreme Court has disavowed the second prong of the test—the requirement that the challenged publication demonstrate on its face that the defendant intended or endorsed the implication—in cases involving media defendants and matters of public concern such as this one.

A. Plaintiff's Claimed Implications Are Not Reasonably Conveyed By The Article

To survive the Demurrer, Plaintiff must demonstrate that the article is reasonably susceptible to the implications alleged, when read as a whole. *See Schaecher v. Bouffault*, 290 Va. 83, 93-94, 772 S.E.2d 589, 595 (2015). Like numerous libel plaintiffs before him, in both his Complaint and in his Opposition, Tayloe rewrites the article and thereby impermissibly "extend[s]" the challenged language "beyond its ordinary and common" meaning. *Webb v. Virginian-Pilot Media Co.*, 287 Va. 84, 89, 752 S.E.2d 808, 811 (2014). In particular, Tayloe

cherry-picks phrases and separates those phrases from their context in the article, while ignoring passages that contradict the implications he proffers.

Tayloe's principal argument rests on the introduction to the article, which states that *C-Ville Weekly* had "reached out to the plaintiffs [in the monuments lawsuit] to find out why they joined the suit and whether anything had changed for them since 2017. Here's what we found out." Opp. at 8, 10, 13, 24 (quoting Compl. Ex. A at 3). He contends that "the recitation of his family's slave-owning history was presented in the Profile as an answer to the question of why [Tayloe] joined the lawsuit." *Id.* at 10. This is the kind of strained reading that courts reject. First, the article expressly reports that, despite their attempt, the newspaper had *not* reached Tayloe and was thus unable to ask him why he joined the suit or whether anything had changed for him since 2017. Compl. Ex. A at 4. A reading that requires the Court to ignore language contradicting the plaintiff's proffered meaning is not a reasonable and ordinary one. *See, e.g.*, *Webb*, 287 Va. at 90, 752 S.E.2d at 812 (alleged implication not reasonable where article "disclaimed" proffered meaning with other language).

Indeed, to adopt Plaintiff's proffered reading of the article as asserting that intentional racism was his motive for joining the monument litigation would improperly require ignoring several other passages that contradict his reading. For example, Plaintiff asserts that "his stated justification for joining" the monuments litigation was "his commitment to the preservation of war memorials, military service, and past presidency of an organization that contributed to the maintenance of the statutes." Opp. at 26. Yet, each of those "justifications" is in fact expressly reported in the article. Compl. Ex. A at 4; *C-ville* Mem. at 2-3, 6, 8, 14. Additionally, the article quotes Plaintiff's cousin, who envisions that, "through continued conversation," his relatives who support the monuments litigation "might see things from a different perspective and

understand the bitter feelings and abhorrent racism associated with Confederate monuments." Compl. Ex. A at 4-5. This suggests *not* that Tayloe family members who support the monuments litigation do so because they are consciously racist but, rather, because, rightly or wrongly, they do not associate the monuments with abhorrent racism at all; that is, they have a "different perspective" and, for them, the monuments carry a different meaning.[1] And even if the undisputed, factual history about the Tayloe family, together with the truthful public fact that Tayloe is a plaintiff in the monuments litigation, raise in the *reasonable* reader's mind the *question* whether Tayloe is consciously racist, and the reasonable reader answers that question for him- or herself in the affirmative, "the mere raising of questions is, without more, insufficient to sustain a defamation suit in these circumstances." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1098 (4th Cir. 1993) ("Questions are not necessarily accusations or affronts. Nor do they necessarily insinuate derogatory answers. They may simply be . . . expressions of uncertainty.").

Plaintiff also argues that passages about his ancestors give rise to the three alleged implications. Plaintiff argues that "the paragraph [in the article] concerning [] his ancestor John Tayloe III, who 'bred horses and slaves,'" suggests that Plaintiff "comes from a line of racists and holds racist views." Opp. at 10. But the assertion that Plaintiff came "from a line of racists" is not defamatory of him, *see infra* 14-15 and *C-Ville* Mem. at 13-15, and Plaintiff is unable to point to anything in the text of the article that supports the interpretive leap he makes by jumping from the true statement about his ancestors to the separate, purported implication that Plaintiff

[1] Contrary to Plaintiff's assertions about it, the full article at several points ascribes good-faith intentions to the plaintiffs in the monuments litigation. *See, e.g.*, Compl. Ex. A at 1 (describing one plaintiff as "unwavering in his belief that the Civil War was not about slavery, and the statutes of generals Lee and Jackson honor defenders of the state"); *id.* (explaining that, until Charlottesville protests, monuments were considered "harmless pieces of history"); *id.* at 2 ("the 13 plaintiffs" in the litigation "remain[] unconvinced" that statutes "have become tributes to white supremacy and need to go").

himself "holds racist views." Similarly, Plaintiff argues that "the description of his ancestor Benjamin Ogle Tayloe's march of fifty-seven slaves was intended to support the implication that the Tayloe family acted cruelly toward slaves and threatened them with more cruelty as a warning." Opp. at 10. But whether the earlier generations of the "Tayloe family acted cruelly" in their treatment of slaves is not an implication at all—it is a matter of historical record as laid out in the article—and again, not *of and concerning* Plaintiff Tayloe in any event. *See infra* 14.

Plaintiff next cherry-picks phrases from the article discussing his father's role in government when an African-American development was razed by the City. Compl. Ex. A at 4. As the *C-Ville* Defendants observed in their Memorandum, the article reports that the destruction of the development followed a vote, while questioning the quality of the democratic process given the poll taxes imposed on African-American voters at that time. *C-Ville* Mem. at 6, 12. In response, Plaintiff contends that the article implies there was an executive decision overriding a democratic vote. Opp. at 11. But this strained reading is belied by the sentence in question when viewed in the context of the passage in which it appears: Plaintiff's father "was vice-chair of the Charlottesville Redevelopment and Housing Authority when the decision was made to raze the African-American community of Vinegar Hill over the objections of its residents, *many of whom were unable to vote on the issue because of a poll tax*." Compl. Ex. A at 4; *see Perk v. Vector Res. Grp.*, 253 Va. 310, 316, 485 S.E.2d 140, 144 (1997) (sustaining demurrer to claim based on statements about handling of client accounts that plaintiff-attorney alleged adversely affected his reputation for integrity because "innuendo cannot be employed to 'introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain'" (citing *Carwile v. Richmond Newspapers*, 196 Va. 1, 7, 82 S.E.2d 588, 591 (1954)).

Plaintiff claims there "is no justification for the inclusion of the information about the Tayloe family but as an answer to the question of why Tayloe joined the suit." Opp. at 10. But the "justification" is obvious: Historical facts can be critical to understanding contemporary issues. This is true whether Plaintiff's motivation for joining the suit flows from conscious *or unconscious* bias, or from some other source, such as the preservation of artifacts of history that an organization he headed paid money to restore (a fact reported in the article). The history of a so-called "First Family," already well-researched and previously the subject of multiple publications, is of obvious relevance to understanding the context in which the monuments litigation of today is taking place.[2]

Thus, the demurrer to Plaintiff's claim for defamation should be sustained for the straightforward reason that "an implication defaming [him] cannot be *reasonably* drawn" from the challenged article. *Webb*, 287 Va. at 91, 752 S.E.2d at 812 (emphasis added).

B. The Law Requires This Plaintiff To Make The "Rigorous Showing" That Defendants Intended Or Endorsed Any Defamatory Implication Reasonably Communicated By The Article

Even if the Court were to hold that the article conveys to reasonable readers one or more of the purportedly defamatory implications alleged by Plaintiff, the demurrer to his defamation-by-implication claim should still be sustained for the separate reason that he is unable to satisfy the second prong of the threshold legal test for such claims: As the *C-Ville* Defendants pointed out in their opening Memorandum, where such a claim is asserted against a media defendant

[2] Plaintiff's contention that Defendants "[i]ncluded no information about the family tree of any of the other twelve Statute Litigation plaintiffs," Opp. at 11, is puzzling given that, earlier in his brief, he observes that "the family relationships of other plaintiffs are explored," and he goes on to recount those passages from the article, *id.* at 10. Although Tayloe is the only Plaintiff who belongs to a "First Family" of Virginia, making his family's history particularly noteworthy and accessible, details of other plaintiffs' ancestors are in fact referenced in the article.

based on true statements in a report on matter of public concern, the plaintiff "must make an especially rigorous showing" not only that the "language [of the challenged publication can] be reasonably read to impart the false innuendo," but also that, on its face it "affirmatively suggest[s] that the author intends or endorses the inference." *Chapin*, 993 F.2d at 1092-93 (applying Virginia law); *see also, e.g.*, *Lamb v. Weiss*, 62 Va. Cir. 259 (2003) (citing *Chapin* and sustaining demurrer as to all but one of challenged statements); *Steinla v. Jackson*, 42 Va. Cir. 281 (1997) (citing *Chapin* and sustaining demurrer as to challenged statements). Plaintiff's contention that Virginia no longer recognizes this *constitutional* limitation on defamation claims rests on a misreading of the Virginia Supreme Court's decision in *Pendleton v. Newsome,* 290 Va. 162 (2015). *See* Opp. at 2-5, 12-13.

Pendleton involved a mother whose daughter tragically died from an allergic reaction to a peanut she received from a classmate at school, and school officials who misled the public by juxtaposing statements that together gave the inescapable false impression that the mother had failed to follow critical procedures relating to her daughter's deadly allergy and thereby caused her death. 290 Va. at 166-70. Specifically, the school's statements expressing sadness about the girl's death included admonitions that it is "a parent's responsibility" to take specific steps to ensure a child's safety and that the school "relies on parents to follow through." *Id.* at 168. In fact, the mother, herself a nurse, *had* followed the school's instructions on allergy management, *id.* at 166-67, and she alleged that the school's statements therefore reasonably conveyed the false factual implication that she had not and that this implication was defamatory. *Id.* at 167.

As Plaintiff Tayloe correctly points out, the Supreme Court in *Pendleton* rejected the defendant's request to impose the "intend/endorse" prong of the threshold test for claims of defamation by implication. But Tayloe ignores entirely the *reason* the court did so. In declining

to apply that second prong of the test, the Court in *Pendleton* observed that, in the case before it, the plaintiff "was not a public figure, the defendants were employed by government agencies but were not officials generally known, the publicity attending the subject matter lasted only a few days, and the freedom of the press is in no way impacted." 290 Va. at 174 n.5. The Supreme Court expressly "contrast[ed]" that situation from the one in *Chapin*, "in which the defendants were members of the press, the plaintiffs were public figures, and the subject matter touched on matters of public concern," in which circumstances "'the *constitutional* protection of the press reaches its apogee.'" *Id.* (emphasis added). In other words, Plaintiff Tayloe is flatly wrong when he asserts that the Virginia Supreme Court in *Pendleton* held that "the Fourth Circuit interpreted Virginia's *common law* incorrectly." Opp. at 12 (emphasis added). The Virginia Supreme Court in *Pendleton* expressly recognized that the principle in question was a federal constitutional requirement fully applicable to a particular class of cases, but it held as a factual matter that the case before it did not fit within that class of cases. And as Plaintiff Tayloe tacitly concedes by his silence, *this* case, a claim for defamation by implication against a media defendant based on true statements in a news report on a matter of public concern, falls squarely within the class of cases to which the principle articulated in *Chapin* applies.[3]

Plaintiff also contends that the ruling in *Pendleton* casts doubt on a court's power to resolve a defamation case at the demurrer stage. Opp. at 2-3. But the Virginia Supreme Court has consistently reiterated the importance of the Circuit Courts' gatekeeping role in defamation cases, including in *Pendleton* itself: "Virginia law recognizes a claim for defamation by inference, implication, or insinuation, but we made it clear that ensuring that defamation actions

[3] Plaintiff admits that "the [*Pendleton*] court acknowledged in footnote 5 that the facts in *Chapin* were different from those in *Pendleton*" but argues nonsensically that "the body of the opinion directly contradicts *Chapin* and its 'rigorous showing' requirement." Opp. at 12. Because the Court in *Pendleton* was dealing with a different class of case, it is not surprising that it applied a different requirement.

proceed only upon statements which may actually defame a plaintiff 'is an essential gatekeeping function of the court.'" 290 Va. at 172 (quoting *Webb*, 287 Va. at 89-90, 752 S.E.2d at 811). Indeed, in a decision issued the same day as *Pendleton*, the Court held that a demurrer should have been sustained. *Schaecher*, 290 Va. at 89, 772 S.E.2d at 592. There, the defendant had made numerous statements criticizing the plaintiffs, who alleged that the statements implied they were lawbreakers, without integrity, and dishonest. *Id.* at 90, 772 S.E.2d at 593. The Court, however, examined the critical statements in context and determined as a matter of law that plaintiffs' proffered interpretations of them were not reasonable. *Id.* at 94, 772 S.E.2d at 595 ("[A] court must decide as a threshold matter of law whether a statement is reasonably capable of defamatory meaning before allowing the matter to be presented to a finder of fact.") (citing *Perk*, 253 Va. at 316–17, 485 S.E.2d at 143–44 (affirming demurrer because "a defamatory charge can[not] be inferred from the statements" without "extend[ing] the meaning of the words used" and concluding "that the alleged statements are not sufficiently defamatory on their face to permit a fact finder to decide whether in fact the statements were actually defamatory.")); *Webb*, 287 Va. at 86–87, 752 S.E.2d at 809–10 (holding that alleged implication was not reasonable, and that trial court had erred by not granting demurrer, *despite* fact that jury had found proffered implication to be defamatory and returned verdict for plaintiff).

Plaintiff Tayloe's protestations notwithstanding, these longstanding principles of Virginia law as applicable in cases like this one were not upset by *Pendleton*, they were confirmed by it. The demurrer should be sustained for the independent reason that Plaintiff cannot meet his burden of showing that the article, on its face, demonstrates that the *C-Ville* Defendants intended or endorsed any defamatory implication that could be said to reasonably flow from it.

II. THE DEFAMATORY IMPLICATIONS ALLEGED BY PLAINTIFF ARE IN ANY EVENT NON-ACTIONABLE OPINION

Even if a defamatory implication were naturally present in the article as a whole and Defendants could fairly be said on the face of the article to have intended or endorsed such an implication, the *C-Ville* Defendants pointed out in their opening Memorandum that Plaintiff's claim would still be legally defective because the purported implications he alleges constitute non-actionable opinion. *C-Ville* Mem. at 15-18. Plaintiff's response is to argue that only opinions conveyed in an "editorial" or delivered as a "screed" qualify as constitutionally protected opinion. Opp. at 24-26 & n.4. That plainly is not the law. Instead, as the Virginia Supreme Court instructed earlier this year, "[w]hen a statement is relative in nature and depends largely on a speaker's viewpoint, that statement is an expression of opinion." *Sroufe v. Waldron*, 829 S.E.2d 262, 264 (Va. 2019) (citation omitted). The defamation claim in *Sroufe* was based on a letter from a school superintendent to a principal he was reassigning. In the letter, the superintendent stated that the principal had "failed to ensure" her staff "underst[ood]" and "appropriately" "appl[ied]" certain criteria in assessing students and that her "actions will result in students being required to take [particular] assessments who, under a correct interpretation of the criteria, should not have been required to do so." *Id.* at 263. The Supreme Court held that this letter, measured in tone and setting forth the factual circumstances of the reassignment, "remained opinion because it was relative in nature and depended largely on [the superintendent's] own, independent viewpoint. The Statement therefore was not actionable as defamation, and the claim should not have been submitted to the jury." *Id.* at 264; *see also, e.g.*, *Cashion v. Smith*, 286 Va. 327, 336–37, 749 S.E.2d 526, 531 (2013) (statements from one doctor to another following death of patient that "[t]his was a very poor effort," "[y]ou didn't really try," and "[y]ou gave up on him," were "subjective and wholly depend on [defendant-doctor's]

viewpoint" and thus were non-actionable opinion,); *Chaves v. Johnson*, 230 Va. 112, 116-17, 335 S.E.2d 97, 100 (1985) (letter to city council regarding contract bid, and whether competitor was underqualified and overcharging, was protected opinion notwithstanding business-like tone).[4] Even assuming Tayloe's proffered implications can be fairly read into the article and that it could fairly be said that the *C-Ville* Defendants endorsed those implications, whether Tayloe in fact has acted based upon racially insensitive beliefs is a viewpoint on which, as in *Sroufe*, "reasonable people could disagree," and they are therefore non-actionable opinion. 829 S.E.2d at 264.[5]

Plaintiff cites *Fleming v. Moore*, 221 Va. 884, 275 S.E.2d 632 (1981), for the proposition that statements about a person's motivation are provable as true or false and therefore not opinion. Opp. at 25-26. But that case did not involve a plaintiff attempting to evade the opinion

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[4] It also bears emphasis that the Supreme Court in *Sroufe* reiterated the Circuit Courts' important threshold role in the context of identifying protected opinion, where "'[e]nsuring that defamation suits proceed only upon statements which actually may defame a plaintiff, rather than those which merely may inflame a jury to an award of damages, is an essential gatekeeping function of the court.' In this case, the trial judge ignored that function by consciously disregarding the law and permitting the jury to return a verdict and award damages on a statement that he knew was not actionable as defamation as a matter of law." 829 S.E.2d at 265 (quoting *Webb*, 287 Va. at 90, 752 S.E.2d at 811).

[5] Plaintiff's constricted view of the construct of rhetorical hyperbole is also wrong. After describing the monuments litigation and the view of some Tayloe relatives' reaction to it, the article quotes Professor Schmidt accusing prior generations of the Tayloe family of "roiling the lives of black people" and then expressing dismay that, given this difficult legacy, "this [litigation] is what" Plaintiff Tayloe "chooses to pursue." *See* Compl. Ex. A at 4-5; Compl. ¶ 16(g). Plaintiff asserts that the term "'roiling the lives of black people' would carry a precise factual meaning to readers" and therefore cannot constitute protected hyperbole or opinion, Opp. at 28, but he does not explain how examples of Tayloe family history makes the phrase, or the term "roiling," precise or factually verifiable as true or false. And while course language may be protected as rhetorical hyperbole, Opp. at 28-29, hyperbolic statements need not contain foul words to qualify for protection. *Schaecher*, 290 Va. at 103, 772 S.E.2d at 600 (loose criticisms such as "excessive" and "inexperienced" are non-actionable particularly when voiced by an adversary). There can be no doubt that statements bemoaning "roiling the lives of black people," attributed to an "activist and UVA professor" who regards the Tayloes as among "the bow tie upscale people," qualifies as the kind of "lusty and imaginative" language from an "adversary" that—even if not profane and uncivil—"belong[s] to the language of controversy rather than to the language of defamation." *Schnare v. Ziessow*, 104 F. App'x 847, 853 (4th Cir. 2004) (article containing "stern quotations" and "harsh" criticisms—but no foul language—was protected rhetorical hyperbole).

doctrine by proffering unreasonable implications. In *Fleming*, the plaintiff was a white landowner whose property adjoined the site of a proposed housing development marketed to African-American citizens. The challenged publication was an advertisement placed by the developer captioned "RACISM," in which the developer asserted that plaintiff had opposed the project because he did "not want any black people within his sight." 221 Va. at 887-88 & n.2 (emphasis original). Even on those facts, the Court held that the publication was not defamatory *per se* (thus undercutting Tayloe's allegations here, *see* Compl. ¶¶ 27, 33), and it reversed the circuit court on this point, analogizing to cases from other jurisdictions in which it was held not defamatory per se to call a plaintiff a Communist. *Id.* at 889-91; *see also C-Ville* Mem. at 16-18 & n.3 (collecting cases in which charges of racism and similar motives are held non-actionable). Indeed, Plaintiff concedes, as he must, that "a charge of racism, without more, may not be actionable, just as in *Fleming*," Opp. at 14, but he cannot point to anything in the article at issue in this case that would permit this Court to side-step the result in *Fleming*. Despite the sleights-of-hand Plaintiff attempts in his Opposition, the *C-Ville Weekly* article did *not* call Tayloe racist, and he has *not* been the subject of a "general allegation of racism."[6]

Finally, as defendants pointed out in their opening Memorandum, the alleged implications, even if reasonably conveyed and endorsed by defendants, are non-actionable opinions for the separate reason that they arise out of the undisputed facts disclosed in the article. *See C-Ville* Mem. at 18; *Schaecher*, 290 Va. at 102, 105, 772 S.E.2d at 599, 601 (in section of

[6] Plaintiff also misreads *Milkovich v. Lorain Journal Co.*, which simply stands for the well-settled principle that there is no "wholesale defamation exemption" simply because a statement superficially "might be labeled 'opinion.'" 497 U.S. 1, 18 (1990). Likewise, in *Raytheon Technical Services Co. v. Hyland*, the statement in a performance review that the plaintiff missed goals by specified percentage points was an obviously verifiable statement of fact, and the mere addition of the word "significantly" did not render it an opinion. 273 Va. 292, 304, 641 S.E.2d 84, 91 (2007). These cases simply are not pertinent to the facts of this one.

ruling titled "Protected Fact-Based Opinion," Supreme Court observed that plaintiff, like Tayloe here, "does not contend that the facts underlying the accusation are incomplete or untrue, but rather that the conclusion that she lied is incorrect and thus implies a defamatory fact," and held that, because "[t]he email appears to fully disclose the basis of [defendant's] rationale," the alleged implication that plaintiff had lied was non-actionable opinion) (citing *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 185 (4th Cir.1998) (opinions fully disclosing their factual bases constitute subjective view and are not actionable)); *see also Cummings v. Addison*, 84 Va. Cir. 334 (2012) (publication that "laid out a lengthy series of factual statements and conclude[d] the document with [] interpretation or opinion of what the facts indicate" is non-actionable where reader can "ascribe his or her own interpretation of the facts, and is more than welcome to disagree with [defendant's] opinion as to what the facts show").

Plaintiff's only response to this conclusive authority is his attempt to distinguish *Scheacher* on the ground that the readers of the challenged statements in that case had a "'high degree of familiarity with the situation.'" Opp. at 25 (citation omitted). But even if such familiarity were required, Plaintiff himself expressly contends here that the "Charlottesville readers to which the publication was targeted would necessarily be aware of the social and political climate" about which the article reports. *Id.* at 13-14.

At bottom, Plaintiff has offered nothing in this Opposition to undermine the showing by the *C-Ville* Defendants that the alleged implications Plaintiff reads into the article, even assuming they are reasonably conveyed, are subjective viewpoints expressed in the context of an ongoing public debate, and arise from the disclosed, true facts about the Tayloe family history and Plaintiff's public role as a plaintiff in the monuments litigation. Such viewpoints may be perceived by readers as "right" or "wrong," but they are not actionable precisely because they are

fairly a matter of spirited debate. And that debate is best left for the open arena of public discourse and not the arena of the courtroom.

III. PLAINTIFF HAS FAILED TO DEMONSTRATE THAT ANY DEFAMATORY STATEMENT OR IMPLICATION IS "OF AND CONCERNING" HIM

As Plaintiff would have it, the *C-Ville* Defendants' observation that the challenged statements are not *about* Plaintiff is an "attempt to slip through the door that the *Pendleton* court definitively closed for defamation-by-implication defendants." Opp. at 7. Plaintiff misunderstands both *Pendleton*, *see supra* at 6-9, and the "of and concerning" requirement. The prerequisite that the alleged defamation be *about* the plaintiff is one of constitutional dimension,[7] and applies even in cases involving claims for defamation by implication, *e.g.*, *Schaecher*, 290 Va. at 100, 772 S.E.2d at 598. In that case, for example, the plaintiff alleged that negative true statements about her relative, also an employee, reflected on plaintiff and her business and that she was impliedly defamed by them. The Supreme Court held that the challenged statements were not "of and concerning" the plaintiff and therefore not actionable by her as a matter of law. *Id.* at 93-94, 772 S.E.2d at 595.

Plaintiff concedes that it "'is black-letter law that an individual cannot state a claim for defamation based on descriptions of a relative's misconduct or affairs.'" Opp. at 8-9.[8] He

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[7] *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (statements about police department generally were not "of and concerning" head of department personally as required by First Amendment); RESTATEMENT (SECOND) OF TORTS § 564(g) (1977) ("The question of whether the communication was made of and concerning the plaintiff has been held by the Supreme Court to be one involving constitutional rights.").

[8] Plaintiff nevertheless argues that the cases cited by the *C-Ville* Defendants in which courts dismissed defamation claims based on statements about the plaintiff's relative, *see C-Ville* Mem. at 15, rely on an "irrelevant standard," Opp. at 9. All apart from the fact that the "of and concerning" element of the claim is a constitutional requirement to which Virginia courts must and do adhere, Plaintiff is mistaken about the cited authorities, all of which are from courts in states that do recognize defamation by implication. *See Solaia Tech., LLC v. Specialty Publ'g Co.*, 221 Ill. 2d 558, 852 N.E. 2d 825 (2006) (defamation by implication recognized); *Heeb v. Smith*, 613 N.E. 2d 416 (Ind. Ct. App. 1993) (same);

argues, however, that this only "would be relevant . . . if the Plaintiff had alleged that the description of his ancestors defamed him *by association*. Instead, he has alleged that the description of his ancestors, read in the context of the entire Profile, created in the mind of the ordinary, average reader several defamatory implications *about him.*" *Id.* at 9. Plaintiff relies on a distinction without a difference. Defamation-by-association claims rejected by courts involve plaintiffs who allege that statements about their relatives imply something bad about *that plaintiff*. Yet the "of and concerning" requirement cabins such claims to ensure that the allegedly defamatory content is truly *about* the one complaining and that speech is not improperly chilled. *See C-Ville* Mem. at 13-15. Plaintiff Tayloe's inability to adequately plead that any purportedly defamatory meaning conveyed by the article is "of and concerning" him provides yet another, independent basis on which the demurrer should be sustained.

IV. THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO VIRGINIA'S IMMUNITY STATUTE

The *C-Ville* Defendants explained in their opening Memorandum that, in addition to all of the foregoing, the demurrer should be sustained because Plaintiff's claims are barred by the immunity conferred by Va. Code § 8.01-223.2 for statements regarding matters of public concern that are not made with constitutional "actual malice." *C-Ville* Mem. at 18-20. Plaintiff does not meaningfully dispute that the statute applies in the first instance, although he argues at length (but incorrectly) that he can prove actual malice.

A. The *C-Ville* Defendants' "Immunity" From Suit Is Properly Enforced On Demurrer

Plaintiff contends that application of Virginia's immunity statute to the claim asserted in this case should only be determined after discovery is completed. Opp. at 30. This flies in the

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Bowling v. Pow, 301 So. 2d 55, 59 (Ala. 1974) (same); *Schaefer v. Lynch*, 406 So. 2d 185 (La. 1981) (recognizing defamation by implication except where matters relating to public affairs are concerned).

face both of the statutory language and courts' application of it. The immunity statute by its terms anticipates dismissal in situations like that presented here: "A person *shall be immune* from civil liability for . . . a claim of defamation based solely on statements [ ] regarding matters of public concern that would be protected under the First Amendment to the United States Constitution . . . . Any person who has *a suit against him dismissed pursuant to the immunity provided by this section* may be awarded reasonable attorney fees and costs." Va. Code § 8.01-223.2 (emphasis added). Whether the article at issue addresses a matter of public concern and whether the challenged statements are protected under the First Amendment present questions of law appropriate for resolution on demurrer. Indeed, just this year, a federal court held that the statute immunized a news report and dismissed the defamation and related claims arising out of it on a preliminary motion. *See Agbapurunowu v. NBC*, No. 18-cv-01555-AJT-MSN, Dkt. No. 24 (E.D. Va. Feb. 1, 2019), *appeal pending* No. 19-1236 (4th Cir.).

Plaintiff cites two federal court decisions for the proposition that the immunity statute does not provide for early dismissal of lawsuits. Opp. at 30. While it is certainly true that Virginia's statute does not create any *special* procedural vehicles for early disposition (unlike similar statutes in some states), neither does it provide that it *cannot* be applied upon demurrer. In both cases cited by Plaintiff, the courts found that the plaintiffs had adequately pleaded facts that, if proven, would establish actual malice and thus denied the preliminary motions to dismiss on that basis, not because the immunity statute cannot be applied at that stage of a proceeding. *See Gilmore v. Jones*, 370 F. Supp. 3d 630, 682 (W.D. Va. 2019), *motion to certify appeal granted*, 2019 WL 4417490 (W.D. Va. Sept. 16, 2019); *Steele v. Goodman*, 382 F. Supp. 3d 403, 427 (E.D. Va. 2019). Thus, assuming the Court agrees with the *C-Ville* Defendants that the Demurrer should be sustained on any one or more of the above grounds, then the Court properly

proceeds to examine whether Plaintiff can meet his burden of showing that the immunity statute does not apply (and that defendants are not entitled to their attorney's fees) because he can show that the statements were published with constitutional actual malice. This he cannot do.

B. None Of Plaintiff's Allegations Of Actual Malice, Taken As True, Could Establish Actual Malice, And The Immunity Statute Therefore Bars His Claims And Entitles Defendants To An Award Of Their Fees And Costs

Section 8.01-223.2 of the Virginia Code provides that its immunity "shall not apply to any statements made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false"—what in the law of defamation is referred to as "actual malice" or sometimes as "constitutional malice." This term of art requires that the plaintiff show that a challenged statement was published with subjective knowledge that it was false, or with "reckless disregard" as to its falsity. *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968). "Recklessness" in this context means that the publisher proceeded with the statement despite having "a high degree of awareness of probable falsity." *Shenandoah Publ'g House, Inc. v. Gunter*, 245 Va. 320, 324, 427 S.E.2d 370, 372 (1993) ("'reckless disregard for the truth ... requires more than a departure from reasonably prudent conduct'") (quoting *Harte–Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989)). Distinct from common law malice or ill will, to establish constitutional actual malice, the plaintiff must present "clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement" at the time of publication. *Jordan v. Kollman*, 269 Va. 569, 577, 612 S.E.2d 203, 207 (2005); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 n.30 (1984). Under Virginia law, a plaintiff cannot show actual malice by relying on a combination of allegations that individually would not constitute evidence of actual malice. *See, e.g.*, *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 295, 362 S.E.2d 32, 42 (1987).

In his effort to meet this burden, Plaintiff makes a number of conclusory assertions, but neither pleads nor proffers in his Opposition any factual allegations that, taken as true, could establish that the *C-Ville* Defendants published the allegedly defamatory material while believing that it was false or while entertaining serious doubts as to its truth. Specifically, Tayloe sets forth the following conclusory allegations, each of which is inadequate as a matter of law:

- Defendants neglected to "question[] Tayloe about 'why he joined the suit'" or speak to his representatives or friends. Opp. at 21; *id.* at 17, 18. As the article recounts, however, Defendants in fact sought out Plaintiff's view and were rebuffed, and reached out to Plaintiff's cousin. *See C-Ville* Mem. at 20 n.4; Compl. Ex. A at 4. More to the point, even had Defendants not made this effort, declining to contact Plaintiff or his supporters would not be evidence of actual malice. *See, e.g.*, *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1510 (D.C. Cir. 1996) (no actual malice where defendant "fail[ed] to contact [plaintiff] himself about the allegations" or "any individual who would have had first-hand knowledge" of plaintiff); *Perk v. Readers' Digest Ass'n, Inc.*, 1989 WL 226143, at *3-4 (N.D. Ohio Nov. 14, 1989) (no actual malice where defendant failed "to contact the subject of the article" or "other sources that would speak favorably of plaintiff"), *aff'd Perk v. Reader's Digest Ass'n, Inc.*, 931 F.2d 408 (6th Cir. 1991). Nor is Tayloe's assertion that questions posed to his cousin were "loaded" evidence of actual malice. *See, e.g.*, *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 597 (D.C. Cir. 2016) (no actual malice even if writer "may have adopted an adversarial stance" (citation omitted)).

- Defendants had a "'pre-selected narrative about racism as the driving force behind the Statute Litigation.'" Opp. at 21; *id.* at 18. Even if this were true, a purported preconception "is not antithetical to the truthful presentation of facts" and here does nothing to show actual malice. *See Jankovic*, 822 F.3d at 597 ("argument that [writer] had concocted a pre-conceived storyline . . . fails to establish actual malice" (citations omitted)); *see also Lohrenz v. Donnelly*, 223 F. Supp. 2d 25, 48 (D.D.C. 2002) ("Any 'pre-existing agenda,' even one which may be noxious to some minds, is not indicative of actual malice."), *aff'd*, 350 F.3d 1272 (D.C. Cir. 2003).

- Defendants did not cite "information provided by any person in a position of authority or credibility" to support the challenged statements. Opp. at 22; *id.* at 18. Defendants however, relied on credible sources for the information provided in the article—court records, IRS filings, archival research, Professor Schmidt, and the published historical works of Dr. Dunn—which negates any finding of actual malice. *See Kollman*, 269 Va. at 581, 612 S.E.2d at 210 (no actual malice where defendant relied on news accounts and other public information in formulating statements); *Jackson v. Hartig*, 274 Va. 219, 230-31, 645 S.E.2d 303, 309-10 (2007) (same).[9]

[9] It is of no moment that Plaintiff believes Professor Schmidt, a Harvard-trained professor at one of America's premiere institutions of higher learning, not to be a credible source. *See Hatfill v. New York*

- Defendants' "lack of investigation of Plaintiff Tayloe's motivations may constitute intentional avoidance of truth, which would support a finding of actual malice." Opp. at 22. This argument is foreclosed by black-letter law. *See Harte-Hanks*, 491 U.S. at 666; *Shenandoah Publ'g House*, 245 Va. at 324-25, 427 S.E.2d at 372; *see also, e.g.*, *Mayfield v. NASCAR, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012) (dismissing on preliminary motion where actual malice allegations relied on alleged failure to adequately investigate); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013) (same); *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 704 (11th Cir. 2016) (same). Plaintiff concedes, as he must, that this is the law but he insists that "alleged additional facts" are cumulatively "probative" of actual malice. Opp. at 22-23. However, for this to be true, a plaintiff must actually *allege* "additional *facts*" that themselves could serve as probative evidence of knowing falsity, *see Richmond Newspapers, Inc.*, 234 Va. at 295, 362 S.E.2d at 42, and that Tayloe simply does not and cannot do.

- Defendants' "decision to include Plaintiff Tayloe's family history was plainly intended to tie his involvement in the litigation to a history of, in their view and in Jalane Schmidt's view, systematic cruelty to and antagonism of people of color." Opp. at 17. This allegation likewise fails. *See Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 597 (D.C. Cir. 1988) (no actual malice by publishers of highly critical articles describing plaintiff's political activities and associations).

- Plaintiff's other supposed examples of actual malice are merely reiterations of his argument that the article falsely called him a racist and tied him to cruel and antagonistic behavior toward African Americans. Opp. at 21. However, even if it were true that the article did so, and even if the article itself contained errors, an allegation of falsity does not equate to an allegation of the separate element of actual malice fault.

Not only do Plaintiff's allegations fail as a matter of black-letter constitutional law to support a finding of actual malice, the article itself negates any finding of actual malice. As Plaintiff acknowledges, the article includes "paragraphs quot[ing] from the Statute Litigation complaint explaining the basis for his standing"—his war service and his associations prompting his interest in the monuments. Opp. at 21; *id.* at 18. In other words, the article presented to the readers the very reasons Plaintiff himself has offered for his involvement in the monuments litigation. While he tries to spin this as evidence that Defendants knowingly falsely implied he is

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Times Co., 532 F.3d 312, 325 (4th Cir. 2008) (no actual malice where defendant had been warned his main source was untrustworthy; source was credentialed in her field and defendant had no reason not to rely on her "even given the expressed disagreement of others with regard to her opinions").

racist, the inclusion of the very information that *Plaintiff* contends prove his true motivations for the monuments litigation is, in fact, the opposite of actual malice. *See, e.g.*, *Lohrenz v. Donnelly*, 350 F.3d 1272, 1286 (D.C. Cir. 2003) ("Reporting perspectives at odds with the publisher's own, 'tends to rebut a claim of malice'") (citation omitted); *Freedom Newspapers of Texas v. Cantu*, 168 S.W.3d 847, 858 (Tex. 2005) (reporting plaintiff's perspective as well "is evidence of the absence of actual malice, not the opposite"). The Court should reject Plaintiff's contention that he has adequately alleged constitutional malice and find that the immunity statute applies, entitling defendants to recover their fees and costs.

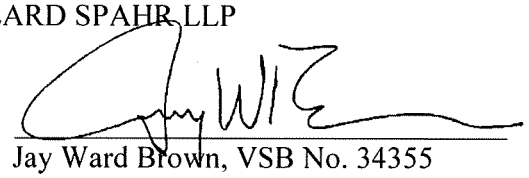
CONCLUSION

For the reasons stated above and in their opening Memorandum, the *C-Ville* Defendants respectfully request that the Court (1) sustain their Demurrer and dismiss with prejudice Plaintiff's Complaint, and (2) award to them their reasonable attorney fees and costs pursuant to Va. Code § 8.01-223.2(B).

Dated: October 21, 2019

Respectfully submitted,

BALLARD SPAHR LLP

By: 

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CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of October 2019, I caused a true and correct copy of the foregoing REPLY IN SUPPORT OF THE DEMURRER OF DEFENDANTS C-VILLE HOLDINGS, LLC AND LISA PROVENCE, to be served on the following persons by First Class U.S. Mail and electronic mail:

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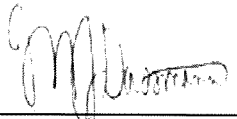

Mara Gassmann