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Re: Phi Kappa Psi v. Rolling Stone, et al.— Demurrer
Circuit Court file no. CL 15 – 479; hearing May 17, 2016

Dear Counsel:

I have now had a chance, since August 1, to fully review this matter, including re-reading all of the pleadings as well as many of the cases cited, and reviewing my notes from the May 17 hearing. The issue before the Court is whether Defendant's Demurrer should be sustained or overruled.

Procedural Posture

Plaintiff The Virginia Chapter of Phi Kappa Psi Fraternity ("PKP") filed a complaint November 9, 2015, against Defendants Rolling Stone LLC, Wenner Media LLC, Straight Arrow Publishers LLC, and Sabrina Rubin Erdely.

The Defendants then filed their Demurrers to the Complaint March 3, 2016.[1]

Plaintiff then filed a Response to the Demurrer March 25, 2016, and Defendants on April 11 filed a Reply to the Response in Further Support of the Demurrers to the Complaint.

The Parties appeared May 17, 2016, to argue the Demurrer.

Defendants submitted a letter with authority and further argument dated June 29, 2016, and Plaintiff submitted a similar letter on June 30. I have read these letters in addition to the pleadings and the cases.

Legal Authority and Standard for Considering Demurrer

A demurrer tests the legal sufficiency of a pleading. The issue is whether the Complaint states a cause of action for which relief may be granted. Pendleton v. Newsome, 290 Va. 162, 171, 772 S.E. 2d 759 (2015); Welding, Inc. v. Bland County Service Auth., 261 Va. 218, 226, 541 S.E.2d 909, 913 (2001); Grossman v. Saunders, 237 Va. 113, 119, 376 S.E.2d 66, 69 (1989). The question is: does the Complaint contain sufficient factual recitations or allegations to support or sustain the granting of the relief requested?

A demurrer is not interested in or dependent on the evidence—neither its strength nor a determination of whether the Plaintiff can prove its case. In ruling on a demurrer the Court does not consider the anticipated proof but only the legal sufficiency of the pleadings, and it considers the facts and allegations in the light most favorable to the plaintiff. Glazebrook v. Board of Supervisors of Spotsylvania County, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003); Welding, above, 261 Va. at 226, 541 S.E.2d at 913; Luckett v. Jennings, 246 Va. 303, 307, 435 S.E.2d 400, 402 (1993).

A demurrer accepts all well-pleaded facts or allegations as true, along with all reasonable inferences drawn therefrom. That is, the Court considers as admitted all facts expressly or impliedly alleged or that may fairly and justly be inferred from the facts alleged. Glazebrook, Luckett, Grossman, above; Cox Cable Hampt., Rds. v. City of Norfolk, 242 Va. 394, 397 (1991).

[1] Defendants were all served in late January or early February 2016, and the time for Defendants to file a responsive pleading was extended by agreement of the parties to March 3, 2016.

So if I accept all Plaintiff says as true, does Plaintiff then prevail? If so, I should overrule the demurrer. Put another way, given all that is alleged, is this a case where a jury or judge ought to be allowed to decide whether the allegations are true or have been proved?

There is another way of expressing this standard when ruling on a demurrer. In the context of defamation, many of the cases and counsel have restated this standard, particularly with regard to the issue of whether there is defamatory content or meaning, but also with regard to the other two issues, by asserting that the Court has a "gatekeeping function", and must determine whether the article is capable or susceptible of such defamatory meaning, whether it is capable of being reasonably understood to refer to the plaintiff, and whether it is capable of being proved true or false; if not, on any count, the demurrer should be sustained.

Nevertheless, even with this standard, in considering a demurrer the Court should not engage in evaluating evidence outside of the pleadings. So it is the facts as pleaded upon which the court must make its ruling. For anything outside of the pleadings, dependent on the evidence presented at trial, the Court would have to reserve its gatekeeping function for trial, before submission to the jury, perhaps on a motion for summary judgment or motion to dismiss.

However, in this case, the Plaintiff made the entire article--in fact both the print and online versions--an exhibit to the Complaint. Therefore, in my view, the entire article is made a part of the Complaint for purposes of notice, allegations, and consideration of the demurrer.

Factual Background

Plaintiff's claims are based on the content of an article that appeared in the *Rolling Stone* magazine November 19, 2014.[2] *Rolling Stone* magazine is published by Defendant Rolling Stone LLC, with its member (owning) companies Defendants Wenner Media LLC and Straight Arrow Publishers LLC. The article was written by Defendant Sabrina Rubin Erdely.

In the article a violent rape is recounted by the purported victim, which takes place at the Phi Kappa Psi (also PKP or "Phi Psi") fraternity house on the edge of the University of Virginia grounds, at a PKP-sponsored function, by individuals some or all of which are stated or understood to be associated with the fraternity.

In the article describing the event, Phi Kappa Psi at UVA is mentioned at least 18 times by name (Phi Kappa Psi, PKP, or Phi Psi). There are at least 9 other references to "that

[2] The article appeared in the December 4, 2014 print edition of the magazine, but was posted on its online edition on November 19, 2014. They are both incorporated into the Complaint. ¶33 of the Complaint.

fraternity", "a frat", "the fraternity", "his frat", etc., which in context specifically refer to Phi Kappa Psi at UVA. There are at least 8 times where the term "gang rape" is used, many in the same phrase or sentence as "Phi Kappa Psi" or its variations.

The Complaint

Plaintiff's Complaint (Counts 1 and 2) alleges that both the print article and the on-line version are defamatory of PKP, in that they contain false statements that accuse the fraternity itself and its members of criminal activity involving moral turpitude, brutish and violent behavior, and hiding the truth, both directly and indirectly painting the fraternity in a false light, and holding the fraternity up to public criticism, ridicule, and scorn, resulting in damage to the fraternity's reputation, and causing anger and distress, and hurting its ability to acquire new members.[3]

The Demurrer

Defendants say that Plaintiff cannot prevail, and that it has not stated a cause of action because:

1) The article complained of is not "of and concerning" Phi Kappa Psi at UVA.
2) The article is not defamatory.
3) The statements complained of are not factual statements but opinions.[4]

Analysis and Discussion of Authority

Whether the Complaint states a cause of action turns on three points or inquiries

1. Whether the article is of, about, concerning or focused on Plaintiff;

[3] The original Complaint also includes a subsequent post-article statement and interview (Counts 3 and 4), although they are not the basis for a separate count, as they were withdrawn by Plaintiff at the May 17, 2016, hearing, and the allegations contained there are not an independent basis for recovery, and would be relevant or pertinent here, if at all, only in so much as they reinforce, support, or corroborate any facts or issues related to the two articles.

[4] The Demurrer originally also addressed two other matters not at issue here—Counts 3 and 4, which were withdrawn, and the request for attorney's fees, which also was withdrawn by Plaintiff at the May 17 hearing. Defendants also point out that the article contains many factually true statements.

2. Whether the article--if of, about, concerning or focused on Plaintiff--is defamatory of Plaintiff; and,

3. Even if the article is of and concerning PKP, and the content of the article, or at least a good portion of it, holds Plaintiff in a bad light, are such statements factual in nature and susceptible of being proved true or false, or just opinion? (In the context of the demurrer, on this third point, do Defendants' claims turn on their interpretation of the article, as opposed to what it actually says?)

Of and Concerning

The first issue raised in the Demurrer and to be addressed here, is whether the article and the purportedly false and defamatory statements contained in it have to do with—that is, were "of and concerning"—the plaintiff, the fraternity Phi Kappa Psi at UVA, as opposed to the individuals involved, all fraternities at UVA, fraternities in general, or the University of Virginia itself. So, if the article is false, or contains significant false statements, and if the article is--or such statements in it are--in fact defamatory (both issues discussed below), the question is: "Who is defamed by such?" The defamation, if it exists, must be about or focused on the Plaintiff Phi Kappa Psi in order for it to prevail.

If the article or such false and defamatory statements are just about the alleged individual perpetrators who just happened to be members of PKP, or were simply attending a PKP function, that is not sufficient, nor is that it happened at the frat house (whether an official function or not). Plaintiff must show that the statements in the article, when taken as a whole, were either solely or primarily about the fraternity.

Defendants, in their written responses and in argument at the hearing, assert that the statements, or the bulk of them, and the focus and tenor of the article, are about "Drew", the purported initial offender, or "rogue" members or pledges of the fraternity, or fraternities in general, or the University of Virginia.

Plaintiff, in the Complaint, cites and quotes numerous passages from the article that focus specifically and repeatedly on the Phi Kappa Psi fraternity. Just to mention a few, from the Complaint, there is a reference to a "Phi Kappa Psi brother"[5] (¶35, page 14 of Complaint), "his fraternity Phi Kappa Psi", "The upper tier frat…", and "Phi Psi" (¶35, page 15), a "Phi Kappa Psi

[5] One initially wonders what difference does it make, to the writer, that the individual is a member of the fraternity if that is not going to be a major focus of the article?

date function" (¶¶40, pages 17-18), and the victim "taking on" her individual alleged assailants "*and their fraternity*". (¶42, page 18, *italics* added). Furthermore the Complaint recounts a moment when one individual apparently is reluctant to participate in the severe assault, and another says, "don't you want to be a brother? *We all* had to do it" (page 16, *italics* added). The Complaint also refers to the illustration of the PKP house, and the letters "PKP" displayed on a banner" (¶42, pages 18-19). There is a reference to "tracing this incident back 30 years ago" to PKP (¶47, page 20).[6] There are other PKP-related allegations in the Complaint.

Also, in considering the "of and concerning" requirement, the question is, is the article, or are sufficient statements in the article, about or focused on the University of Virginia Phi Kappa Psi chapter itself, either instead of or conjointly with the University of Virginia, other fraternities at UVA, or fraternities in general. The short answer, in the Court's view, is "yes".

As stated above, in the Complaint Plaintiff alleges numerous points at which the Phi Kappa Psi fraternity at UVa is mentioned, not just as the location of the alleged offense, but as the actual offender, the "adversary" who must be proceeded against. I do not recall any other fraternity besides Phi Kappa Psi being mentioned by name; it is certainly the only one repeated over and over.

To the extent that Phi Kappa Psi at Brown University is mentioned, it arguably is mentioned to lend credence to the idea that PKP is a "bad egg" wherever found, particularly at UVA, where other mentions of PKP at UVA include Ms. Seccuro's rape at Phi Kappa Psi and two other girls who are described as victims of a PKP rape.

If one considered only the first two pages of the article, one might be persuaded that the article was going to address fraternities in general, or sexual assault on campuses in general. The first two paragraphs (on page 68 of the print article) mention a fraternity house, a fraternity party, and PKP once. But it appears that the writer is simply preparing the reader for what is coming; taking the entire article as a whole does not allow this interpretation or conclusion:

On page 69 is a photograph of the PKP house and the lettering "PKP" on the banner. On page 70 of the print article (the second page of the story) is the second reference to Phi Kappa Psi, including "his fraternity", "the frat house", and the "frat party". But then we read this line: "But her concerns go beyond *taking on* her alleged assailants and *their fraternity*". It continues. When referring to the Brown incident, it turns out it was "Phi Kappa Psi--*of all fraternities*". Page 73. Then on page 75 of the print article, "The UVa administration took no action to warn

[6] Also in the on-line article there are three photographs of the Phi Kappa Psi fraternity house, two from the outside and one on the inside (of a room), all with identifying captions. The print article has the inside photo, but PKP is not identified, and it does not have the two outside photos.

the campus that *an allegation* of gang rape had been made *against an active fraternity*". This is followed on that same page by "You can trace UVA's cycle of sexual violence and institutional indifference back at least 30 years—and incredibly the trail leads back *to Phi Psi*". It refers to "gang raped" in the context of Phi Psi and the Phi Psi house twice (on page 75). This is followed by "two other women...assaulted at *his* frat house". On page 76, again we see "UVA strategy of doing nothing to warn the campus of gang rape allegations *against a fraternity*", and Jackie learned of "two other young women who were *Phi Kappa Psi gang rape victims*." It then follows on that page in the 3rd column an account of one of the young women "gang-raped as a freshman at the *Phi Psi house*", and the other "assaulted by four men in a *Phi Psi* bathroom", and Jackie's helplessness "when she thought about "*Phi Psi*". And finally, at the end of that page, continuing over to the next page, speaking of gang rape allegations "*against* [not "at"] one of UVA's oldest and most powerful fraternities". (All *italics* added.) There are, thus, at least six references in two pages to "gang rape" linked to Phi Kappa Psi, and not all describing one event.

One cannot read these latter portions and not see that it is a reasonable interpretation that the article is singling out PKP at UVA, not some other fraternity or fraternities in general. There is no other fraternity named or alluded to that could be the object of these references. It is naïve to argue that all taken together this did not put the spotlight on PKP to the exclusion of other frats.

The case of Darling v. Piniella, Civ. A. 91-5219, 1991 U.S. Dist. Lexis 13546, 1991 WL 193524 (E.D.Pa.), is instructive on this point. After a Major League baseball game, the losing team's manager, Lou Piniella[7], made some critical remarks about one of the umpires in the game. The Major League Umpires' Association filed suit, alleging that the statements about this particular umpire defamed all umpires (at least those in the MLUA, which presumably the criticized umpire was). Aside from the issue of whether the statements made were factual or opinion—and the Court assumed the statements were defamatory—the dispositive issue was whether they were "of and concerning" the Plaintiff Umpires' Association.

In ruling that the statements were not "of and concerning" the MLUA, it was important to the Court that "[n]one of the statements on which plaintiff MLUA's claim is predicated identify, refer to, describe or concern the MLUA." At page 4 of opinion. This certainly is in contrast to the case before us, where references to PKP are ubiquitous. While the main part of the opinion talks about the remarks being about one specific person, the Court again mentions that "Here, the statements are clearly not 'of and concerning' plaintiff MLUA. MLUA was neither named nor referred to, and the statements neither apply to...plaintiff MLUA". At page 6 of opinion. The same cannot be said of the *Rolling Stone* article and the UVA fraternity Phi Kappa Psi. "The MLUA...alleged no set of facts that would entitle it to relief." At page 6. "[F]or an

[7] Whom I remember as a player when I was in Little League and then in high school!

organization to have a cause of action for defamation, the remarks must be directed toward the organization." At page 7, citing Church of Scientology of Cal. v. Flynn, 578 F. Supp. 266, 268 (D. Mass. 1984) (where the statement "was directed at the action of one or a few members, not at the organization"). The organization must be "the object of the alleged defamations", or "the remarks must somehow identify the organization or implicate the organization as actively encouraging the behavior of their members". At page 8. In our case, the fraternity itself is repeatedly identified and mentioned, and there are facts from which it can be reasonably inferred that the fraternity approved, condoned, supported, and even encouraged or facilitated such actions of the various unnamed or unknown (or nonexistent) individuals. So this meets the Darling test. The *Rolling Stone* article is certainly amenable to the conclusion that it was not just one or a few individuals viewed as "the problem", but rather the UVA fraternity as a whole was painted in a bad light.

So this article is not just about rape, or just about sexual assault at colleges in general, or at UVA, or even a greater likelihood of rape at fraternity events, at least not as a matter of law. Whether the article was focused on PKP may be a matter for the factfinder--the jury or judge--to decide. But the Court finds that the article is certainly capable or susceptible of the interpretation that if it is defamatory, it is defamatory as to Phi Kappa Psi and that in the article there is a clear basis from which to argue the primary focus of the article was PKP at UVA.

As pleaded, taken as a whole, the article is primarily and significantly about this particular fraternity, and was certainly "of and concerning" the Plaintiff, and the article's intent and focus was not just the individual assailants, or fraternities in general, or all fraternities at UVA, or the University itself, but rather this fraternity in particular. The combination of the numerous repeated, direct, explicit references to Phi Kappa Psi, combined with several implied references to "a major frat", "a top tier frat", the "frat that was suspended", in conjunction with the various individuals referenced as affiliated with the fraternity, if borne out by the evidence, clearly establishes that it is the fraternity itself that is the main target of the article.

It is not, in the Court's view, just as likely that the article, as pleaded, raises the likelihood or even possibility that rogue members or aspiring members were responsible for the described rape, or were the main actors, as suggested by Defendants. The article taken as a whole, again as pleaded, clearly paints the rape as a fraternity event and happening. That is a clear possible interpretation, in the Court's view, of the references to previous PKP events and accusations, and the discussion about UVA's responsibility to confront or sanction this particular fraternity for the risk it presented to the rest of the University and it students.

So if such article or statements therein are false and defamatory, it is the fraternity, at least primarily, that is being defamed and damaged. The excerpts cited and quoted in the Complaint allow argument that the intent was to paint PKP in a bad light and cause people to

think badly of it, as an entity, as an organization. So I disagree with Defendants on this point, and would overrule the demurrer based on that argument.

Again, the main point is not whether I find such, but whether, in light of the demurrer, the plaintiff has pleaded enough to allow the factfinder to draw such conclusions. In the Court's view, Plaintiff has definitely pleaded enough facts which, if proved and believed, would justify a jury in finding that it is the fraternity itself that would be damaged by any defamatory and recklessly false statements. So the Complaint withstands the Demurrer on this point.

Defamatory Content

The next question is whether, even if the article was solely or primarily about PKP, was it or the tenor of the account and statements contained therein defamatory. That is, does it hold the fraternity up to scorn and ridicule, or paint them in a bad light. With regard to the demurrer, the question is whether the article is capable or susceptible of defamatory meaning. This is a legal issue, to be resolved by the Court.

The case of Webb v. Virginian-Pilot Media Companies, LLC, 287 Va. 84, 752 S.E. 2d 808 (2014), was cited by both parties. The Virginian-Pilot newspaper published an article about Phillip Webb and his two sons. Mr. Webb was a high school assistant principal at an area high school, and previously was a successful track coach at a neighboring high school. The article, without making any false statements, discussed disparate outcomes for two boys (one of them one of Mr. Webb's sons), after an altercation resulting in criminal charges. (Both boys were charged with felonies, and both convicted of misdemeanors.) Webb's son was allowed to stay at his high school and continue to compete in track, eventually going on to college, while the other boy was required to transfer to stay in school, and eventually dropped out of school. A spokesman for the school system was quoted as saying that the Webb boy did not get any preferential treatment simply because of his father's position. The father sued alleging the article falsely implied that his son did get special treatment, despite what the article said.

The Court discussed whether the requirement of defamatory meaning could be by implication, inference, insinuation, or innuendo. The Court stated that it could, but that such inferred meaning must come from the words themselves, and be a reasonable interpretation thereof. 287 Va. at 89. The question there was "whether the words and statements complained of...are reasonably capable of the meaning ascribed to them..." Id., quoting Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 8-9, 82 S.E. 2d 588, 592 (1954).

This is a question of law to be decided by the Court on demurrer as a part of its essential "gatekeeping function", prior to submission to the jury. Id. at 90-91, citing Perk v. Vector

Resources Group, 253 Va. 310, 316-17, 485 S.E. 2d 140, 144 (1997). The Court ruled in Webb that, as a matter of law, the article was not reasonably capable of defamatory meaning.[8] Id. at 91.

Pendleton v. Newsome, 290 Va. 162 (2015), cited by Plaintiff, is also enlightening on this issue. In this tragic case a seven-year old child died from severe allergic reaction to a peanut given to her by another student. On several occasions the defendant Superintendent of Schools made public statements about the importance of parents alerting the school to such severe allergies, having a health/safety plan of action, and supplying the school with proper medications and resources. The clear implication—though never stated explicitly—was that the child's mother failed to do such, and was therefore responsible for her child's death.

In fact, the mother, who was a Licensed Practical Nurse, had actually informed the school of her child's severe allergy, had filled out a "Standard Health/Emergency Plan", and had brought to school an EpiPen to counter anaphylactic reactions. (She was told the EpiPen was not needed and that the school had all the necessary resources and medications, and the mother could take the Pen home to use there.) Therefore, the clear implications and insinuations of the parent's failures or negligence, on all three points, were false.

The Court reviewed the trial judge's sustaining of Defendant's demurrer. The Court first noted that a statement clearly implying the mother was responsible for her child's death is capable of defamatory meaning. This is a legal question for the Court. Whether the statement implied the mother was responsible and whether she was defamed thereby was for the factfinder. In that case, in the words of the Webb opinion, above, the defamatory meaning came from the words themselves. (In Webb, unlike Pendleton and our case, the words did not imply Mr. Webb had done anything wrong.)

In reversing the trial court's sustaining of the demurrer, the Court ruled that it cannot be said that the words are not capable of defamatory meaning. Citing Carwile, above, they said the words are reasonably capable of defamatory meaning when aided by innuendo reasonably inferred from the words themselves.

The facts of the current case are much more akin to Pendleton than to Webb. When the term "gang rape" and PKP are uttered in the same breath, it seems inescapable. The repeated references to "gang rape", in conjunction with the fraternity, along with the specific behaviors, acts, and statements described or repeated, are clearly capable of and susceptible to defamatory meaning. And these are direct statements, not just indirect or innuendo. So this also is not a reason to sustain the Demurrer.

[8] Unlike the present case, Webb involved statements that were literally true, and rested entirely on innuendo.

Factual Assertions or Opinion?

The final question is, if the article is of and concerning Phi Kappa Psi, and if the statements are potentially defamatory, are they factual statements, assertions, or accusations, or are they merely statements of opinion? That is, are they amenable or susceptible to being proved true or false, or just interpretations that can be neither true nor false? This too is a legal issue for the Court.

Fuste v. Riverside Healthcare Ass'n., 265 Va. 127, 575 S.E. 2d 858 (2003), addresses the requirement that the defamatory statement be factual and not a matter of opinion. In that case statements were made about two physicians who left their practice after a dispute. Among other things, the statements asserted the physicians left suddenly, were unprofessional, abandoned their patients, and that there were questions about their competence, that they were not taking patients, and left the area. In the context of a demurrer, the Court ruled that such statements must be a "provably false factual connotation". Pure expressions of opinions (such as, for example, "he did not make his patients a high enough priority"), dependent on the speaker's viewpoint, are not actionable. The court there ruled that some of the statements were factual, and some opinion.

In this case, there were numerous statements that are factual assertions, and demonstrably true or false. Whether there was or was not a gang rape is subject to proof; it could be proved that there was or was not a broken glass table and that Jackie got shards of glass in her back; it could be proved whether Drew existed, and worked at the UVA pool, and whether there was a PKP event, or whether anyone sexually assaulted Jackie in any way resembling the depiction in the article. It could be proved true or false whether one of the purported individuals said "We all had to do it." These are all factual assertions, susceptible of proof. In fact even the inferences—that such sexual assaults were commonplace and accepted behavior at Phi Kappa Psi, or that the fraternity condoned, encouraged, or required such gang rape activities—are subject to being proved to be true or not.

For that matter it could be proved whether Dean Eramo said what was attributed to her—"no one wants their daughters to go to the rape school"—or whether Jackie's friends discouraged her from reporting the "rape".[9]

Whether either side will be able to prove whether such statements are true or false at trial is a different matter, but the point is that such statements are factual assertions and are capable of being proved true or false—they either happened or they did not. Thus, they are factual statements and not a matter of opinion. They are susceptible to proof by evidence. If they were

[9] These quotes also go to the issue of whether the entire article or a substantial portion of it was fabricated by Erdely and *Rolling Stone*, or whether it was fabricated by Jackie and embellished by Erdely and *Rolling Stone, and* negligently and recklessly published in failing to check out sources and confirm reports before publishing.

asserted and they were not true, and if they are defamatory, and if they had to do with Phi Kappa Psi, then Plaintiff may recover. Thus, the Demurrer will not be sustained on this ground.

Conclusion

As Plaintiff responded at oral argument, many if not most of Defendants' arguments are properly directed to the factfinder. The jury or judge hearing the case will have to decide 1) if the statements were made, 2) if they were false, 3) if it was the defendants that made them, 4) if the article held the plaintiff in a poor light, and 5) if any damages were occasioned by or flow or resulted therefrom. So much of Defendants' arguments are more appropriately made to the judge or jury hearing the case. If there is a need to take evidence, or to consider the strength of evidence or likelihood of proof, or interpretation of evidence, such is not a proper consideration upon a demurrer. It is not a matter of the evidence, and what the article actually said, but what the Complaint says it says. I cannot try the case in order to rule on the demurrer.

The Court is only ruling that the Complaint contains enough allegations such that Plaintiff may prevail if proved to be true, and the jury could so find. I note that the totality of the Complaint itself is sufficient without the full content of the article, and that Plaintiff has pleaded sufficient facts without the article, but since the entire article was made a part of the pleading the Court may consider such in overruling the Demurrer. Based on the pleadings, I do not find as a matter of law that 1) the article is not of and concerning Phi Kappa Psi, 2) nor that it is not capable of defamatory meaning, 3) nor that it is a matter of opinion and interpretation as opposed to a matter of factual assertion. Rather, I find that the article, as pleaded, is capable of being reasonably viewed as "of and concerning" Plaintiff[10], that it is capable of being considered defamatory in content[11], and that it is factual and susceptible of being proved true or false[12]. Therefore I overrule the Demurrer on all three grounds.

I ask Mr. Albro and Mr. Smolla to prepare the order reflecting my ruling in this letter. Unless agreed otherwise by the parties, Defendants should file their Answer(s) within 21 days of the date the Court enters such order.

Very Truly Yours,

Richard E. Moore

[10] See Darling, above, at page 5: "capable of being reasonably understood as intended to refer to [the plaintiff]".
[11] See Carwile, above, 196 Va. at 13: "reasonably capable of the meaning ascribed to them by innuendo", Webb, above, 287 Va. at 91: "not reasonably capable of the defamatory meaning", and Pendleton, above, 290 Va. at 173: "capable of conveying the defamatory innuendo".
[12] See Fuste, above, 265 Va. at 133: "capable of being proved true or false".