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Case Number 272,2021D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SCOTT D. COUSINS,	:	
	:	
Appellant,	:	
Plaintiff Below,	:	
	:	
v.	:	**No. 272, 2021**
	:	
ROSEMARY S. GOODIER,	:	**On Appeal from the**
	:	**Superior Court of the**
Appellee,	:	**State of Delaware**
Defendant Below.	:	

APPELLANT'S (CORRECTED) OPENING BRIEF

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Dated: October 23, 2021

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NATURE OF THE PROCEEDINGS

Plaintiff is a veteran Delaware bankruptcy and restructuring attorney who practices primarily within the federal system. He was the subject of private professional attacks targeting his religion and race and also falsely branded a racist and religious bigot by another experienced Delaware attorney, who directed her malicious attacks to his Wilmington law firm employer, which forced his immediate resignation rather than risk further attacks on the firm itself. The use of religious, racial, gender and other epithets by members of the Bar is currently a matter of serious debate within the legal community and implicates the recent amendments to Model Rule of Professional Conduct 8.4(g) which were adopted by the U.S. District Court for the District of Delaware and its Bankruptcy Court, but not by this Court for the State of Delaware court system.

The 9,388-word, 180-paragraph and 34-page Complaint was filed on November 30, 2020, and contained four common law counts, including the lead of tortious interference with contract (Count I), as well as defamation (Count II). On July 30, 2021, the Superior Court granted Defendant's Rule 12(b)(6) motion to dismiss in a Memorandum Opinion. (Tab A). A timely Notice of Appeal was filed on August 27, 2021. This is Appellant's Opening Brief.

SUMMARY OF ARGUMENT

1. Defendant is liable for interference with contract because her private email to Plaintiff's private employer unjustifiably interfered with his employment contract. The First Amendment is not an automatic get-out-of-jail-free card excusing all forms of written tortious wrongdoing and application of Delaware's common law has only incidental effects because Defendant's ability to publicly speak out seeking democratic change remains open to her.

2. Defendant is liable for defamation because her racial and religious statements can be proven false objectively, they lowered Plaintiff in the esteem of the community and deterred third persons, such as his law firm, from associating with him. There is no First Amendment immunity for defamatory statements characterized as opinions.

STATEMENT OF FACTS

A. The Parties. Plaintiff Scott D. Cousins is a veteran 29 year Delaware bankruptcy and restructuring attorney, who was: a director and stockholder of Bayard, P.A.; Chair of its Business Restructuring and Liquidations Group; and a member of its Executive Committee. He has successfully represented clients in many of the largest and most complicated business reorganizations, liquidations, and distressed sales and acquisitions in Delaware's federal and state courts. Plaintiff is AV Peer Review Rated by Martindale-Hubbell, a published author and a frequent speaker on issues and developments in bankruptcy and insolvency law. Although employed in Wilmington, he lives in Kennett Square, Pennsylvania. (Compl. ¶¶ 3-4, 17-20; A9-10,12).

Defendant Rosemary S. Goodier is a younger member of the Delaware Bar who works in Wilmington and lives in Chadds Ford, Pennsylvania. (¶¶ 5-7; A10).

B. Plaintiff's Personal Christian Religious Beliefs and Background. Plaintiff has a well-known reputation as a serious professing evangelical Christian. He grew up as a "preacher's kid" and has five pastors in his immediate family, including both Methodist minister parents, as well as two Baptist pastor grandparents. His family includes Native Americans and his ancestors were Abolitionists who: believed the eradication of slavery was one of the primary,

earthly purposes of the Church; believed God's higher laws justified its complete eradication; and fought for many years to end it. Plaintiff has long sought to live his religious faith within both the Delaware Bar and the community, believes racial discrimination is a "grievous sin" and supports numerous social justice projects in Delaware and Pennsylvania. In keeping with his religious convictions, after years of research, Plaintiff also authored an historical novel telling the story about the ecclesiastical battles within the Church in the North and South over the sin of slavery and the Church's role in its eventual abolition before and during the Civil War. Defendant was aware of Plaintiff's reputation as a devout Christian actively involved in his community. (¶¶ 21-45, 99; A12-18,99).

C. The Filing of the *Pro Se* Lawsuit. On August 5, 2020, at 4:21 p.m., Plaintiff filed a *pro se* lawsuit against the Unionville Chadds-Ford School District where he lives seeking to have a committee review the elimination of the use of the letter "U" with a feather as the Unionville high school mascot which he believed had honored Native People. There was no mention of Bayard whatsoever in the lawsuit. (¶¶ 47-50, 155; A19-20,37-38,44).

D. Defendant Attacks Plaintiff By Emailing Bayard Seeking His Firing. Just 51 minutes later, Defendant – in both her individual and representative capacities – sent a private email demanding "support" to Bayard in Wilmington in

which she:

- slurred and smeared Plaintiff's religion and race, and attacked him for having a "white, Christian heritage;"
- stated Plaintiff's lawsuit contained "shockingly racist statements;" and
- stated the lawsuit was "shockingly racist" in its entirety.

The gist of her attacks were that Plaintiff was a white racist and a Christian religious bigot. (¶¶ 53-66, 68, 79, 88, 94, 98-102, 113-19, 133-34; A21-24,26-27,29-30,32-35,46). The President of Bayard confirmed this and admitted that the email "called Cousins a racist." (¶ 88; A27). By contacting Bayard, Defendant intended to get Plaintiff fired from his job. (¶¶ 66, 150-51, 95; A24, 29,36).

E. Defendant Attacks Plaintiff Online. Defendant contemporaneously attacked Plaintiff in social media postings across several online Pennsylvania communities, stating, *inter alia*, he was a white racist and Christian religious bigot. Facebook eventually removed these posts for violating their policies against posting defamatory content. (¶¶ 67-77, 130, 132-33, 141, 84; A24-25,34-35,27).

F. Bayard Forces His Resignation. After receipt of similar communications from "attorneys in town," and out of fear that it would be boycotted by its corporate, business and other clients for being associated with

someone accused of being a racist and religious bigot, Bayard then forced Plaintiff's resignation within 24 hours. (¶¶ 78-98, 2; A26-29,9).

G. Defendant Intends to Injure By Knowingly Making False Statements. All of Defendant's statements and other attacks on Plaintiff were false. Plaintiff is not a racist, nor is he a religious bigot. His *pro se* lawsuit contained no shockingly racist statements whatsoever, it was not shockingly racist in any way and it was not filed to protect his race or religion. (¶¶ 134, 61-65, 51, 114-19, 128-39; A35,22-23,20,32-35). The President of Bayard has admitted that Plaintiff is not a racist, despite Defendant and others' statements to the contrary. (¶ 88; A27). Defendant had actual knowledge that all of these things were false but said them anyway because she acted with malice and wanted to hurt Plaintiff. (¶¶ 144-51, 66-68, 161, 125, 95, 6, 1-2; A36,24,39,34,29,9-10).

ARGUMENT

I. TORTIOUS INTERFERENCE WITH CONTRACT WAS FAIRLY PLED AND THE FIRST AMENDMENT IS NO DEFENSE TO PURELY PRIVATE CONDUCT.

A. Question Presented. Did the Superior Court err in holding that the First Amendment is an absolute bar to all tortious interference with contract claims where the interference takes the form of speech and that this claim is otherwise not adequately pled? (See D.I. 18 at 15-27).

B. Scope of Review. A Rule 12(b)(6) dismissal receives *de novo* review. Windsor I, LLC v. CWCapital Asset Mgmt. LLC, 238 A.3d 863, 871 (Del. 2020). The Court must "view the complaint in the light most favorable to the nonmoving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations." Id.

C. Merits of Argument.

1. The Legal Test. In accord with Section 766 of the Restatement (Second) of Torts (1979) (hereinafter "Restatement"), tortious interference with contract is a five-part test, which requires a plaintiff to prove that:

> (1) there was a contract;
>
> (2) about which the particular defendant knew;
>
> (3) an intentional act that was a significant factor in causing the breach of contract;

(4) the act was without justification; and

(5) it caused injury.

WaveDivision Holdings, LLC v. Highland Capital Mngmt., L.P., 49 A.3d 1168, 1174 (Del. 2012). Even a mere "at will" employment contract is sufficient, and the contract termination itself need not be unlawful. ASDI, Inc. v. Beard Research, Inc., 11 A.3d 749, 751-52 (Del. 2010). This is because the "focus . . . is upon the defendant's wrongful inducement of a contract termination, not upon whether the termination itself was legally justified." Id. at 751 (emphasis in original).

2. The Test is Satisfied. All of these parts are fairly pled in the Complaint.

a. A Contract Of Which Defendant Was Aware. Plaintiff had an employment and stockholder agreement with Bayard as both an employee and director. (¶¶ 46, 90, 109-11; A18-19,28,31-32). Defendant, another Delaware attorney with her own history working for large Wilmington law firms, was aware of it. (¶¶ 109-10, 54, 66; A31,21,24).

b. An Intentional Act That Was a Significant Factor in

Causing the Breach. The proximate cause link[1] is satisfied by Defendant's intentional action in sending her email to Bayard (see Facts at **D.** above), as well as the posting of her online social media attacks. (See Facts at **E.** above).

That these actions were a significant factor in the termination of Plaintiff's contract is demonstrated by several means. First, within 24 hours of her email's arrival Bayard initially demanded, and within 48 hours had actually forced, Plaintiff's resignation upon pain of firing and being labeled a racist within a firm press release. (¶¶ 121, 94-97, 80-91; A33,26-29). This temporal proximity of less than 48 hours is compelling evidence of cause and effect.[2]

Second, the President of Bayard repeated the actual language from Defendant's email in demanding Plaintiff's resignation (¶ 83; A27), admitted he

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[1] See KT4 Partners LLC v. Palantir Techs. Inc., 2021 WL 2823567, at *22 (Del.Super. June 24, 2021) (discussing the law of proximate cause in the context of an interference with prospective contract action).

[2] See KT4, 2021 WL 2823567, at *22 ("To assess proximate causation, the Court must look to the time of the alleged interference"); Lloyd v. Jefferson, 53 F.Supp.2d 643, 676 (D.Del. 1999) (finding that a defendant's comments and actions, and the timing of the same, may establish the proximate cause necessary for an interference with contract claim). There is abundant analogous federal case law in this regard. See, e.g. Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989) (an inference of causation can be established when the adverse action occurs within two days); Marra v. Phila. Hous. Auth., 497 F.3d 286, 302 (3d Cir. 2007) (two days is "unusually suggestive"); Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273-74 (2001) (temporal proximity alone must be 'very close" to establish causation).

had seen it (¶ 88; A27) and also referenced emails, calls and social media posts from "attorneys in town" directed to Bayard. (¶ 84-85; A27). In its totality, this demonstrates that Defendant's email was the "direct cause without which the incident would not have happened." KT4, 2021 WL 2823567, at *22. Plaintiff was a highly regarded firm director, with a sterling professional reputation, he also chaired one of the firm's most successful practice groups. (¶¶ 17-20; A12). Yet Defendant's email was sufficient to change all of this in mere hours, which creates more than a mere inference of causation.

c. Injuries. Plaintiff lost his job, no law firm or business in the local or nationwide legal communities would hire him and he has suffered millions of dollars of financial losses, among other injuries. (¶¶ 97, 100-07, 124, 156-60, 15, 66; A29-31,34,38-39,11,24).

d. Without Justification. Finally, in accord with Section 767 of the Restatement, the fourth part of this test – without justification – is determined by looking collectively at seven additional factors in their totality:

> (a) the nature of the actor's conduct;
>
> (b) the actor's motive;
>
> (c) the interests of the other with which the actor's conduct interferes;
>
> (d) the interests sought to be advanced by the actor;

> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other;
>
> (f) the proximity or remoteness of the actor's conduct to the interference; and
>
> (g) the relations between the parties.

WaveDivision, 49 A.3d at 1174. "These factors can be summarized by simply asking 'whether pursuit of self-interest justified one in inducing another to breach a contract in the particular circumstances.'" Nelson v. Fleet Nat. Bank, 949 F.Supp. 254, 260 (D.Del. 1996) (quoting Irwin & Leighton, Inc. v. W.M. Anderson Co., 532 A.2d 983, 992 (Del.Ch. 1987)).

(1). Helpful Delaware Case Law.

(a). Acts Motivated by Racial Animus Do Not 'Justify' Interference. Importantly, one Delaware court has already held that expressive acts demonstrating race or gender bias cannot meet the factor of "legitimate self-interest," under factor (4) of the overall five part test. In Nelson, a fairly typical race and gender discrimination case brought under Title VII and 42 U.S.C. § 1981, the District of Delaware held that there is "no legitimate self-interest" for tortious interference with contract in inducing a contract breach which is "motivated by racial and gender hatred." Nelson, 949 F.Supp. at 260-61.

In our present case, Defendant similarly invoked Plaintiff's irrelevant, yet

sincerely held religious beliefs in Christianity, as well as his race, as improper religious and racial slurs. Yet Nelson teaches that there can be no legitimate self-interest in the expression of such discriminatory hatred towards another.

(b). Racial and Religious References By Attorneys in Employment Matters Are 'Unjustified.' Indeed, more is expected of Delaware attorneys. As one Delaware court recently explained, "[v]iolations of statutory and common law, as well as legal standards of behavior more broadly, satisfy the independent wrongfulness requirement." KT4, 2021 WL 2823567, at *19 (citing Restatement § 767 cmt. c.).

Beyond just the limited context of interference with contract claims, the Third Circuit has more broadly cautioned federal court practitioners – like Plaintiff and Defendant – in ways *apropos* to our present case. The contract Defendant was interfering with was an employment one and the Third Circuit has made it clear that the verbal use of race by attorneys in an employment related matter is "unacceptable." Springer v. Henry, 435 F.3d 268, 283 n.14 (3d Cir. 2006). "We deplore any introduction of race into a case where race is not at issue." Id. The specific issue the Springer Court addressed there was an attorney stating that a plaintiff was a "white male" in a case where the defendant was a black female but where race was not otherwise an issue in the case. Similarly, referring to Plaintiff

as being "white" had no basis other than to make a forbidden racial reference in an employment context – namely, that in order to protect its own economic interests Bayard must fire its "white" employee who allegedly was trying to protect his "white [] heritage." Invoking Plaintiff's deeply held religious beliefs in Christianity also is improper conduct to be similarly "deplore[d]." Id. And the violation of such "legal standards of behavior . . . satisf[ies] the independent wrongfulness requirement." KT4, 2021 WL 2823567, at *19.

(c). Violation of the Ethics Rules Are 'Unjustified.' In the words of the Restatement –

> Violation of recognized ethical codes for a particular area of business activity or of established customs or practices regarding disapproved actions or methods may also be significant in evaluating the nature of the actor's conduct as a factor in determining whether his interference . . . was improper or not.

Restatement § 767 cmt. c.

Here, Defendant invoked Plaintiff's sincerely held religious beliefs in Christianity as a pejorative religious slur, and used his race in the same prejudicial way. Such misconduct violates the plain text of Model Rule 8.4(g),[3] applicable in

[3] See ABA Model Rule 8.4(g) (religious or racial harassment or discrimination is an ethics violation); id. at cmt. 3 ("Discrimination and harassment by lawyers . . . includes harmful verbal . . . conduct that manifests bias or prejudice towards others . . . and derogatory or demeaning verbal . . . conduct."); ABA Formal Op. 493 at 7-9, 11 (explaining the same).

the federal system in which both parties practice.[4] Neither how Plaintiff worships God nor the color of his skin are relevant and the use of such biased, derogatory, harassing and discriminatory terms in this way is ethically improper. As a result, under § 767 of the Restatement, and in the words of part (4) of the interference with contract test found in § 766 of the Restatement, Defendant's "act [of contacting Bayard] was without justification."

(d). Targeting a Plaintiff's Employment in Response to Protected Petition Clause Activity is Not 'Justified' Either. In Lloyd v. Jefferson, 53 F.Supp.2d 643 (D.Del. 1999), the plaintiff wore two hats, first as a contract employee of the State of Delaware, and second, as an officer of a mobile home park. Various DNREC enforcement officers, who later became the defendants in the plaintiff's lawsuit, began to contact and eventually issued citations to her because of issues at the mobile home park. The plaintiff responded and exercised her First Amendment petition clause rights by contacting various officials in the Delaware executive branch and raising concerns, both on the merits of the underlying issue and also with regard to the specific conduct of one of the officer defendants. Id. at 649, 651.

The officer defendants were unhappy about the plaintiff's protected petition

[4] See D.Del. Local Rule 83.6(d); D.Del.Bankr. Local Rule 9010-1.f.

of the government. They conferred and decided that plaintiff "needs to be reeled in!" They did so by meeting with her State employment supervisor, where they 'spoke' and: accurately recounted certain things; lied about others; and omitted key facts to create a false impression about more. This caused the State to non-renew her contract. Id. at 650-52. The plaintiff then sued the officer defendants, including a pendent state law claim of interference with contract. Id. at 650, 676-78.

On the without justification part of the test, the Court looked to the seven collective § 767 factors and found three to be "particularly relevant" under the facts of the case and weighed in the plaintiff's favor. Id. at 677. On prongs (b) and (d), motive and self-interest –

> Plaintiff asserts . . . that defendants were motivated by a desire to interfere with her employment contract in retaliation for plaintiff's complaint against [one defendant] for alleged gender discrimination. Therefore, plaintiff claims that defendants were not asserting legitimate self-interests in seeking the termination of her employment contract.

Id. In our present case, there is no question that Defendant was trying to interfere with Plaintiff's employment contract and get him fired from his Delaware job in retaliation for filing his *pro se* lawsuit in Pennsylvania. Continuing, on prong (f) proximity of defendants' act to the interference –

> At this stage of the proceeding, at least, plaintiff has established that

> there was an immediate and direct chain of events initiated by the defendants that led to an immediate interference or termination of plaintiff's employment contract.

Id. This factor here also is satisfied and was addressed at Argument **I.C.2.b.** above.

Finally, the Lloyd defendants offered up a defense that "their actions in reporting waste of State resources was in fact laudable" and should be commended. Id. The Court responded, finding, "[l]audable though these actions may have been, there is a factual dispute regarding defendants' intent . . . [t]herefore, summary judg[]ment on [plaintiff's] claim of tortious interference with her contract is precluded." Id. at 677-78. Stated another way, because there was a fact dispute on just what the defendants had intended by their actions – to injure the plaintiff out of spite or to report wrongdoing – a jury was required to resolve this fact dispute. Applied to our present case, no matter how loudly Defendant protests the nobility and claimed value of her cause, such subjective motivations do not justify contractual interference.

(2). Defendant Had No Reason to Contact Bayard.

The key question is whether Defendant had any legitimate reason to 'justify' contacting Bayard. But the Complaint does not reveal any legitimate reasons, nor did Defendant offer up any justification in the lower court. Plaintiff filed his

lawsuit *pro se.* He was representing himself. He was not representing Bayard. He was not identified in the pleading as an attorney for Bayard. Bayard was not listed or identified on the pleadings in any way, shape or form. The *pro se* lawsuit was not filed in a court or a state in which Bayard practices law or even has a law office. So why would Defendant contact Bayard? The answer is – to send a threatening message that economic harm would result unless they took immediate action.

The Restatement addresses this as well. The interference with contract sufficient to trigger liability "may be a statement unaccompanied by any specific request but having the same effect as if the request were specifically made. Or it may be a threat by the actor of . . . economic harm to the third person." Restatement § 766 cmt. k. As the record reveals, the threat demanding "support" worked. (See ¶¶ 81-93, 60; A26-29,22,46).

(3). If Contacting Someone's Public Employer Does Not Insulate the Speaker From Liability, Neither Does Contacting Their Private Employer. And if, under the Lloyd precedent above, there is no "justification" for contacting someone's **public** employer in retaliation for that person's filing of a protected petition of government for redress of grievances, 53 F.Supp.2d at 676-78, *a fortiori*, there is no "justification" either for contacting

someone's **private** employer in retaliation for filing a protected petition of government for redress of grievances. This conclusion is strengthened all the more in light of the Nelson precedent holding that there also is no justification for acts motivated by racial or religious bias or hatred, 949 F.Supp. at 260-61, as evidenced by Defendant's pejorative references to Plaintiff being "white" and "Christian" (¶¶ 1, 53, 61-62, 94, 99, 102, 113, 118; A9,21-22,29-30,32,46), already unacceptable under the Third Circuit's Springer precedent and ethics Rule 8.4(g), both discussed above.

3. Errors Made by the Superior Court.

a. Motive. The Superior Court held that "sole motive" is a required element of the tort of interference with contract. (Op. at 16). This is legal error.

(1). Sole Motive Is Not Required as an Element of the Tort. As set forth in Argument **I.C.1.** above, there are five required parts to establish interference with contract. Motive is not one of them. Rather than being a required element of the legal test, motive is instead merely one of seven factors that are weighed in their totality in determining whether the interference is justified, as addressed in Argument **I.C.2.d** above. There are six other factors in the balancing, which also were pled. (¶¶ 109-26; A31-34).

(2). But Even If It Were, Sole Motive Is Adequately Pled. Even if the test required sole motive as one of its prongs, which it does not, the Complaint satisfies this requirement and demonstrates that Defendant's sole motivation was to interfere with malice in his contract in order to get Plaintiff fired and harm him (¶¶ 144-51, 66-68, 161, 125, 95, 6, 1-2; A36,24,39,34,29,9-10), since she had no other reason to contact Bayard.

(3). Misreading of WaveDivision. The core of the problem is the court misreads the particular cited sentence (see Op. at 16) in this Court's WaveDivision decision by ignoring the sentence immediately preceding it. See 49 A.3d at 1174 ("The defense of justification does not require that the defendant's proper motive be its sole or even its predominate motive for interfering with the contract. Only if the defendant's sole motive was to interfere with the contract will this factor support a finding of improper interference.") (emphasis added). This misreading is further demonstrated by review of the very decision WaveDivision cited in support of this proposition, which also demonstrates that this was not the holding of WaveDivision.[5]

(4). The Lower Court Improperly Conflated Motive

[5] See Hursey Porter & Assocs. v. Bounds, 1994 WL 762670, *15 (Del.Super. Dec. 2, 1994) ("In the instant case, there is no evidence that the Bank's actions were motivated by a desire to injure Porter or to interfere with the relationship between Porter and the Bounds.") (citing Restatement § 767 cmt. d).

With Other Factors in the "Without Justification" Prong (4) of the Test. At its core, the Superior Court here with its emphasis on the political implications of cancel culture (Op. at 16) improperly conflated motive with other factors in the balancing, as review of the Restatement below, and the citation to both WaveDivision and Hursey above make clear.

In the Restatement's words, "[t]here is obviously a very intimate relationship between the factors of motive and of the interests that the actor is trying to promote by his conduct." Restatement § 767 cmt. d. But –

> the factor of motive is concerned with the issue of whether the actor desired to bring about the interference as the . . . reason for his conduct, while the factor of the actor's interests is concerned with the individual and social value or significance of any interests that he is seeking to promote.

Id. Here, the properly defined motive is clear – Defendant had no other reason to send her email to Bayard unless she wished to bring about some kind of trouble for Plaintiff in his employment. This is not a case where the Defendant was trying to do something innocuous and, in doing so, accidentally interfered with Plaintiff's contract with Bayard.

b. Defamatory Falsehood is Not an Element of this Tort.

The conclusion that defamatory falsehood is a necessary element of interference with contract (Op. at 15) also is legal error because, as addressed in Argument

I.C.1. above, it is not.

Although the historical record appears to suggest that this tort initiated in cases involving standalone, independent torts concerning "violence, fraud or defamation," the law in this regard left these ancient limitations behind in 1853. Restatement § 766 cmt. c; see id. ("the significance of Lumley v. Gye[, 118 Eng.Rep. 749 (1853)] lies in its extension of the rule of liability to nontortious methods of inducement.").

(1). Each Tort Protects Different Interests. More fundamentally however, interference with contract and defamation each exist to protect certain differing interests which the common law, and Delaware Constitution, have deemed worthy of protection. Defamation exists to protect the interest one has in their good name and reputation. 'What' was said matters, which is why truth or falsity lies at its core. Contrast this with interference with contract, however, which exists to protect expectation interests arising from contractual relations and prevent unjustified interference with parties in abiding by their contracts. It turns on 'why' it was said, rather than 'what' was said.

c. The First Amendment Is No Bar. While the claim that the federal First Amendment is an automatic get-out-of-jail-free card which always overrules the common law of the States is one which colored the defense briefing

and subsequent court decision below (see, e.g. Op. at 15, 3-4), this novel theory has been found wanting by a range of U.S. Supreme Court decisions and by review of how other Delaware courts have handled similar issues in the past. To be clear, there is no absolute First Amendment privilege from state common law claims.

(1). The Delaware Experience. It cannot be the law that each time contract interference takes the form of private speech, writing or other expressive conduct, the First Amendment automatically trumps state common law as this completely ignores the State's interests in protecting expectation interests arising from contractual relations. For example, as already noted above, in Lloyd, 53 F.Supp.2d at 677, the interference took the form of private speech "reporting waste of State resources," yet was still actionable and in Nelson, 949 F.Supp. at 261, the private expressive conduct therein was found to be unjustified because it was "motivated by racial and gender hatred."

The legal precedent set by the ruling below is that the common law provides no protection for any Delaware attorney subject to unjustified religious and racial slurs directed to his employer with the malicious purpose of depriving him of his ability to earn a living as an attorney, or in the vernacular, to 'cancel' him. That cannot be the law but it is the question before this Court.

(2). The Only First Amendment Defense Available

Was Disclaimed by the Defense. The lower court held that the "same First Amendment protections that insulate Defendant from liability for defamation insulate her from liability for tortious interference with contract." (Op. at 15). The problem here is two-fold. First, as addressed in Argument **II.C.4.-5.** below and as review of the Opinion reveals, the court did not base its Count II (defamation) ruling on any viable First Amendment grounds. Second, and relatedly, Defendant did not move on, and explicitly disclaimed at oral argument any reliance upon, the only applicable First Amendment defamation protection, the "actual malice" standard of N.Y. Times v. Sullivan, 376 U.S. 254 (1964) and Gertz v. Robert Welch, 418 U.S. 323 (1974). (Tr. at 6, 31-32; A52,77-78).

But again, even had Defendant not disclaimed it, this requirement is not, and has never been, an absolute protection but merely heightens the liability standard, which is met under our facts. (See Facts at **G.** above). It is not an absolute defense.

(3). Public Protest and Democratic Change. The Superior Court incorrectly held that, "For me, a statement made in a private email carries the same constitutional protections as one stated through a megaphone on Rodney Square." (Op. at 3-4). Plaintiff respectfully submits this is wrong as a matter of federal constitutional law.

In dismissing Count I, the court relied upon NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), (Op. at 15-16, 17-18), finding the decision "protect[s] the right of individuals to engage in public protest for the purpose of influencing societal or governmental change, even if that protest activity causes economic harm." (Op. at 15-16). Although Plaintiff agrees with this worthy principle, it does not apply to our present case which involved purely private actions directed solely at private actors.

(a). Claiborne Hardware. In Claiborne Hardware, the NAACP petitioned public officials seeking racial equality under the Equal Protection clause but were flatly rejected by their own elected officials.[6] In response and to create political pressure to achieve their goals, they organized an economic boycott of white businesses owned by civic leaders and some of those same elected officials.[7]

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[6] See id. at 889 ("black citizens . . . presented white elected officials with a list of particularized demands for racial equality and integration" but were rejected); id. at 898-900 ("the black members of the committee then prepared a further petition entitled 'Demands for Racial Justice'" which "was presented to public officials" but a "favorable response was not received").

[7] See id. at 889 n.3 ("Many of the owners of these boycotted stores were civic leaders" in the community, while others were elected officials including Aldermen, State Representatives, school board members and members of state-wide political committees); id. at 898 (noting prior petitions to these same civic leaders, business owners and elected officials had been rejected).

(i). Purpose of the Boycott. The widely acknowledged and admitted purpose of this boycott was to secure 'government' compliance with the Fourteenth Amendment:

- "It is not disputed that a major purpose of the boycott in this case was to influence governmental actions . . . Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself." Id. at 914.

- The trial court made a factual finding that the "primary dispute" was with the government. Id. at 892.

- For example, the local NAACP demanded: fire "the entire Port Gibson Police Force;" and when the city refused, the boycott was immediately reimposed. Id. at 902.

- The "acknowledged purpose was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice." Id. at 907.

- It was a "politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." Id. at 914.

- "Petitioners withheld their patronage from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure." Id. at 918.

- It "grew out of a racial dispute with white merchants and city government of Port Gibson and all of the picketing, speeches and other communication associated with the boycott were directed to the elimination of racial discrimination in the town." Id. at 915.

(ii). The Methods Used. Review of the

opinion demonstrates that the methods used were primarily public: picketing, marching, leafleting, pamphleteering, meeting and assembly. See id. at 907-12.

(b). Defendant Did Nothing Publicly.

Defendant cannot here wear the First Amendment mantle since our case involves purely private actions, directed only to private parties, not petitioning of government or calls for democratic change. Unlike the detailed facts of Claiborne Hardware involving citizens seeking to publicly influence democratic change in our representative form of 'government,' nothing our Defendant did has any public or democratic overlay whatsoever.

Nothing Defendant did was done in public or in any public forum. First, she did not access "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks and parks."[8] Nor did Defendant invoke the democratic process in any way, shape or form to affect government policy as in Claiborne. She did not: march in a public protest; hold a sign in a

[8] U.S. v. Grace, 461 U.S. 171, 177 (1983) (striking down a statute banning protestors from carrying picket signs containing the text of the First Amendment on the sidewalk outside the Supreme Court); see generally Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.").

park; hand out leaflets on a sidewalk; video record the actions of police officers on a street; write an op-ed for the newspaper; submit a letter to the editor; sit for an interview on the six o'clock news; sit-in at a lunch counter; petition a government official seeking executive branch enforcement action; try to influence and seek statutory change from elected representatives in the legislative branch; or do anything else to sway public opinion. Instead, from the privacy of her own private home, she sent a destructive private email to Plaintiff's private employer.[9]

(4). Context Matters. Although the lower court addressed general context in its defamation discussion (Op. at 11-12), it ignored the specific context: a private email about events in a Pennsylvania school district, sent to a private employer in Delaware with no involvement or connection to those events in Pennsylvania, sent by a person acting maliciously and with intent to injure as she unjustifiably seeks to interfere in a contractual relationship in Wilmington, Delaware. No First Amendment interest is implicated by such purely private misconduct – motivated by racial and religious animus, in violation of the rules of her profession – and unjustified by any legally cognizable interests.

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[9] The lack of any public overlay to this case is further demonstrated by Defendant's belated abandonment at oral argument below (Tr. at 22; A68), of her motion to dismiss claim that this lawsuit was subject to the Delaware SLAPP statute (D.I. 15 at 1-2), after this claim was briefed and comprehensively rebutted below. (See D.I. 18 at 12-14).

(5). Mere "Incidental Effects" on Speech Do Not Negate State Common Law. Although not on all fours with our present case, the decision in Cohen v. Cowles Media Co., 501 U.S. 663 (1991), is instructive. There, the U.S. Supreme Court rejected a claim that the First Amendment barred a state common law action of promissory estoppel for breach of an oral agreement by a newspaper defendant, whose subsequent publication caused a plaintiff "to lose his job and lowered his earning capacity." Id. at 671. The Court found the case to be controlled by the "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects" on their First Amendment rights. Id. at 669 (emphasis added).

The Court found that application of state common law doctrine was "generally applicable to the daily transactions of all citizens of" the State, id. at 670, and that not even the press with its heightened constitutional status had "special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." Id. (quoting Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937)).

The Court also drew a key distinction, that the plaintiff was not using the state common law claim "to avoid the strict requirements for establishing a libel or

defamation claim." Id. at 671. In accord with the discussion in Argument **I.C.3.b.(1).** above – that the contractual expectation interests protected by interference with contract differ in our present case from the reputation interests protected by defamation – the Court affirmed and recognized that different common law claims protect different common law interests, stating –

> Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages in excess of $50,000 for breach of a promise that caused him to lose his job and lowered his earning capacity. Thus, this is not a case like Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), where we held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress.

Id.

So if common law contractual claims can be enforced over First Amendment objections, logically so too can common law tort claims arising from unjustified interference in those same contracts. Any effect on First Amendment rights is merely incidental to the State's interest in protecting expectation interests in contractual relations. There is no absolute protection of such purely private conduct, all the more so when numerous alternate channels of communication remain open. Defendant's right to march in protest on the Green, shout her views through a megaphone on Rodney Square or hold a sign demanding change on the Circle are not at issue nor have they been curtailed.

d. Trailing Issues. The logic of the lower court's reliance on decisions applying absolute privilege for statements made in judicial proceedings (Op. at 16-18), is flawed. The purpose served by absolute immunity for such statements – the search for truth – is not served by allowing private parties to make statements outside of court that are otherwise unjustified, made with malice and are independently tortious.

Finally, the sole ground given by the court below for dismissing civil conspiracy and aiding and abetting, in addition to interference with contract, was that they failed for the same reasons as the defamation count. (Op. at 18, 15). Given the legal error demonstrated in Argument **II** below as to the defamation holding, this holding too should be reversed and discovery on the John Doe issue allowed to proceed. (See D.I. 12, 14).

II. DEFAMATION WAS FAIRLY PLED AND THERE IS NO FIRST AMENDMENT EXCEPTION FOR OPINION.

A. Question Presented. Did the Superior Court err in failing to apply the long-settled Delaware test for defamatory falsehood and holding there is a blanket First Amendment protection for opinions? (See D.I. 18 at 5-14; D.I. 24 at 2-4).

B. Scope of Review. Review here is *de novo*. See Argument **I.B.** above. Three times this Court has addressed the Rule 12(b)(6) standard of review in the defamation context.[10] In Doe, the Court explained that review of the Ramunno decision demonstrates just what a low bar this really is because it -

> illustrate[s] that even silly or trivial libel claims can easily survive a motion to dismiss where the plaintiff pleads facts that put the defendant on notice of his claim, however vague or lacking in detail these allegations may be.

Doe, 884 A.2d at 459.

C. Merits of Argument.

1. Foundational Principles. The Delaware Constitution has long recognized the importance of protecting an individual's reputation by guaranteeing that "every person" have "remedy by the due course of law" to seek redress for an "injury done him or her in his or her reputation . . . ." Del.Const. Art. I, § 9. The

[10] See Ramunno v. Cawley, 705 A.2d 1029, 1034-38 (Del. 1998) (*en banc*); Doe v. Cahill, 884 A.2d 451, 458 (Del. 2005) (*en banc*); Spence v. Funk, 396 A.2d 967, 968 (Del. 1978).

"open courts" or "remedies" clause of our Delaware Bill of Rights provides a "strong state constitutional basis for remedies to recompense damage to one's reputation." Kanaga v. Gannett Co., Inc., 687 A.2d 173, 177 (Del. 1996). These principles are neither new nor novel. In rejecting the claim that the First Amendment bars opinions from ever forming the basis of a defamation action, the U.S. Supreme Court noted the words of Shakespeare in 1603, as spoken by Iago –

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash;
> . . .
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.

Milkovich v. Lorain Journal Co., 497 U.S. 1, 12 (1990) (quoting William Shakespeare, Othello, Act III, Scene 3). The Third Circuit has recognized that a statement which "undermines [an attorney's] professional reputation and standing in the community . . . is far from an insignificant affront" because "[a] lawyer's reputation is one of his/her most important professional assets." Adams v. Ford Motor Co., 653 F.3d 299, 305 (3d Cir. 2011) (internal bracketing omitted).

2. The Legal Test. The test for defamation is well-known. See Doe, 884 A.2d at 463. The court below held the statements were not defamatory (Op. at 6-15), which was the only factor challenged by the defense. There was no dispute

that the other elements – publication, concerning Plaintiff and a third party's understanding – were met, as review of the Complaint makes clear. (See ¶¶ 128-61, 53, 56, 61-77, 88, 99-107, 1-2; A34-39,21-25,27,30-31,9).

3. Defendant's Statements Are Defamatory. Although notably unmentioned in the decision below (see Op. at 5-15), the test for determining what is, and is not, a defamatory falsehood is "long settled" in Delaware.[11] In our motion to dismiss context, the question is whether there is any reasonably conceivable set of facts by which a jury could find accusations of racism and religious bigotry would "lower [Plaintiff] in the estimation of the community or [ ] deter third persons from associating or dealing with him."[12]

a. Bayard's Actions Confirm This. Would any reasonable person want to be associated with a racist and religious bigot? To answer this question, the Court need look no further than at Bayard's actions. Bayard

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[11] Spence, 396 A.2d at 972; see id. at 969-73 (exhaustively addressing the legal analysis, reaffirming the holding of the seminal defamation decision in Rice v. Simmons, 2 Del. 417 (Del. 1838) and overruling any Delaware precedent arguably to the contrary).

[12] Id. at 969; see id. at 971 ("tends to disgrace a man, lower him in, or exclude him from society, or bring him into contempt or ridicule"); id. at 972 ("the law requires the imputation of something that will dishonor or degrade a man, or lessen his standing in society . . . nor does it afford any countenance or refuge for covert and insidious slander . . . [it] is to be judged by the effect it produces on the mind").

certainly did not want to be associated with such a person and immediately forced out its own longtime employee, Director and Department Chair of its most successful practice. (See ¶¶ 78-97; A26-29).

Even the mere false accusations, which Bayard's own President admitted he knew were in fact false (id. ¶ 88; A27), were enough to "exclude [Plaintiff] from society," id. at 971, and "lessen his standing," id. at 972, even among persons with whom he had worked, side by side, for many years. The "effect it produce[d] on the mind" is clear. Id. The test is met here.

(1). Racist Conduct is an Ethics Violation for a Delaware Attorney. Additionally, that a reasonable Delaware law firm would not want to be associated with a Delaware attorney engaging in racist and religiously bigoted conduct is not surprising given Plaintiff's primary legal practice is in the Delaware federal courts. And as already noted in a related discussion in Argument **I.C.2.d.(1).(c).** above, under the ethics rules which govern attorneys practicing in both of those federal courts, such conduct is an ethics violation for which Plaintiff can be disbarred under Model Rule 8.4(g), its comment and ABA Formal Opinion 493. Despite briefing and argument on this issue below (D.I. 18 at 8, 22; Tr. at 42-43; A88-89), the Superior Court failed to even mention the implications that Plaintiff had violated one of the very ethical rules governing his chosen

profession.

In an analogous case, also occurring in the motion to dismiss context and also involving false statements about a person in their profession, this Court held that the "defamatory matter imputes to plaintiff a characteristic or view incompatible with the exercise of his profession or office, and is actionable because it falls within one of the four specialized categories" of defamation *per se.* Spence, 396 A.2d at 973 (internal punctuation and citation omitted). Being a racist and religious bigot and engaging in racist and religiously bigoted conduct is similarly "incompatible with the exercise of [Plaintiff's] profession" as an attorney and is actionable for the same reason. Id.

4. There Is No Separate First Amendment Protection For Opinions. The Superior Court held "Defendant's comments regarding Plaintiff's lawsuit are her opinions. . . . [A]s opinions Defendant's comments are protected by constitutional privilege." (Op. at 3). The view that mere opinions are never actionable permeates the mistaken analysis within the decision below.

Such a view is consistent with the holding of Riley v. Moyed, 529 A.2d 248, 251 (Del. 1987), see Kanaga, 687 A.2d at 178 ("This Court in Riley stated: Pure expressions of opinion are protected under the First Amendment . . ."), and the Superior Court based seven pages of its legal analysis applying Riley to our case.

(See Op. at 8-15).

But three years after Riley, the U.S. Supreme Court took up this same federal question and ultimately rejected the faulty assertion that there is any independent constitutional protection whatsoever for opinions. See Milkovich, 497 U.S. at 21 ("We are not persuaded that, in addition to [the N.Y. Times-Gertz] protections, an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment."); id. at 14-21 (exhaustively analyzing and addressing the question). This was the cornerstone of the decision below and it is clear legal error.

5. Riley Does Not Govern Our Case. This Court has repeatedly recognized the impact of Milkovich on the scope of interpretation to be given Riley. First, the panel opinion in Kanaga did so. 687 A.2d at 177-81. This was followed by the *en banc* decision in Ramunno which repeatedly did the same. See 705 A.2d at 1036-37; id. at 1038 at n.34.

The Superior Court spent many pages of analysis on a four-part test from Riley. (See Op. at 8-15). Yet this Court in Ramunno "caution[ed] against an overly rigid application of the four-part Riley test," id. at 1038 at n.34, repeatedly explaining that when a statement – even one labeled as an opinion – contains implied or inferred facts, it is actionable under Ramunno, 705 A.2d 1036-38,

Kanaga, 687 A.2d at 177-81, and Milkovich, 497 U.S. at 19.

6. False Statements and Implied Assertions of Fact Are Actionable. Synthesizing these decisions, statements of opinion still can be defamatory when: (1) they "imply a false assertion of fact;"[13] (2) they state facts which "are either incorrect or incomplete[;] or . . . [3] [their] assessment of [those facts] is erroneous, [because] the statement may still imply a false assertion of fact."[14]

7. Errors Below.

a. Objective Truth Matters. While the Superior Court explained that "courts cannot, and should not, evaluate the objective validity of an opinion," and "[t]o do so violates First Amendment standards," (Op. at 4), this position is legal error. The question of objective truth versus objective falsity is at the very core of defamation law. Art. I, § 5 of the Delaware Constitution mandates

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[13] Milkovich, 497 U.S. at 19; see, e.g. Kanaga, 687 A.2d at 178 (removing any ambiguity and explaining Riley allows liability for "implied assertions of fact"); id. at 179 ("a statement of opinion would be actionable if it implies the allegation of undisclosed defamatory facts as the basis for the opinion"); Ramunno, 705 A.2d at 1036 ("a defamation action may lie where an opinion implies the existence of an undisclosed defamatory factual basis"); id. at 1038 n.34 ("Again, in light of our holding in Kanaga that a statement cast as an opinion is actionable if it implies the existence of undisclosed defamatory facts, we caution against an overly rigid application of the four-part Riley test").

[14] Kanaga, 687 A.2d at 177; see Milkovich, 497 U.S. at 19.

that "truth . . . may be given in evidence" in holding "any citizen . . . responsible for the abuse" of their liberty to "speak, write and print." This goes hand-in-hand with Art. I, § 9's requirements that courts shall be open to every person who has suffered an injury to their reputation. These constitutional responsibilities cannot be disclaimed.

b. The Court Intruded on the Jury's Function. Defendant's email contained three statements that this case challenges. (See Facts at **D.** above). One, for example, is that Plaintiff's *pro se* lawsuit, contained "shockingly racist statements." The Superior Court held that this cannot be objectively verified. (Op. at 10). This is legal error.

The actionable assertion of fact is that review of the lawsuit will reveal that it contains "shockingly racist statements." Whether this statement is true is objectively verifiable by review of the lawsuit itself. Does it contain such "shockingly racist statements" or does it not? The Superior Court stated "I think it is highly debatable whether that fact would be verifiable by the face of the lawsuit." (Op. at 10). Respectfully, putting to the side that this statement ignores the Rule 12(b)(6) standard of review, the court cannot make that factual determination without looking at the *pro se* lawsuit, which it did not do. The *pro se* lawsuit is not in the record but is characterized throughout the Complaint and it

contains no racist statements whatsoever, nor is there anything racist (or shockingly so) about it. (See Facts at **G.** above). Nor did the defense ever offer to the court below even one racist statement it purportedly contained.

The Court also expressed concern about trial evidence and jury instructions. (Op. at 9-10). But again, as discussed at oral argument (Tr. at 40-41; A86-87), this is the role of the jury as the conscience of the community and the decider of disputed facts. There is nothing new or novel about this. It is how fact disputes have been resolved in our common law system for centuries. Resolving disputed facts is not the role of the judge at trial, and is certainly not the judicial role at the Rule 12(b)(6) stage where the plaintiff, not the defendant, receives the factual inferences.

c. The Delaware Test Cannot Be Ignored. A fair reading of the lower court's decision is that, as a matter of law, charges of racism and religious bigotry can never be actionable. (See Op. at 8-9, 12).

As addressed in much greater detail in Argument **II.C.3.** above, this is legal error under "long settled" Delaware law going back to 1837, which looks to whether the accusations would "lower [Plaintiff] in the estimation of the community or [ ] deter third persons from associating or dealing with him." Spence, 396 A.2d at 969. Notably, the Superior Court's decision makes no

mention whatsoever of any of this longstanding body of Delaware law, instead unduly relying primarily on foreign decisions, along with giving the sole Delaware decision in Riley an incorrect yet highly deferential 'opinion' interpretation which both this Court and the U.S. Supreme Court have subsequently significantly narrowed, if not outright rejected. See Argument **II.C.4.-5.** above.[15] This was legal error.

Additionally, even foreign case law is more nuanced than the decision below recognizes. The answer to the defamatory meaning question is not 'never.' The answer is 'it depends.'[16] One has to apply the traditional Delaware test, which

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[15] Contrast the lower court's statement that "[t]ort liability does not attach to hyperbole and name calling at common law and under First Amendment principles" (Op. at 6), with this Court's *en banc* conclusion that a "statement is not a protected opinion simply because it contains 'colorful language, catchy phrases or hyperbole.'" Ramunno, 705 A.2d at 1038 n.34.

[16] See, e.g., Ward v. Zelikovsky, 643 A.2d 972, 983 (N.J. 1994) ("Not all accusations of bigotry are automatically non-defamatory . . . Instances may arise in which claiming someone is a bigot will become more than non-actionable insult. Whether an accusation of bigotry is actionable depends on whether the statement appeared to be supported by reasonably specific facts that are capable of objective proof of truth or falsity. The statement might explicitly refer to those specific facts or be made in such manner or under such circumstances as would fairly lead a reasonable listener to conclude that he or she had knowledge of specific facts supporting the conclusory accusation. For example, a claim of bigotry could include claims that the selected person had engaged in specific acts such as making racist statements") (emphasis added); MacElree v. Phila. Newspapers, Inc., 674 A.2d 1050, 1055 (Pa. 1996) ("Although accusations of racism have been held not to be actionable defamation, it cannot be said that every such accusation is not capable of defamatory meaning as a matter of law . . . [a] communication is

the lower court did not do. Again, this was legal error.

d. The Defamatory Publication Did Not Include the Factual Basis for Its Conclusions. The lower court held that Defendant's email was not defamatory because readers were able to independently investigate its defamatory conclusions on their own by looking to the *pro se* lawsuit and to newspaper stories. Stated another way, by looking to documents other than the challenged email itself which contains the defamatory statements at the heart of this case. (Op. at 14). This is legal error as it misinterprets the requirements of this Court's precedents which look to the publication alone in determining if it contains the underlying factual basis, rather than looking at other independent documents.

(1). This Court's Precedents. In Ramunno, this Court was faced with defamation claims against two separate sets of defendants arising out of the publication of a: (1) letter by a local businessman; and (2) newspaper article by a reporter and his newspaper. In addressing the question of defamatory

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defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. A charge of racism clearly could have such an effect on the individual so charged. Where such a possibility exists, it is up to the jury as fact finder to determine its existence") (internal punctuation omitted) (emphasis added); La Liberte v. Reid, 966 F.3d 79, 92 (2d Cir. 2020) (finding accusations of "archetypal racist conduct" to be "a provable assertion of fact, and therefore actionable"); Kyle v. Apollomax, LLC, 2013 WL 5954782, *5 (D.Del. Nov. 1, 2013) (accusing one of being the "devil" when combined with claims of stalking another man's wife are sufficient to support a claim of defamation).

nature of the letter, the *en banc* Court observed:

> What is crucial is that the average reader is unable to discern the source of the statement. Nothing in the letter signals to the audience that Cawley is surmising or reasoning from facts made explicit in the letter. Readers are simply left to wonder what facts underlie Cawley's derogation of Ramunno's real estate portfolio.

705 A.2d at 1037 (internal footnote omitted) (emphasis added). Moving on to the newspaper article and case against the reporter:

> More disclosure of the underlying factual basis – including an exact description of Ramunno's real estate holdings – would shed light on Ramunno's reaction to Cawley's letter and cure the article's potential defamatory character.

Id. at 1038. In both instances, the Court looked to the specific challenged defamatory publication alone, to determine whether that publisher defendant's statements were defamatory. It did not look to outside documents published by third persons not being sued.

Although the importance of the challenged publication containing the explicit factual basis for defamatory statements made therein was first made explicit by this Court in Ramunno, it is consistent with the earlier panel decision in Kanaga where a doctor sued a reporter and a newspaper, among others, because of a defamatory news story.

The factual recitation in Kanaga explained that the challenged newspaper "article does not report any facts to support Ms. Kane's opinion that Dr. Kanaga's

motive in recommending a hysterectomy was monetary gain without concern for the patient." 687 A.2d at 176. Continuing into the legal analysis, this Court explained "we cannot say as a matter of law that 'an ordinary reader would not infer the existence of undisclosed facts'" in support of what Ms. Kane defended as her mere "opinion." Id. at 180.

(2). Discussion. Defendant's email is in the record. (A46). The only relevant question is what does the email itself say. Here, review reveals that it does not state the facts upon which its conclusions are based in order to let the readers of the email decide for themselves. It does not:

- list any "shockingly racist statements" that need "countering;"
- give any examples of how the lawsuit is "shockingly racist;"
- offer any facts or other evidence to support the statement that it was brought by Plaintiff to "protect[] his white, Christian heritage;" or
- quote any part of the lawsuit at all.

Instead, it draws a number of conclusions about the lawsuit, each of which implies an underlying factual basis in the lawsuit consistent with those conclusions. Because of these implications, it "fall[s] squarely within the scope of Kanaga and Milkovich," Ramunno, 705 A.2d at 1037, and Ramunno itself.

Under both *en banc* and panel precedent from this Court as set forth above, it is irrelevant that readers could go out and read the *pro se* lawsuit on their own.

The question in Delaware is whether the email itself set forth the factual basis for its defamatory statements, implications and conclusions. Here it did not. The Superior Court's conclusion to the contrary was in error.[17]

8. Concluding Note. This case cannot be considered in isolation from the current day and age in which Defendant's statements were made. Even more so than being called a religious bigot, the meaning of the term 'racist' has continued to evolve in our society. In ways that did not exist even a few short decades ago, there is now much belated but widespread recognition of the evils of racism generally, all the more so against the shameful past sin of slavery in our country specifically. Next to 'child molester' or 'pedophile,' there is no worse statement that can be made than branding a person a 'racist.' Nothing else has the same destructive force on one's good name and reputation, the very interests the law of defamation exists to protect.

[17] The court also mischaracterized the factual record, stating the lawsuit "had been reviewed by members of Bayard." (Op. at 14). But that is incorrect. The Complaint states the Bayard President quoted Defendant's email and stated that none of the partners "agreed with the lawsuit," (¶¶ 82-83; A26-27), not that they had read it. Yet even such a mischaracterization is not relevant to the defamatory nature question, but instead goes to the issue of proximate cause, on which Defendant did not Move.

CONCLUSION

The decision of the Superior Court should be reversed in all respects.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 14(d)(ii), I certify, based on the word-counting function of my word processing system (Word Perfect X4), that this brief complies with the typeface requirements of Rule 13(a) and the type-volume requirements of Rule 14(d)(I), as it is prepared in Times New Roman 14-point typeface, and does not exceed 10,000 words, to wit, it contains 10,000 words.

/s/ Stephen J. Neuberger
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