VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WESLEY C. SMITH, Plaintiff, v. ROGER D. VANDERHYE, Defendant.	)	Case No. CL 2006-0007859

DEFENDANT ROGER D. VANDERHYE'S DEMURRER TO AMENDED COMPLAINT

Defendant Roger D. Vanderhye ("Mr. Vanderhye"), by counsel, and pursuant to Rule 3:8 of the Rules of the Supreme Court of Virginia, respectfully demurs to the Amended Complaint filed by Plaintiff Wesley C. Smith ("Mr. Smith"). The grounds for this Demurrer are fully set forth in the accompanying Memorandum of law.

Respectfully submitted,

ROGER D. VANDERHYE

By: Sona Rewari
Counsel

Thomas J. Cawley (VSB No. 04612)
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CERTIFICATE OF SERVICE

I hereby certify that, on October 26, 2006, a true and correct copy of Defendant Roger D. Vanderhye's Demurrer to Amended Complaint was sent by electronic mail and by first-class U.S. mail, postage prepaid to:

Wesley C. Smith
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Counsel

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WESLEY C. SMITH, Plaintiff, v. ROGER D. VANDERHYE, Defendant.	)	Case No. CL 2006-0007859

DEFENDANT ROGER D. VANDERHYE'S
MEMORANDUM IN SUPPORT OF DEMURRER TO AMENDED COMPLAINT

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Counsel to Roger D. Vanderhye

Defendant Roger D. Vanderhye ("Mr. Vanderhye"), by counsel, respectfully submits this Memorandum in Support of his Demurrer to the Amended Complaint.

I. PROCEDURAL BACKGROUND

On May 11, 2006, Plaintiff Wesley C. Smith ("Mr. Smith") filed a ten-count Complaint against Mr. Vanderhye, principal of Spring Hill Elementary School, arising out of Mr. Smith's arrest at the school. On September 8, 2006, the Court sustained Mr. Vanderhye's demurrer, and granted Mr. Smith leave to amend only two of the ten counts in the Complaint, specifically, his slander and defamation of character (Count VII) and intentional infliction of emotional distress (Count IX) claims. Mr. Smith filed his Amended Complaint on October 5, 2006. For the reasons set forth below, the Amended Complaint should be dismissed with prejudice.

II. ARGUMENT

In reviewing the adequacy of Mr. Smith's Amended Complaint, the Court must consider only the factual allegations made in the Amended Complaint, and should not consider any factual allegations made in the original Complaint which was dismissed in its entirety and which is not incorporated by reference into the Amended Complaint. *See, e.g., Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 129-30, 575 S.E.2d 858, 860 (2003); *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 129, 523 S.E.2d 826, 829 (2000). On the face of the four-paragraph Amended Complaint, Mr. Smith fails to state any claim for relief. Moreover, even if the Court were to consider the allegations of the original Complaint in tandem with the Amended Complaint, Mr. Smith still has failed to state a claim for relief.

A. Mr. Smith Fails To Allege A Slander and Defamation of Character Claim.

The elements of a defamation claim under Virginia law are (1) a publication of (2) an actionable statement with (3) the requisite intent. *See Jordan v. Kollman*, 269 Va. 569, 575, 612

S.E.2d 203, 206 (2005) (setting forth elements of libel); *Fleming v. Moore*, 221 Va. 884, 890, 275 S.E.2d 632, 636 (1981) (no distinction between claims for libel and slander).

Mr. Smith bases his "slander and defamation of character" claim upon three alleged statements by Mr. Vanderhye: (1) a statement to Jack Dale, Division Superintendent of the Fairfax County Public Schools, that "there were court orders that prohibited the Plaintiff from having contact with his son," (Am. Compl. ¶2); (2) a statement to a teacher "that the Plaintiff was not allowed contact with his son without permission from the mother," (*id.* ¶2); and (3) Mr. Vanderhye's testimony at Mr. Smith's criminal trial (*id.* ¶3). These allegations are insufficient to support a claim "slander and defamation of character" claim for at least three reasons.

First, the alleged statements are not actionable. To be actionable, a statement "must be both false and defamatory." *Jordan*, 269 Va. at 575, 612 S.E.2d at 206. A statement is defamatory if it creates an apparent substantial danger to the plaintiff's reputation. *See, e.g., Miller v. Lowe*, 2006 Va. Cir. LEXIS 122, at *1-*2 (Greene County July 6, 2006) (sustaining demurrer on grounds that statements made in critical letter to editor did not create an apparent substantial danger to plaintiff's reputation) (copy attached as Exhibit 1). Statements that are merely annoying, unflattering, unpleasant, embarrassing, or offensive are not defamatory. *Lamb v. Weiss*, 62 Va. Cir. 259, 260-61 (City of Winchester 2003).

Whether a statement is capable of a defamatory construction is a question of law for the Court. *Yeagle v. Collegiate Times*, 255 Va. 293, 296, 497 S.E.2d 136, 138 (1998). In determining whether a statement is capable of a defamatory construction, the court must take the allegedly defamatory words "in their plain and natural meaning and to be understood . . . as other people would understand them. . . . [T]he meaning of the alleged defamatory language cannot,

by innuendo, be extended beyond its ordinary and common acceptation." *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 7-8, 82 S.E.2d 588, 591-92 (1954).

Mr. Smith has not even alleged that the statements purportedly made by Mr. Vanderhye are defamatory. Nor are the alleged statements defamatory on their face. Mr. Smith also has not alleged any facts to show the alleged statements could reasonably be understood as defamatory.

Second, even assuming that the alleged statements were defamatory, Mr. Smith has not alleged any special damages. There are four types of defamatory statements that are actionable *per se*. *See Shupe v. Rose's Stores, Inc.*, 213 Va. 374, 376, 192 S.E.2d 766, 767 (1972). "All other defamatory words which, though not in themselves actionable, occasion a person special damages are actionable." *Id.* (internal quotation omitted). A plaintiff proceeding under such a theory of defamation *per quod* must plead and prove such special damages. *Id.*

The statements allegedly made by Mr. Vanderhye do not fall into any of the categories of defamation *per se*, and Mr. Smith has not pled any special damages.

Third, the statements allegedly made by Mr. Vanderhye are privileged. "Communications between persons on a subject in which the persons have an interest or duty are occasions of privilege." *Larrimore v. Blaylock*, 259 Va. 568, 572, 528 S.E.2d 119, 121 (2000). To defeat such a privilege, the plaintiff must allege facts, and subsequently prove by clear and convincing evidence, that the privilege has been exceeded. *Id.* Moreover, "[a] statement made in the course of a judicial proceeding is absolutely privileged if it is material and relevant to the proceeding." *Titan Am., L.L.C. v. Riverton Inv. Corp.*, 264 Va. 292, 308, 569 S.E.2d 57, 66 (2002) (affirming trial court's grant of demurrer on defamation claim on the grounds that statement made in the course of litigation was absolutely privileged).

Whether a communication is privileged is a question of law to be determined by the Court. *E.g., Fuste*, 265 Va. at 134-35, 575 S.E.2d at 862-63. Mr. Vanderhye's alleged statements to Dr. Dale and a teacher are qualifiedly privileged because they were made in the course of his employment to other persons having a legal interest in the operation of the school, and Mr. Smith has not alleged any facts to overcome that privilege. The statements allegedly made by Mr. Vanderhye during Mr. Smith's trial in District Court are absolutely privileged.

For all of these reasons, the Court should dismiss the slander and defamation of character claim against Mr. Vanderhye with prejudice.

B. Mr. Smith Fails To State A Claim for Intentional Infliction of Emotional Distress.

Mr. Smith fails to state a claim for intentional infliction of emotional distress against Mr. Vanderhye. A claim for intentional infliction of emotional distress has four elements, and a plaintiff cannot simply plead conclusions but rather, must specifically plead sufficient facts to make out all four elements of the claim. *Jordan v. Shands,* 255 Va. 492, 498-99, 500 S.E.2d 215, 218-19 (1998); *Ely v. Whitlock*, 238 Va. 670, 677, 385 S.E.2d 893, 897 (1989).

The tort of intentional infliction of emotional distress is disfavored in Virginia. Accordingly, liability has been found only where the conduct has been so outrageous in character and so extreme in degree, as to exceed all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society. *Russo v. White,* 241 Va. 23, 26, 400 S.E.2d 160, 162 (1991); *Ruth v. Fletcher*, 237 Va. 366, 373, 377S.E.2d 412, 415-16 (1989).

In *Jordan,* for example, the plaintiff was wrongfully arrested and jailed because the defendants filled in her personal information on an arrest warrant that was intended for another person. 255 Va. at 495, 500 S.E.2d at 217. She alleged that the defendants knew or should have known that the warrant was intended for someone else. *Id.* The Supreme Court, nevertheless,

held that those allegations were not sufficient to state a claim for intentional infliction of emotional distress. 255 Va. at 499, 500 S.E.2d 219.

Here, Mr. Smith appears to complain about his arrest and Mr. Vanderhye's statements to the police. But those acts are not outrageous and intolerable as a matter of law. Indeed, Mr. Smith has not even alleged that he was wrongfully arrested. Nor could he. Unlike the plaintiff in *Jordan* who was wrongfully arrested and jailed in a case of mistaken identity, Mr. Smith was tried and found guilty on the charge against him.[1] (*See* Exhibit 2.) Though Mr. Smith asserts that the Court should not consider his conviction "because it is under appeal" (Am. Compl. ¶ 4), that is incorrect. Mr. Smith's appeal was dismissed by the Court of Appeals on April 7, 2006. (*See* Exhibit 3.) Moreover, Va. Code § 17.1-410(A)(1) provides that the Court of Appeals' dismissal of Mr. Smith's appeal is final, without appeal to the Supreme Court. Because Mr. Smith's conviction has been made final, he cannot claim that Mr. Vanderhye's actions in allegedly having him arrested and speaking to the police were outrageous and intolerable.

Mr. Smith's Amended Complaint also is devoid of any allegations that he suffered any emotional distress, much less the kind of severe distress required to state such a claim. *See Russo*, 241 Va. at 28, 400 S.E.2d at 163.

CONCLUSION

For all of these reasons, Mr. Vanderhye requests the Court to sustain his demurrer and to dismiss the Amended Complaint with prejudice.

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[1] In ruling on Mr. Vanderhye's demurrer to the Amended Complaint, the Court may properly take judicial notice of Mr. Smith's conviction on the trespass charge, and the status of Mr. Smith's appeal, because that criminal proceeding forms the basis of his intentional infliction of emotional distress claim. *See Martone v. Martone*, 257 Va. 199, 208, 509 S.E.2d 302, 307 (1999); *Fleming v. Anderson*, 187 Va. 788, 794-95, 48 S.E.2d 269, 272 (1948).

Respectfully submitted,

ROGER D. VANDERHYE

By: Sona Rewari
Counsel

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I hereby certify that, on October 26, 2006, a true and correct copy of Defendant Roger D. Vanderhye's Memorandum in Support of Demurrer to Amended Complaint was sent by electronic mail and by first-class U.S. mail, postage prepaid to:

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liamsdad@liamsdad.org

Sona Rewari
Counsel

VIRGINIA: **IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

Wesley C. Smith

Plaintiff

vs.

Civil Action No. CL 2006-007859

Previous Chancery No.: CH

Roger D. Vanderhye

Defendant

SERVE:

FRIDAY MOTIONS DAY – PRAECIPE/NOTICE

Moving Party: ☐ Plaintiff ☒ Defendant ☐ Other

Title of Motion: Demurrer to Amended Complaint ☐ Attached ☒ Previously Filed

DATE TO BE HEARD: 12/01/06 **Time Estimate** (combined no more than 30 minutes): _____

Time to be Heard: ☐ 9:00 a.m. **with** a Judge ☐ 9:00 a.m. **without** a Judge

☒ 10:00 a.m. (Civil Action Cases) Does this motion require 2 weeks notice? ☒ Yes ☐ No

☐ 11:30 a.m. (DOMESTIC/Family Law Cases) Does this motion require 2 weeks notice? ☐ Yes ☐ No

Case continued from: _____ (Date) **continued to:** _____ (Date)

Moving party will use ***Court Call*** **telephonic appearance:** ☐ Yes ☒ No

Judge Stanley P. Klein **must** hear this motion because (check one reason below):

- ☐ The matter is on the docket for presentation of an order reflecting a specific ruling previously made by that Judge.
- ☐ This Judge has been assigned to this entire case by the Chief Judge; or,
- ☒ The Judge has advised counsel that all future motions, or this specific motion, should be placed on this Judge's docket

PRAECIPE by: Sona Rewari (Printed Attorney Name/ Moving Party Name) Hunton & Williams LLP (Firm Name)

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CERTIFICATIONS

☒ I certify that I have in good faith conferred or attempted to confer with other affected parties in an effort to resolve the subject of the motion without Court action, pursuant to Rule 4:15(b) of the Rules of the Supreme Court of Virginia; and,

☒ I have read, and complied with, each of the Instructions for Moving Party on the reverse side of this form.

Sona Rewari

Moving Party/Counsel of Record

CERTIFICATE OF SERVICE

I certify on the 16th day of November, 2006, a true copy of the foregoing Praecipe was ☒ mailed ☐ faxed ☒ delivered to all counsel of record pursuant to the provisions of Rule 4:15(c) of the Rules of the Supreme Court of Virginia.

Sona Rewari

Moving Party/Counsel of Record

CCR-E-10 (Jan. 1, 2006)