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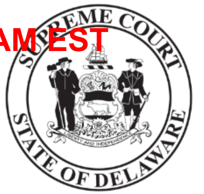

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
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| **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 REPLY BRIEF

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# ARGUMENT

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

**A. What Defendant Does Not Contest.** Defendant abandons the field and makes no argument, reasoned or otherwise, in response to many of the key legal issues thoroughly addressed in Plaintiff's Opening Brief. (Hereinafter "OB"). As a result, the following issues are uncontested.[1]

**1. The Five-Part Legal Test Has Been Met.** In his earlier brief, Plaintiff explained how the five-part Delaware common law test for interference with contract was met. (See OB at 7-18). Defendant does not contest any of the five elements.

For example, on the key legal issue under Delaware common law, Defendant does not contest that her contract interference was "without justification" under the fourth prong of the test and makes no effort whatsoever to justify it under any of the abundant Delaware case law or Restatement provisions Plaintiff addressed. Stated another way, she concedes by her complete silence that she had no legitimate reason to contact Bayard. (Accord OB at 16-17). By surrendering the field here, Defendant agrees the five-part common law test is met.

[1] Defendant also concedes the fairness of Plaintiff's Statement of Facts by offering none of her own.

**2. The Superior Court Erred In Requiring Sole Motive.** Plaintiff also earlier explained how the Superior Court erred in four specifically identified ways by requiring sole motive as a newly added sixth part of this long established five-part test. (OB at 18-20). Other than stating that the Superior Court was correct (AB at 32), Defendant makes no effort to meet or address Plaintiff's reasoned legal analysis explaining how the lower court had misapplied this Court's precedents in ways that a review of the cases themselves, and the key Restatement provision, make clear. Accordingly, Plaintiff's argument here is unopposed.

**3. Defendant Waived the Only First Amendment Defense.** Finally, Plaintiff also explained that Defendant had explicitly disclaimed and waived any reliance upon the only possible First Amendment defense, the heightened "actual malice" liability standard of N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964), and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). (OB at 23). Defendant does not contest this either and it is, yet again, conceded. So the question of private figure versus public figure – and the consequences thereof to the applicable liability standard – is not before this Court.

**B. The Many Defense Errors.**

**1. The Torts Are Independent: Contract Interference Depends on**

**the 'Why,' Not the 'What'.** Defendant is legally incorrect that both the interference with contract and defamation torts arise from the "meaning" of the email (AB at 32), the "injurious falsehood" it contains (AB at 34, 41-42), and 'what' was said.[2]

**a. Each Count Protects Different Interests Here.** As addressed earlier (OB at 21, 29), while defamation protects one's interest in his reputation,[3] interference with contract exists for a different reason, to protect contractual expectation interests.[4] In defamation, the focus is truth versus falsity, which is why 'what' was said matters. (OB at 37-38). But because interference with contract focuses on whether the interference was "without justification," it is not the 'what' a defendant said, but the 'why' she said it, that is key.

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[2] Additionally, Defendant disregards the fact that the defamation Count also addresses the online social media attacks which Facebook removed because of their defamatory content. (See OB at 5).

[3] See, e.g. Kanaga v. Gannett Co., 687 A.2d 173, 181 (Del. 1996) ("The law of defamation embodies the public policy that, generally, individuals must be protected so as to enjoy their good reputations unimpaired by defamatory statements.") (quoting Short v. News Journal Co., 212 A.2d 718, 719 (Del. 1965)).

[4] See, e.g. Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP, 2019 WL 4927053, at *25 (Del.Ch. Oct. 7, 2019) ("The tort of interference with contractual relations is intended to protect a promisee's economic interest in the performance of a contract by making actionable 'improper' intentional interference with the promisor's performance.") (quoting Shearin v. E.F. Hutton Gp., 652 A.2d 578, 589 (Del.Ch. 1994)).

**b. Defendant Has Offered No Justification For Her Actions.** Defendant's lack of a legally cognizable 'why' is addressed in greater detail earlier. (OB at 16-17). But briefly, Defendant simply had no legitimate reason to contact Bayard. She was not seeking to protect or improve her own economic circumstances and financial interests by attempting to get Plaintiff's position as an attorney, Department Chair and/or Director at Bayard, which would be more akin to the factual scenario in the typical contract interference case.[5] No doubt due to her inability to comply with 10 Del.C. § 1906 (requiring Delaware attorneys have "an honest disposition"), Defendant now has belatedly proclaimed an intent to give up the practice of law. (See AB at 6 n.1). But again, despite the opportunity, she has completely abandoned the field and declined to offer any explanation or argument to justify her actions at issue in this case.

**c. Defendant Would Have Been Sued Regardless of the Defamatory Content of the Email.** As referenced earlier (OB at 20-21), contract

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[5] Cf. NAMA Holdings, LLC v. Related WMC LLC, 2014 WL 6436647, at *26 (Del.Ch. Nov. 17, 2014) ("For participants in a competitive capitalist economy, some types of intentional interference with contractual relations are a legitimate part of doing business. Claims for unfair competition and tortious interference must necessarily be balanced against a party's legitimate right to compete.") (internal punctuation omitted). But even in this traditional sphere, it is well-established that the use of lies and misrepresentations are improper and unjustified. See, e.g. Agilent Techs., Inc. v. Kirkland, 2009 WL 119865, at *8 (Del.Ch. Jan. 20, 2009) (finding that "alleged statements purportedly contained misrepresentations of fact" and so "are not legitimate vehicles of competition.").

interference does not turn on the truth or falsity of the email Defendant sent to Bayard. Plaintiff would still be suing Defendant for contract interference even if the email had not been independently defamatory because Defendant's improper interference got him fired from his job. The fact remains that Plaintiff lost his job because of Defendant's unjustified meddling. She has offered no justification for her actions because she has no legally cognizable interest in the balancing. Regardless of the truth or falsity of the contents of her email, Plaintiff brought Count I to hold Defendant accountable for her improper actions in injecting herself into his employment contract. Interference with contract focuses upon this job loss.

**d. The U.S. Supreme Court Has Recognized This Distinction in Interests.** As also addressed earlier (OB at 29), the U.S. Supreme Court explained in Cohen v. Cowles Media Co., 501 U.S. 663 (1991), that because of the different common law interests protected by different common law claims, First Amendment defamation standards do not apply when interests that are different from those protected by defamation are at stake.

In our present case, the interference with contract claim arising out of Defendant's unjustified email focuses upon the 'job loss' and major financial injuries Plaintiff suffered as a result, akin to the "lo[ss of] his job and lowered [ ]

earning capacity" damages at issue in Cohen. Id. at 671. The defamation claim arising out of Defendant's email focuses on the damage to Plaintiff's 'good name' and reputation. As in Cohen, this is not a case where Plaintiff seeks "to avoid the strict requirements for establishing a libel or a defamation claim." Id. Indeed, as the filing of this case demonstrates, Plaintiff also intends to protect his reputational interests and pursue to the fullest his defamation claims arising out of both the email and the social media attacks. But each common law claim in our present case protects different common law interests. There is nothing new or novel about this. Under such two-fold circumstances, any impact on constitutional rights is merely "incidental" and was sanctioned by the U.S. Supreme Court in Cohen. Id. at 669, 672.

**2. First Amendment Errors.** The term "First Amendment" is not a magical talisman that immunizes Defendant's conduct or otherwise automatically trumps state common law claims.

**a. Defendant Waived the Only Applicable First Amendment Protection.** The precise holding of Milkovich v. Lorain Journal Co., 497 U.S. 1, 17-21 (1990), was there is no independent First Amendment defamation protection for opinion. (OB at 35-36). The only recognized First Amendment defamation defense is the N.Y. Times/Gertz liability paradigm which

Defendant waived. (OB at 23). But even had she not waived it, it has never provided absolute protection as it merely heightens the liability standard. So again, there is no First Amendment defamation defense to carry over to interference with contract.

**b. Ignoring the Government Focused Facts of Claiborne Does Not Change Them.** Defendant states that "[n]othing in [NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)] indicated that the First Amendment rights of the boycotters was tethered to the targeting of government." (AB at 36). Yet Plaintiff provided an entire page of bullet point quotes from Claiborne demonstrating that this was in fact the case. (See OB at 25). Ignoring the facts of the case and the very words of the U.S. Supreme Court – including the trial court's factual finding that the "primary dispute" was with the government and that a "major purpose . . . was to influence governmental actions" – does not make them go away. (Id.).

**c. The Public Nature Was Key In Claiborne.** Despite the fact that all of her own actions took place in private (OB at 26-27, 4), the defense appears to begrudgingly concede that all relevant actions in Claiborne – picketing, leafleting, pamphleteering – occurred in public. (See AB at 37). This is in accord with the discussion in Plaintiff's earlier brief, explaining how all of Claiborne's

public actions took place in public spaces and public places, in accord with the long established doctrine of First Amendment public forum law. (OB at 25-26).

**d. "Ample Alternative Channels for Communication" Exist.** Ours is not a case like Claiborne involving "a complete prohibition" on public protest on public issues.[6] But even in such public forums where First Amendment rights are most sacrosanct, and in many other widely varied free speech contexts, the U.S. Supreme Court has long recognized the constitutional significance of "leav[ing] open ample alternative channels for communication of the information." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).[7]

As explained earlier (OB at 29, 26-27), from speaking to a newspaper reporter on the Green, to holding a sign on the Circle, to leafleting on Rodney Square, the "alternative means of communication left open are almost limitless." Regan v. Time, Inc., 468 U.S. 641, 658 n.13 (1984). The sheer number of such communicative options here weigh heavily against Defendant's claim of First

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[6] Claiborne, 458 U.S. at 914 ("The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.") (emphasis added).

[7] Accord, e.g. Hill v. Colo., 530 U.S. 703, 726 (2000) (abortion protests on the public sidewalks); Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 690 (2010) (membership in student groups at public universities); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 535 (1980) (commercial speech).

Amendment infringement. (See OB at 26-27 - giving 11 additional examples).

**e. Inapplicable Defense Cases.**

**(1). Public Actions in Public Places.** The defense characterizes the two paragraph discussion in Claiborne, see 458 U.S. at 910-11, of the prior restraint[8] decision in Org. for a Better Austin v. Keefe, 402 U.S. 415 (1971), as heavy reliance upon Keefe by Claiborne. (AB at 37 - "relied heavily"). But however it is characterized, the brief Keefe decision addressed a pre-speech injunction against peaceful leafleting on public streets and sidewalks, Keefe, 402 U.S. at 415-17 – traditional public forums from time immemorial (see OB at 26) – that failed to meet the "heavy burden" required for such a prior restraint. Id. at 419. But our present case involves only private speech, in a private place, sent to a private employer, occurring only after the speech occurred not before. All are relevant differences of constitutional dimension under the case law.

**(2). Actions Aimed at Public Officials.** Other cases in the deceptive defense string cites reveal similar shortcomings. For example, Defendant refers the Court's attention to Cincinnati Arts Assn. v. Jones, 777

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[8] Prior restraints carry a "heavy presumption against [ ] constitutional validity" since they bar speech before it is spoken, rather than hold it to account only if and after it transgresses the law. See, e.g. N.Y. Times Co. v. U.S., 403 U.S. 713, 714 (1971); Bailey v. Sys. Innovation, Inc., 852 F.2d 93, 98 (3d Cir. 1988); Conley v. Chaffinch, 2005 WL 2678954, *1 (D.Del. Mar. 4, 2005).

N.E.2d 346 (Ohio C.P. 2002). (AB at 43). Plaintiff does the same. As in Claiborne, in Jones, the speech at issue sought to "punish" the City of Cincinnati or "persuad[e]" it to take remedial action, id. at 355-56, by persuading performers to avoid Cincinnati until specific Fourth Amendment racial justice issues were addressed. But in our present case, Defendant's email was not directed to citizens, voters or parents in the Pennsylvania school district at issue in order to pressure them to invoke the democratic process and change things in their district. Instead, it was directed to a law firm in a different city, in a different school district, in a different county, in a different sovereign state. A law firm that does not even have an office in Pennsylvania.

Continuing, City of Keene v. Cleaveland, 118 A.3d 253 (N.H. 2015) (cited in AB at 43), involved the public videotaping of public employees giving out parking tickets on public streets. That court looked to traditional free speech public forum doctrine and concluded that citizens in a democracy have the First Amendment right to protest, criticize and videotape public officials performing their public duties on a public street. Id. at 259-61. This is a far cry from the purely private email to a private employer in our case where no effort was made to influence public officials in a democracy in any way, public or private.

**(3). Where the "Actual Malice" Standard Was Found**

**to Apply.** Other cases cited (see AB at 41-42, 34) relied upon a finding that the "actual malice" standard from defamation law must be met.[9] But, again, it is undisputed that Defendant in our present case waived the "actual malice" First Amendment defense.

**(4). Leaving Out Key Words in Quoted Material.**

Moreover, at least one other citation omits about 40 key words from the end of the proffered quotation, which completely changes its meaning. Defendant quoted a Third Circuit decision as standing for a purportedly helpful legal proposition but omitted the key italicized words in the following quotation –

> unless defendants "can be found liable for defamation, the intentional interference with contractual relations count is not actionable *because there is no basis for finding that their actions were 'improper,' see Adler, Barish, Daniels, Levin, and Creskoff v. Epstein, [] 393 A.2d 1175 (1978), cert. denied, 442 U.S. 907[] (1979) (conduct is improper if taken in the absence of a privilege or justification), or that they unlawfully conspired.*"

Redco Corp. v. CBS, Inc., 758 F.2d 970, 973 (3d Cir. 1985) (non-italicized text quoted in AB at 42). Given Defendant does not even dispute that her actions in our present case were 'improper' and 'unjustified' under the Delaware common law test (see Argument **I.B.1.b.** above), it is clear how the omission of such key language from the Third Circuit decision is material and this decision instead

[9] See Blatty v. N.Y. Times Co., 728 P.2d 1177, 1182-83 (Cal. 1986); Resolute Forest Prod., Inc. v. Greenpeace Int'l, 302 F.Supp.3d 1005, 1016 (N.D. Cal. 2017).

supports Plaintiff.

**f. The Public Concern Test.** Finally, invoking a line of cases not addressed by the Superior Court below, Defendant now also claims that her email is entitled to absolute First Amendment protection because it purportedly addressed a matter of "public concern." (See AB at 37, 38-39). Although Defendant omits the terms of the governing legal test, when those terms are considered, this effort too fails.

**(1). But This Also Depends Upon the Issue Defendant Waived.** In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985) (plurality opinion), the Court surveyed its precedents and explained it is long settled that "the fact that expression concerned a public issue d[oes] not by itself entitle [a] libel defendant to the constitutional protections" of N.Y. Times/Gertz. Instead, this turns on the status of the plaintiff as a public person/official or a private person. Id. Yet, again, Defendant waived the question of Plaintiff's status here. (See OB at 23, Arguments **I.A.3.** and **I.B.2.a.** above).

**(2). The Three Factors.** But out of an abundance of caution, Plaintiff will address Defendant's claimed "public concern" argument. Whether something addresses a matter of public concern is "determined by the content, form, and context of a given statement, as revealed by the whole

record."[10] This "includ[es] what was said, where it was said, and how it was said." Snyder v. Phelps, 562 U.S. 443, 454 (2011).

**(a). Form.** The problem here is the same as already noted repeatedly both above and in Plaintiff's earlier brief. Everything Defendant did was private.[11] She sent a private email. She did not march on the streets or hold a sign in a park. She can invoke no aspect of long-established First Amendment public forum doctrine, be it full or limited purpose. She simply did nothing publicly. (See OB at 26-27).[12]

Finally, the target of her email was not a public official, the government or even the general citizenry. Instead, it was Plaintiff's private employer, a business, not an individual, importantly, an employer in an entirely different state from the state in which the events took place that were the subject of her email.

**(b). Context.** Context was addressed in the

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[10] Connick v. Myers, 461 U.S. 138, 147-48 (1983); Dun & Bradstreet, 472 U.S. at 761; Connolly v. Labowitz, 519 A.2d 138, 141 (Del.Super. 1986)

[11] Plaintiff acknowledges that the analysis of her defamatory social media activities may be different, but those are not the subject of the tortious interference Count.

[12] Additionally, as a private individual and sender, none of the special case law protections for media defendants apply. See, e.g. Kanaga, 687 A.2d at 181-82; Ramunno v. Cawley, 705 A.2d 1029, 1038 (Del. 1998) (*en banc*); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 773-79 (1986).

earlier brief. (See OB at 27). Yet it is key here, too. Defendant's email addressed issues occurring in the Unionville-Chadds Ford School District in Chester County, Pennsylvania. Yet it was sent to an employer in the Christina School District, in New Castle County, Delaware.[13] This employer does not do business in Chester County, nor does it have a law office there. That employer's name was nowhere on the Pennsylvania lawsuit. (See OB at 4). Defendant had no reason to contact Bayard other than to harm Plaintiff. (OB at 10-18).

**(c). Content.** Even if the content of her email would arguably be of interest to taxpayers, voters or parents in the Unionville-Chadds Ford School District, lesser interest in Chester County as a whole (which contains 14 school districts), or perhaps marginal interest throughout the Pennsylvania Commonwealth (500 school districts), it is of no interest whatsoever to taxpayers, voters and parents in the entirely different sovereign State of Delaware (19 school districts), in the entirely different County of New Castle (six school districts) and in the entirely different Christina School District. It does not affect the Delaware public in any way, shape or form. It does not implicate Delaware government, Delaware schools, Delaware taxpayers, Delaware children or Delaware issues. Her email addresses no item of any interest to the

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[13] Using Bayard's address of 600 N. King Street in Wilmington. See https://arcgis.doe.k12.de.us/school_locator/ (last visited on Nov. 14, 2021).

"community" in Delaware where she sent it.[14] For all these reasons, Defendant's email is not of public concern. As a result, "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government . . ." Dun & Bradstreet, 472 U.S. at 760. The "role of the Constitution in regulating state [tort] law is far more limited when the concerns that activated [N.Y.] Times and Gertz are absent," id. at 759, as they are here. Accordingly, Defendant's newfound surprise "public concern" argument fails.

[14] See Snyder, 562 U.S. at 453 ("Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'") (emphasis added) (quoting Connick, 461 U.S. at 146).

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

### A. What Defendant Does Not Contest.

#### 1. The Key Concession That Allows This Case to Continue.

Plaintiff challenged three statements as defamatory (see OB at 5), as Defendant concedes. (See AB at 2). While spilling much ink challenging two of those on various grounds, nowhere in her lengthy brief does Defendant contest or challenge that the third contains an actionable statement of fact sufficient under the case law: her claim that the lawsuit contained "shockingly racist statements." (See OB at 38-39, 43, 37). This alone concedes proper grounds for reversal.

**2. A Fact-Finder Must Look at the Underlying Lawsuit To Determine Truth or Falsity.** Plaintiff explained it is proper for a jury fact-finder to look at the underlying complaint to determine if it contained "shockingly racist statements." (OB at 38-39). Although initially defending the lower court's ruling to the contrary (AB at 20), Defendant later concedes that if an ethics complaint were filed, the fact-finder there "[s]urely . . . would read the . . . Complaint for itself." (AB at 23). But Defendant cannot have it both ways. Either it is proper for a fact-finder to look at the underlying facts, or it is not. Her belated concession that it is proper for a fact-finder to do so is another ground for reversal.

**3. Importance of Reputation to an Attorney.** Finally, Defendant

also does not contest the weighty interest in a person's good name under the Delaware Constitution, or the elevated importance to a federal court attorney of their professional reputation under Third Circuit case law. (See OB at 31-32).

**B. The Many Defense Errors.**

**1. "Derogatory or Demeaning Verbal . . . Conduct."** Rather than respond on the merits to Plaintiff's two-fold reliance upon application of the federal courts' Model Rule of Professional Conduct 8.4(g) in this case (OB at 13-14, 34, 18, 1), Defendant levels the *ipse dixit* claim that "it is utterly implausible" that disciplinary authorities would apply Rule 8.4(g) in this way. (AB at 23).

Plaintiff respectfully suggests that Judge Poppiti's observation is *apropos* here. See Monsanto Co. v. Aetna Casualty and Surety Co., 593 A.2d 1013, 1017 n.3 (Del.Super. 1990) (choosing to disregard a contradictory litigation affidavit from Professor Hazard on the meaning of the ethics rules and instead "accept an earlier analysis [he] developed in a context removed from the heat of partisan litigation."). In the same way, and at a calmer time, these issues were fairly recognized by all, finding such professional rules represent a –

> carve out [from general First Amendment principles which] appropriately empowers bar regulators to restrict the speech of judges and lawyers in a manner that would not be permissible regulation of the citizenry in the general marketplace [of ideas].

Rodney A. Smolla, Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession, 66 Fla. L. Rev. 961, 989 (2015); accord at 967.[15]

The sweep and breadth of the language in Rule 8.4(g) and its comments are well-recognized in the legal community.[16] That this Court declined to adopt it for our state court system takes nothing away from the risk to attorneys, like Plaintiff and Defendant, who practice primarily within the Delaware federal system which has. (OB at 14). Defendant falsely accused Plaintiff of violating the rules governing his profession in the federal court system in which he practices, placing

[15] See also Rebecca Aviel, Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech, 31 Geo. J. Legal Ethics 31, 40 (2018) (explaining that "[a]ny discussion of the First Amendment as a bar to the adoption of Rule 8.4(g) must seriously grapple with" Professor Smolla's acknowledgment that lawyers have ethics exposure because of this "carve out" from First Amendment protections).

[16] See, e.g. Josh Blackman, Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law," 30 Geo. J. Legal Ethics 241 (2017); George W. Dent, Jr., Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political, 32 Notre Dame J.L. Ethics & Pub. Pol'y 135 (2018); Eugene Volokh, A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities, The Volokh Conspiracy (Aug. 10, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/ (last visited on Nov. 19, 2021). The fallacy of the defense claim that the rule is limited to conduct in violation of anti-discrimination statutes (AB at 21) also has been thoroughly discredited in the scholarship. See, e.g. Aviel, Distinguishing, at 50-52.

this case squarely within the scope of the holding of Spence v. Funk, 396 A.2d 967, 973 (Del. 1978). (OB at 35).

**2. Context Matters.** Defendant also cites (AB at 9) a portion of this Court's discussion in Doe v. Cahill, 884 A.2d 451, 466 (Del. 2005) (*en banc*), explaining the need to look to the form and context of the defamatory statement in order to determine if it is actionable as a statement of fact. See id. at 465-66 (surveying the hierarchy of online reliability, ranging from the Wall Street Journal to unmoderated anonymous chatrooms). Plaintiff agrees this is key.

In our present case, a Delaware law firm received an email from a licensed and experienced Delaware attorney, one assumed by her Delaware Bar membership to have "an honest disposition," 10 Del.C. § 1906, and bound by the "Truthfulness in Statements to Others" rule which forbids "mak[ing] a false statement of material fact . . . to a third person." Del.R.Prof.Resp. 4.1. That email purported to report misconduct by the Department Chair of the firm's most successful federal court practice, misconduct that violated Rule 8.4(g) of the ethics rules that govern that federal practice. This is a far cry from an anonymous gripe in the shadowy reaches of an unregulated internet chatroom.

**3. Defamatory Includes Factual.** Citing just a non-Delaware legal treatise (AB at 9), Defendant incorrectly states that Plaintiff conflates

"defamatory" with "factual." But under Delaware law set forth by this Court, *en banc*, prong 1 of the defamation test requires "a defamatory statement," Cahill, 884 A.2d at 463, which requires analysis of two sub-elements: (1) fact vs opinion; and (2) defamatory meaning. Id. Plaintiff properly addressed each separately. (See OB at 33-35 - defamatory meaning; OB at 35-37 - fact vs. opinion).

**4. "The Effect It Produces on the Mind."** The repeated mantra also fails that Defendant did not call Plaintiff a racist and a religious bigot, but only attacked him for filing a racist and bigoted lawsuit. (See, e.g. AB at 26). For 183 years, this Court has clearly, and repeatedly, held that a defamatory statement that "will dishonor or degrade a man, or lessen his standing in society" does not require a "plain and direct charge," it "may depend much on inferential reasoning," the "imputation" need not be "in express terms" and, instead, "is to be judged [ ] by the effect it produces on the mind." Spence, 396 A.2d at 972 (quoting Rice v. Simmons, 2 Del. 417, 433 (Del. 1838) (*en banc*)). The effect it produced on Bayard's 'mind' is clear. In one day, Plaintiff went from sitting in the Department Chair to standing on the unemployment line.

**5. The Factual Basis Must be in the Defamatory Communication.** It is error to argue racist statements did not have to be given to the reader. (AB at 26). Since her email stated the complaint contained "shockingly racist

statements," such a factual basis is absolutely critical and is required under this Court's *en banc* and panel precedents. (See OB at 41-44).[17] It has been the law followed by this *en banc* Court since at least 1838 that the factual basis must be apparent "from the publication itself, or such explanations as it may admit of." Rice, 2 Del. at 429 (quoted with approval in Spence, 396 A.2d at 971). This is "long settled law in this State." Spence, 396 A.2d at 972.

So again, in the same way that the defamation claims were actionable under this Court's *en banc* decision in Ramunno despite the newspaper reader's ability to themselves independently go out and inspect the condition of Mr. Ramunno's properties to determine if he was really a slumlord as charged, so also Plaintiff's defamation claim survives despite the ability of readers of Defendant's email to independently go out, find, review and study Plaintiff's complaint and see if it really contained the "shockingly racist statements" as Defendant contended.

**6. Riley.** The limitations this *en banc* Court placed on the analytical framework of Riley v. Moyed, 529 A.2d 248 (Del. 1987), were addressed earlier. (OB at 36). Yet, as Defendant concedes (Argument **II.A.1.** above and AB at 13), because her assertion the lawsuit contained "shockingly racist statements" is an

[17] The claim that her email is insulated by referring to a Pennsylvania online news story (AB at 24-27) is similarly unavailing as the news story contains nothing racist or bigoted either.

implied (indeed an explicit) statement of fact that is objectively verifiable under the "most important" factor (AB at 17), it is actionable under Riley, so the question of Riley's continued viability can be saved for another day.

No worse statement can be made today than branding someone a racist. (OB at 44). The ongoing legal debate surrounding the Delaware federal courts' adoption of Rule 8.4(g) speaks to the same. (See Argument **II.B.1.** above). If Plaintiff can be disciplined and lose his law license for 'it' if true, so also 'it' can hurt his reputation if false, as 'it' is "incompatible with the exercise of his . . . profession," under Spence, 396 A.2d at 973.[18]

**7. Remaining Defense Case Citations.** Ignoring that most are foreign court precedent, most defense case citations also are inapplicable because even if they were to state a general rule, they ignore the facts underlying our case.

Plaintiff earlier cited Ward v. Zelikovsky, 643 A.2d 972, 983 (N.J. 1994) (OB at 40), which recognizes accusing a plaintiff of "making racist statements," id., is actionable if it "rests on false facts." Id. at 979. McCafferty v. Newsweek Media Grp., Ltd., 955 F.3d 352, 358 (3d Cir. 2020), quotes and applies the Pennsylvania Supreme Court decision in MacElree v. Phila. Newspapers, Inc., 674

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[18] The murder of George Floyd, the Confederate flag and racial/ethnic caricatures and stereotypes have nothing to do with this case. (Cf. AB at 27). The facts reveal the mascot at issue in this case was the letter "U" with a feather. (OB at 4).

A.2d 1050, 1055 (Pa. 1996) (cited in OB at 40-41), which recognizes a “charge of racism clearly could have such a[ ] [defamatory] effect” even if it does not in every case. Underlying facts matter. (See OB at 40 - the “answer to the defamatory meaning question is not ‘never.’ The answer is ‘it depends’”).

Defendant claims Agar v. Judy, 151 A.3d 456, 481 (Del.Ch. 2017) stands for the proposition that “while specific accusations of race discrimination may be actionable, ‘a simple accusation of racism’ is not.” (AB at 22). This is false and misleading as the 32 page Agar decision contains no such statement whatsoever and, factually, had nothing to do with ‘race’ in the biological or taxonomic sense but only in the corporate board election sense.

## CONCLUSION

For six decades, Plaintiff has striven to be an honorable man, serve others and live a life that glorifies his Creator. Hate speech has been defined -

> as a direct attack on an individual's . . . dignity based on characteristics such as the color of their skin . . . [and] their religion . . .. [W]hen [such] hate speech moves into the realm of . . . actionable defamation [and other torts] it properly loses its First Amendment protection.[19]

Defendant's unjustified hate speech invoked Plaintiff's "white" skin and "Christian" religion and he lost both his job and good name as a result. Absent a remedy, what happened to Plaintiff can happen to any Delaware attorney. The decision of the Superior Court should be reversed in all respects.

Respectfully Submitted,

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[19] See delawarelaw.widener.edu/files/resources/personalnoteondiversityandraceformatted.pdf (last visited on Nov. 17, 2021).

## 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 5,500 words, to wit, it contains 5,498 words.

/s/ Stephen J. Neuberger
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