

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

**CABELL COUNTY BOARD
OF EDUCATION**

Plaintiff,

v.

**ERIC A. MORRISON and
E.T. ADVISOR SERVICES, LLC,**

Civil Action No. 22-C-327

Defendants,

v.

**CABELL COUNTY BOARD
OF EDUCATION,**

Counterclaim Defendant.

**COUNTERCLAIM DEFENDANT CABELL COUNTY BOARD OF EDUCATION'S
MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM**

Now comes Cabell County Board of Education, ("Counterclaim Defendant"), by and through counsel, Perry W. Oxley, David E. Rich, Katee E. Neltner, and the law firm of Oxley Rich Sammons PLLC, pursuant to Rule 12b(6) of the West Virginia Rules of Civil Procedure, and moves this Court to enter an Order dismissing all claims asserted against the Counterclaim Defendants contained in Defendants' Answer and Counterclaim, for failure to state a claim upon which relief can be granted. In filing this Motion, the Counterclaim Defendant specifically raises and reserves any and all other grounds for dismissal including, but not limited to, grounds provided under the West Virginia Rules of Civil Procedure. The Counterclaim Defendant does not waive any additional defenses. In support of the Counterclaim Defendant's contemporaneously filed Motion to Dismiss, it hereby submits this Memorandum of Law.

I. Statement of Facts

On September 22, 2022, Plaintiff Cabell County Board of Education ("CCBOE") filed its complaint in the Circuit Court of Cabell County, West Virginia as a result of the alleged actions or inactions of Defendants Eric A. Morrison and E.T. Advisor Services, LLC (hereinafter collectively referred to as "Morrison Defendants"). *See generally*, Complaint.

During the 2019-2020 school year, Barboursville Middle School ("BMS") and Milton Middle School ("MMS") jointly contacted the Morrison Defendants to make all necessary arrangements for an Eighth-Grade trip to Washington, D.C., planned for the spring of 2020. *Id.* Individual "General Service Agreements" were signed by Defendant Morrison and each schools' respective Principals on August 26, 2019.

BMS and MMS families made regular payments to their respective schools, who then, over the course of four (4) installments paid a combined total of One Hundred Thirty-Six Thousand and Five Hundred (\$136,500.00) Dollars to the Morrison Defendants. In March 2020, schools in West Virginia were closed and all school-related activities were suspended due to the COVID-19 pandemic. Additionally, the attractions and tours scheduled for the School Trip also closed operations. *Id.* Neither school made the fifth installment to the Morrison Defendants, and instead returned that money to the BMS and MMS families. Since 2020, the CCBOE by and through their agents have provided the public with factual updates on the status of the monies. Additionally, due to the growing public interest in this situation, local news stations such as WSAZ have included these factual updates in their broadcasts.

A refund sought by the Plaintiff/Counterclaim Defendant administration was denied by the Morrison Defendants citing nonrefundable monies paid to train fares and hotels. Plaintiff/Counterclaim Defendant was subsequently informed that all Amtrak train fares, and pre-

paid hotel reservations would be refunded to the Morrison Defendants. Plaintiff/Counterclaim Defendant again requested a refund and further requested an accounting of funds paid by the schools to the Morrison Defendants. The Morrison Defendants again refused to provide a refund or an accounting of monies paid.

Plaintiff CCBOE filed this lawsuit alleging Conversion/Civil Theft; Unjust Enrichment/Restitution; and Fraud. On December 1, 2022, the Morrison Defendants, by and through Counsel, filed their Answer and Counterclaim alleging defamation and breach of contract, as such, the Counterclaim Defendant moves this Court to dismiss all of the claims that may or may not exist in the Morrison Defendants' Counterclaim.

II. Legal Standard

The West Virginia Rules of Civil Procedure provide that a trial court must dismiss the Plaintiff's complaint if it fails "to state a claim upon which relief can be granted." W.Va. R. Civ. P. 12(b)(6). "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief. *Melissa C. v. W. Va. Dep't of Health & Human Res.*, No. 15-0863 (W. Va. 2016), 3, citing *Conley v. Gibson*, 355 U.S. 41, 45-6, [78 S.Ct. 99, 2 L.E.2d 80] (1957).

A motion to dismiss for failure to state a claim upon which relief may be granted tests the legal sufficiency of a civil complaint. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint fails to state a claim when, viewing the factual allegations as true and in a light most favorable to the plaintiff, the complaint does not contain "enough facts to state a claim

that is plausible on its face.” *Bell*, 550 U.S. a 570.

III. Argument

All counterclaims asserted against the Counterclaim Defendant, and contained in the Morrison Defendants’ Answer and Counterclaim, must be dismissed with prejudice pursuant to Rule 12b(6) of the West Virginia Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

A. Defamation

i. The “Defamation Claims” of July 23, 2020, and November 30, 2021, (Counts VI, VII, VIII, and IX) are Barred by the Applicable Statute of Limitations.

Pursuant to W. Va. Code § 55-2-12(c) claims of defamation have a statute of limitations of one (1) year. Specifically, this code section provides as follows:

Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) *within one year next after the right to bring the same shall have accrued* if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative. W. Va. Code § 55-2-12. (Emphasis added).

Importantly, the Supreme Court of Appeals of West Virginia has consistently held that claims of defamation only last for one year pursuant to W. Va. Code § 55-2-12(c). “Numerous torts such as libel, defamation, false arrest, false imprisonment, and malicious prosecution take the one-year statute of limitations set forth in West Virginia Code § 55–2–12(c).” *Herbert J. Thomas Mem’l Hosp. Ass’n v. Nutter*, 238 W. Va. 375, 390–91, 795 S.E.2d 530, 545–46 (2016); *Snodgrass v. Sisson's Mobile Home Sales, Inc.*, 161 W. Va. 588, 244 S.E.2d 321 (1978); *Duffy v. Ogden Newspapers, Inc.*, 170 W. Va. 318, 319, 294 S.E.2d 121, 122 (1982); *Scolapio v. Harrison Cnty. Comm’n*, No. 19-0543, 2020 WL 2735497, at 2 (W. Va. May 26, 2020).

The Morrison Defendants' claims regarding defamation in relation to the statements of the CCBOE and/or their agent(s) on July 23, 2020 (Counts VI and VII) had to be filed on or before July 23, 2021—one year from the date of the alleged defamatory statements. Additionally, the Morrison Defendants' claims of defamation in relation to the statements of the CCBOE and/or their agent(s) on November 30, 2021 (Counts VIII and IX) had to be filed on or before November 30, 2022. Considering the Morrison Defendants failed to assert these claims in any court until December 1, 2022, the statute of limitations related to these claims has expired. Thus, the Morrison Defendants' defamation claims fail as a matter of law and should be dismissed by this Court.

ii. The Morrison Defendants' Counterclaim (Counts V, VI, VII, VIII, IX, X, XI, XII, XIII, and XIV) fail to include sufficient allegations to state any cognizable defamation claims.

The first step in an analysis of a defamation action is to determine whether the individual asserting such a claim is a public or private figure. *Zsigray v. Langman*, 243 W. Va. 163, 170, 842 S.E.2d 716, 723 (2020). The CCBOE acknowledges that the Defendant in this case is most likely a private figure. *Id.* As a result, the essential elements that the Morrison Defendants were required to allege for their defamation action to survive a motion to dismiss are, (1) defamatory statements; (2) a nonprivileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) at least negligence on the part of the publisher; and (6) resulting injury. *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1984).

Importantly, the Supreme Court of Appeals of West Virginia has consistently held that a qualified privilege against defamation exists when “a person publishes a statement in good faith about a subject in which he has an interest or duty and limits the publication of the statement to those persons who have a legitimate interest in the subject matter.” *Id.*; *Swearingen v.*

Parkersburg Sentinel Co., 125 W.Va. 731, 744, 26 S.E.2d 209, 215 (1943); *England v. Daily Gazette Co.*, 143 W.Va. 700, 104 S.E.2d 306 (1958); *Mauck v. City of Martinsburg*, 280 S.E.2d 216, 221 (W.Va.1981). The thrust of this privilege is that there is a “public policy that it is essential that true information be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons or certain interests of the public.” *Id.* Here, the statements were made in good faith by agents of the CCBOE who had an interest and a duty to relay information regarding the subject matter, as well as, any developments in the ongoing dispute between CCBOE and the Morrison Defendants.

The *Crump* Court further held that “. . . privilege and truth, allow a defendant to avoid all liability once established.” “A plaintiff must show that false and defamatory statements were made against him, or relating to him, to a third party *who did not have a reasonable right to know*, and that the statements were made at least negligently on the part of the party making the statements.” *Zsigray v. Langman*, 243 W. Va. 163, 170, 842 S.E.2d 716, 723 (2020) (emphasis added). Here, these elements are not satisfied. The quoted statements were not defamatory. It is also unclear how the specific statements quoted in the Defendants’ Counterclaim were false in any way. Further the incidents and allegations surrounding this lawsuit affect several members of the community, as such, the CCBOE had the authority to inform the public of developments as the public had a reasonable right to this information. Going further, the Morrison Defendants failed to pinpoint any negligent statements from the CCBOE or their agents which would be actionable.

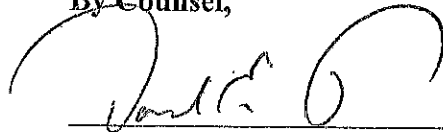
The Morrison Defendants’ claims of defamation fail to meet the essential elements as stated above. As a result, Defendants’ counterclaim fails to state a colorable defamation claim against the CCBOE and said claims should be dismissed with prejudice.

IV. Conclusion

WHEREFORE, for the reasons stated above, the Counterclaim Defendant Cabell County Board of Education respectfully moves this Court to enter an Order dismissing all counterclaims asserted against them with prejudice for failure to state a claim upon which relief can be granted, and for any and all other such relief as the Court deems appropriate and just under the circumstances.

CABELL COUNTY BOARD OF EDUCATION

By Counsel,



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CERTIFICATE OF SERVICE

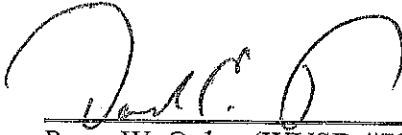
The undersigned counsel for Counterclaim Defendant, Cabell County Board of Education served the foregoing "*Counterclaim Defendant Cabell County Board Of Education's Memorandum Of Law In Support Of Its Motion To Dismiss Defendants' Counterclaim*" via electronic mail and by depositing a true copy of the same in the United States first-class mail, postage prepaid on this 18th day of **January 2023**, upon the following:

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A handwritten signature in dark ink, appearing to read 'Perry W. Oxley', is written over a horizontal line.

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