INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ROBERT HARRIS,

Plaintiff Below/Petitioner,

v.

No. 24-ICA-264
(Appeal from the final order of the Circuit Court of Lewis County. No. CC-21-2023-C-71)

WARNER LAW OFFICES PLLC,

and

CLARKSBURG PUBLISHING COMPANY,
d/b/a The Weston Democrat,
a West Virginia Corporation,

Defendants Below/Respondents.

RESPONDENT CLARKSBURG PUBLISHING COMPANY'S RESPONSE TO PETITIONERS' BRIEF

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CLARKSBURG PUBISHING COMPANY D/B/A
THE WESTON DEMOCRAT,

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TABLE OF AUTHORITIES

Cases

Rules

Other Sources

STATEMENT OF THE CASE

In his Brief, Petitioner provides little discussion of the allegations contained in his Amended Complaint and/or the actual ad upon which he basis his claims of defamation and intentional infliction of emotional distress, focusing more on a recitation of the filing of pleadings and briefs that ultimately led to the dismissal of his Amended Complaint.[1] To the extent that Petitioner does discuss the allegations contained in his Amended Complaint, Petitioner continues to fail to acknowledge the actual statement upon which he basis his claims for defamation, defamation *per se* and intentional infliction of emotional distress, which, incredibly, ask nothing more than the following of its readers: "Have you been sexually assaulted by a gynecologist in the local area?" App. at 210-212. The same ad goes on to invite anyone who believes they may have been sexually assaulted to call for a free, confidential case review. *See id*. At no point in his Amended Complaint or his Brief submitted to this Court does Petitioner acknowledge that absent from this statement is the mention of any specific medical provider, any specific place of employment of any such medical provider, and any specific time frame in which this potential assault may have occurred. *See id.* What is more, Petitioner further fails to acknowledge that the ad is devoid of any false or defamatory statement directed at any individual much less himself. *See id*. Indeed, the ad asks that the readers who have sought gynecological care to reflect on such care and to answer the question of whether they have been sexually assaulted.

Instead, Petitioner makes allegations that Respondent Clarksburg Publishing Company d/b/a The Weston Democrat (hereinafter "Clarksburg Publishing") advertised non-privileged

[1] Clarksburg Publishing would note that it filed with the Circuit Court of Lewis County, West Virginia its Answer and Motion to Dismiss, along with its Memorandum in Support, on March 8, 2024, not March 11, 2024 as represented in Petitioner's Statement of the Case. *See* App. at 4. Moreover, Petitioner filed his response to Clarksburg Publishing's Motion to Dismiss on March 17, 2024, not February 17, 2024. *Id.* Additionally, on June 6, 2024, Clarksburg Publishing also filed its Reply to Dr. Robert Harris' Response to Its Motion to Dismiss. *Id*. at 257-266.

defamatory statements to third parties, in Weston, West Virginia, which falsely alleged sexual assault was or has been committed by Dr. Harris. *See id*. at 101. Throughout the pendency of this litigation, including on appeal, in an effort to make his allegations stronger and to link the ad to himself in order to sustain his Amended Complaint, Petitioner has offered many "rewritings" of the language of the ad, suggesting, for example, that Clarksburg Publishing advertised "defamatory statements alleging sexual assault by a local gynecologist" (*See Brief,* at 3; App. at 102), or specifically assigning the location stated therein as Weston, West Virginia, ignoring the ad's actual language. *See* App.. 102-103; 235-236. By ignoring the plain language of the ad and attempting to assign the location of Weston, West Virginia, (*See id.*), Petitioner intentionally ignores and omits from his Amended Complaint the fact that, in actuality, the nonspecific, innocuous ad, which poses a question regarding "the local area" was published not just in The Weston Democrat, which serves Weston and all of Lewis County, but also in The Record Delta, which serves Buckhannon and all of Upshur County. Accordingly, attempting to replace the phrase "the local area" contained within the ad with Weston, West Virginia or to narrow the ad's application to only Weston, West Virginia in order to sustain his Amended Complaint is plainly wrong and disingenuous.

Petitioner's efforts to link the ad to himself are further undermined by the fact that, according to the allegations contained in his own Amended Complaint, he, not Clarksburg Publishing, published the purportedly false statement to third-parties when he connected himself to the nonspecific ad. According to Petitioner's Complaint, he read this ad and notified his employer, Stonewall Jackson Hospital, that the ad was about him and his practice. *See* App. at 101, ¶12. According to his Amended Complaint, after his own self-reporting, linking himself and his practice to the ad, a domino effect of adverse professional actions and/or decisions by those around him began. *See* App. at 101, ¶¶12-15.

SUMMARY OF THE ARGUMENT

The Circuit Court of Lewis County, West Virginia did not commit reversible error when granting Respondent's Clarksburg Publishing's Motion to Dismiss. The West Virginia Supreme Court of Appeals has explained that "[t]he purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint." *Collia v. McJunkin*, 178 W. Va. 158, 159, 358 S.E.2d 242, 243 (1987) (citations omitted). "'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.**' *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)." Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977) (Emphasis supplied). "Dismissal for failure to state a claim is proper where it is clear that no relief could be granted **under any set of facts that could be proved consistent with the allegations**." *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996) (Internal quotation omitted.) (Emphasis supplied). Further, "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995); *see also Zsigray v. Cindy Langman & J.W. Ebert Corp.*, 842 S.E.2d 716 (W. Va. 2020).

The ad that is the subject of Petitioner's Amended Complaint never identified Petitioner by name. Moreover, it never accused any specific individual of any wrongful behavior, never identified a specific hospital association or practice name and never identified a specific practice location. The ad also did not limit the timeframe in which the wrongful behavior may have occurred. Instead, the ad merely asked a question regarding a type of medical provider "in the local area." Under these circumstances, Petitioner could not, as a matter of law, state a claim for

either defamation or defamation *per se* as no false defamatory statement referencing and/or referring to an individual was ever made to other third-parties. *See Crump v. Beckley Newspapers, Inc*., 173 W.Va. 699, 320 S.E.2d 70 (1983); *Greenfield v. Schmidt Baking Co., Inc.*, 199 W. Va. 447, 485 S.E.2d 391 (W. Va. 1997); *Richard H. v. Rachel B.*, No. 18-1004 (W. Va. Dec 20, 2019).

These same circumstances also illustrate why Petitioner cannot state a claim for intentional infliction of emotional distress. Merely publishing an ad that contains a question without any suggestion to what the answer might be cannot, as a matter of law, be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *See* Syl. pt. 5, *Williamson v. Harden*, 214 W.Va. 77, 585 S.E.2d 369 (2003); *Bine v. Owens*, 208 W.Va. 679, 684, 542 S.E.2d 842, 847 (2000); 18 M.J., Torts, § 2, p. 556 n. 3 (2005); *Travis v. Alcon Labs., Inc.*, 202 W. Va. 369, 504 S.E.2d 419 (1998).

Under these circumstances, and for all the reasons set forth below, the Circuit Court of Lewis County properly granted Clarksburg Publishing's Motion to Dismiss, and, as a result, this Court should affirm the same.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not requested by Respondent Clarksburg Publishing.

ARGUMENT

I. The Circuit Court of Lewis County did not err when it concluded, as a matter of law, that the ad with which Petitioner took issue could not serve as the basis of a claim for defamation or defamation *per se*.

Petitioner's Amended Complaint is devoid of an essential element, if not "the" essential element required to maintain a defamation action, a defamatory statement that references Petitioner. In syllabus point one of *Crump v. Beckley Newspapers, Inc*., 173 W.Va. 699, 320

S.E.2d 70 (1983), the West Virginia Supreme Court of Appeals set forth the elements of a defamation action by a private individual: "The essential elements for a successful defamation action by a private individual 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." The Court went on to summarize this standard in its decision in *Bine v. Owens*, 208 W. Va. 679, 683, 542 S.E.2d 842, 846 (2000). There, the Court explained that to have a "defamation claim, 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, and resulted in injury to the plaintiff." 208 W. Va. 679, 683, 542 S.E.2d 842, 846. The Court has explained that defamation published in written form, as opposed to spoken form, constitutes libel. *See Greenfield v. Schmidt Baking Co., Inc.*, 199 W. Va. 447, 485 S.E.2d 391 (W. Va. 1997). Moreover, the Court has also recognized the distinguishing characteristics of a cause of action for defamation *per se*, explaining that such a cause of action is one that includes imputations of a crime of moral turpitude, imputations of a loathsome disease, imputations of sexual misconduct by a woman, and imputations which affect a business, trade, profession or office.' *Mauck v. City of Martinsburg*, 167 W. Va. 332, 336 n.3, 280 S.E.2d 216, 219 n.3 (1981) (citing Restatement (Second) of Torts §§ 571-74 (1977))." *Richard H. v. Rachel B.*, No. 18-1004 (W. Va. Dec 20, 2019). When the allegations contained in Petitioner's Amended Complaint are considered in light of these standards, it becomes readily apparent that Petitioner has failed, as a matter of law, to demonstrate that any false defamatory statement identifying him, either directly or indirectly, was ever made by Clarksburg Publishing Company, and, as a result dismissal of his

claims by the Circuit Court of Lewis County for defamation and defamation *per se* was appropriate.

Under West Virginia law, failure to set forth allegations to support an essential element of one's cause of action is fatal to his or her claim, even at the motion to dismiss stage. The West Virginia Supreme Court of Appeals has stated the following in this regard:

> a plaintiff may not 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint[,]' *see Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir.1993), or where the claim is not authorized by the laws of West Virginia." *Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. at 776, 461 S.E.2d at 522 (1995). "[I]f a plaintiff does not plead all of the essential elements of his or her legal claim, a [trial] court is required to dismiss the complaint pursuant to Rule 12(b)(6)." Louis J. Palmer, Jr. and Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure*, 406-07 (5th ed. 2017) (quotations and citation omitted).

See Newton v. Morgantown Mach. & Hydraulics of W. Virginia, Inc., 242 W. Va. 650, 838 S.E.2d 734 (2019). When filing a complaint, a plaintiff must set forth the basis for entitlement to relief, which requires more than labels, conclusions, and mere recitations of the elements of the causes of action. *See Fass v. Nowsco Well Serv., Ltd.*, 177 W. Va. 50, 52-53, 350 S.E.2d 562, 563-64 (1986). The Court has explained that "sketchy generalizations of a conclusive nature unsupported by operative facts do not set forth a cause of action. *Id.* In a complaint for defamation, a plaintiff must allege the actual statement(s) that is purportedly defamatory and references the plaintiff. *See Shawkey v. Lowe's Home Ctrs. Inc.,* 2:09-cv-01264 (S.D. W.Va. Mar 30, 2011) (citing *Susko v. Cox Enterprises, Inc.,* 5:07-cv-144, 2008 WL 4279673, at *3 (N.D. W. Va. Sept. 16, 2008) ((citing *Kondos v. W. Va. Bd. of Regents,* 318 F. Supp. 394, 398 (S.D. W. Va. 1970)). In the present litigation, Petitioner claims in his first assignment of error that the circuit court erred by finding that he could not establish the essential elements of defamation statements, arguing that "[t]he allegations in Petitioner's Complaint, when taken as true and viewed in a light most favorable to

Petitioner, state a claim for defamation against Respondents upon which relief can be granted." In actuality, Petitioner's Amended Complaint fails to set forth any defamatory statement with which he takes issue. Instead, he makes general allegations of defamation because no defamatory statements were ever made.

In that regard, in his Amended Complaint in numbered paragraph 11 he alleges that "On or about April 2023, Defendant The Weston Democrat advertised non-privileged defamatory statements to third parties, in Weston, West Virginia, which falsely alleged sexual assault was or has been committed by Dr. Harris." and in numbered paragraph 24 he alleges that "Defendant The Weston Democrat advertised defamatory statements, via news media publication, in Weston, West Virginia, stating sexual assault by a local gynecologist, which was directed at Dr. Harris." App. 101-102. The deceptive nature of Petitioner's allegations is striking as they certainly suggest that direct, defamatory statements were made by Clarksburg Publishing against Petitioner, accusing him of having committed sexual assault, when in reality they are utterly devoid of the actual "statement" purportedly made. As such, at the very least, Petitioner's Amended Complaint deficiently pled his cause of action for defamation.

Notably, however, the deficient nature of Petitioner's pleadings is not surprising when the actual statement that forms the basis of his Amended Complaint against Clarksburg Publishing is considered. Extraordinarily, his claims for defamation and defamation *per se* are based upon an ad that contains the following innocuous question, "Have you been sexually assaulted by a gynecologist in the local area?" *Id*. at 210-212. The same ad goes on to invite anyone who believes they may have been sexually assaulted to call for a free, confidential case review. *See id*. Absent from this ad is the mention of any specific medical provider, any specific place of employment of any such medical provider, and any specific time frame in which this potential assault may have

occurred. What is more, the ad is devoid of any false or defamatory statement. The ad asks that the readers who have sought gynecological care to reflect on such care and to answer the question of whether they have been sexually assaulted. In fact, one would expect that "the local area" would extend as far as the readers travel to obtain their gynecological care. As Clarksburg Publishing explained to the Circuit Court of Lewis County, much of West Virginia is rural. *Id.* at 259. Many local cities and towns are so small they lack any healthcare at all, and, it is not uncommon for residents to travel to neighboring cities and towns for "local" care even where there might be healthcare offered closer to home. *Id.* Simply put, when speaking of healthcare in West Virginia, using the phrase "local area" casts a wide geographical net. *Id.* In other words, Petitioner sought to do exactly what is prohibited under West Virginia law: fumble around trying to find a meritorious claim with sketchy generalizations of a conclusive nature unsupported by the operative facts.

Without question, Petitioner cannot demonstrate that any statement within the ad published by Clarksburg Publishing contained false statements made against him. Petitioner also cannot demonstrate that any statement within the ad published by Clarksburg Publishing contained false statements relating to him. In fact, no statement was ever made in the ad, and certainly, no statement was ever made that anyone had engaged in sexual assault. Instead, a question was asked of anyone reading the ad. It is a hypothetical question referring to no one in particular. Those individuals, presuming that they were individuals receiving care from a gynecologist, were then invited to identify any gynecologist they allege committed sexual assault. The question itself does not make any reference to any specific individual, practice or treatment facility, and it fails to identify any specific timeframe for the potential behavior about which it inquires. As a matter of law, the ad, itself, demonstrates that Petitioner can prove no set of facts in support of his claim

which would entitle him to relief. Moreover, to set forth the contents of the question contained in the ad, itself, illustrates why Petitioner's Amended Complaint was so poorly pled. Indeed, on its face, it defeats multiple essential elements of a cause of action for defamation as it does not set forth a (1) false defamatory statement, (2) referencing the plaintiff (3) disclosed to a third-party.

Based upon the contents of the question set forth in the ad at issue in Petitioner's amended complaint and which is the sole basis for his claim of defamation against Clarksburg Publishing, the Circuit Court of Lewis County concluded that such a question was "comparable to, 'have you been injured by a truck.'" *Id.* at 302. As a result, the Court concluded that the question was not a false statement. First, the Court took judicial notice, pursuant to West Virginia Rule of Evidence 201(a)(l), that local citizens will travel for medical services to Morgantown, Clarksburg/Bridgeport, and Buckhannon, West Virginia. App. at 304. Second, the Court also acknowledged that the advertisement was not limited to any specific time frame. Based upon these findings, the Circuit Court concluded that Petitioner's claims for defamation failed to state claims upon which relief could be granted. *See id.* Given the aforementioned deficiencies outlined in detail above, the Circuit Court did not err in dismissing Petitioner's claims for defamation.

In an effort to survive dismissal, on multiple occasions below, Petitioner essentially attempted to redefine the area identified in the ad, specifically assigning the location stated therein as Weston, West Virginia, ignoring the ad's actual language, which merely offered the nonspecific language "local area." Petitioner cannot re-write the language of the ad with which he takes issue to support his cause of action for defamation. Moreover, Petitioner's attempt to re-write the language of the ad necessarily reveals the inherent issues with his cause of action for defamation. First, as noted previously, when speaking of healthcare in West Virginia, using the phrase "local area" casts a wide geographical net. Second, it goes without saying that anytime an attorney

advertises for a specific type of case whether it be for cases involving trucks or wrongful discharge or sexual assault, implicit in all of those ads is the notion that these incidents have occurred in the "local area," hence the reason attorneys have chosen to advertise there at all. Moreover, the "local area" is determined by the actions of the local residents and cannot be limited to a single small city like Weston, West Virginia.

Furthermore, under the plain allegations of Petitioner's Amended Complaint, what really happened is that Petitioner defamed himself. Based upon his own allegations, Petitioner himself cast the light of public scrutiny in his direction and linked himself to an innocuous ad that sought to combat sexual assault by individuals in a position of power and trust with clients. The ad specifically sought to have readers identify any offending medical providers and to contact the specified law office for a free, confidential case review. According to Petitioner, he read this ad and, despite being referenced nowhere, incredibly, he notified his employer, Stonewall Jackson Hospital, that the ad was about him and his practice. *See* App. at 101, ¶12. In fact, his Amended Complaint goes on to allege that after his own self-reporting that this innocuous ad targeted him and his practice, a domino effect of adverse professional actions and/or decisions by those around him began. *See* App. at 101, ¶¶12-15. In other words, any adverse consequences Petitioner claims to have suffered are the result of his own actions and/or "guilty conscience," which attributed an ad containing a non-specific, non-identifying question to himself. Simply put, Petitioner cannot identify himself as the subject of an innocuous ad to other third-parties and then claim defamation because of his own disclosure. It was not the ad run by the Clarksburg Publishing Company that published Petitioner's identity to other third-parties, **it was Petitioner himself**. Under these circumstances, Petitioner has failed to set forth allegations to support the essential element of a nonprivileged communication to a third-party of an allegedly defamatory statement by Clarksburg

Publishing. As such, Petitioner can demonstrate absolutely no error with the Circuit Court's dismissal of his claims for defamation

Even if this Court were to find that Petitioner has stated a cause of action for defamation. Clarksburg Publishing's running of the subject ad is entitled to, at the very least, qualified privilege. Statements published by the media **without malice**, in good faith, in a reasonable manner for which there is a public interest or for which there is a private interest of such importance to the public that is protected by public policy are subject to qualified privilege. A media Defendant cannot be required to prove the truth of a statement involving a matter of public concern. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.E.2d 783 (1986). Moreover, a media defendant's liability for failure to check the accuracy of advertisements is limited to those cases where the Defendant actually knew the advertisement was false before publication or where the advertisement is so inherently improbable on its face that the media defendant must have realized the advertisement was probably false. *See Varanese v. Gall*, 35 Ohio St. 3d 78, 518 N.E.2d 1177 (Ohio 1988). In so holding, the Ohio Supreme explained the following:

> We are persuaded that these protections apply with special force to paid political advertisements. Such ads, unlike many news stories, are not generated from within the media organization itself--a fact which, practically speaking, should diminish media responsibility for the accuracy of any statements contained in such ads. It should be noted that the political advertisement in *New York Times Co. v. Sullivan, supra*, was checked by no one at the defendant newspaper, and still the court refused to impose liability. Id. 376 U.S. at 287-288, 84 S.Ct. at 729-730. The defendant's advertising manager therein relied on the reputation of the sponsors of the ad. *Id*. at 287, 84 S.Ct. at 729. The court considered this factor to be probative of an absence of actual malice. *Id*. Even where such reliance is negligent, liability will not lie. *St. Amant*, supra, 390 U.S. at 730-733, 88 S.Ct. at 1325-1327. However, where the contents of the proposed publication "are so inherently improbable that only a reckless man would have put them in circulation," the defendant may be guilty of actual malice. *St. Amant, supra*, at 732, 88 S.Ct. at 1326.

Varanese, 35 Ohio St.3d 78, 518 N.E.2dat 1184. As argued below, in the present litigation, Petitioner has failed to set forth any supporting factual allegations of malice on the part of Clarksburg publishing, *i.e.*, that the Defendant actually knew the advertisement was false before publication or where the advertisement is so inherently improbable on its face that the media defendant must have realized the advertisement was probably false. Accordingly, no cause of action for defamation or defamation lies against Clarksburg Publishing, as a matter of law.

Furthermore, as Respondent Warner Law Offices PLLC argued below, questions posed to the reading public regarding potential tortious conduct are not defamatory statements and/or are privileged. As such, publishers like Clarksburg Publishing cannot be held liable for publishing such questions. While it appears that there are no West Virginia cases on point on this issue, other Courts have considered this issue, deciding it in favor of Respondents.

First, with regard to a finding that they are defamatory, the Superior Court of New Jersey concluded that an advertisement in a newspaper that offered free consultation to discuss the legal rights of readers who answered affirmative the questions of whether they were treated by Dr. Dello Russo or Dr. William Kellogg at the NJ Eye Center and whether they suffered a "bad" result from eye surgery was not defamatory. *Dello Russo v. Nagel,* 358 N.J. Super. 254, 262 (N.J. 2003). The Court concluded that even though the advertisements actually mentioned the physicians by name, the advertisements were not defamatory statements. The Court explained that the advertisements did not state that Dr. Dello Russo was incompetent or that he had a history of bad results. Rather, it asks whether patients who had been treated at the New Jersey Eye Center by either Dr. Dello Russo or Kellogg suffered a bad result. The Court reasoned that the term "bad" used by defendants was not significant because the defendants were trying to limit the patients who contacted them to those who experienced unfavorable results. The Court concluded that the advertisements were not

defamatory. *Id.* at 432. The court explained that "attorneys are constitutionally and ethically permitted to advertise." *Id.*

Similarly, an opinion was issued by the Wisconsin Court of Appeals regarding an advertisement published with a law firm's contact information inquiring as to whether "anyone has any information regarding Liberty Mutual Fire Insurance Company's delay or failure to pay claims or losses, please contact the undersigned." *Liberty Mut. Fire Ins. Co. v. O'Keefe,* 205 Wis. 2d 524, 526 (Wisc. Ct. App. 1996). The Court of Appeals concluded the advertisement was not defamatory of Liberty Mutual, explaining "[i]n its plain and popular sense, and in the context used, the entire statement would be interpreted as a lawyer's fishing expedition, not a statement about Liberty Mutual's business ethics." *Id.* at 530.

The striking fact in each of these cases is that in each question posed to third-parties, the plaintiff alleging defamation was actually named, by name, in the questions posed in the ads. Yet, in both instances, the courts concluded defamation had not occurred. The inquiries were just that, inquiries. They never stated anyone had engaged in wrongful behavior; instead, they inquired as to whether anyone had been harmed by the named plaintiffs alleging defamation. In the instant case, no one, including Petitioner, was ever identified in the inquiry set forth in the subject ad placed with Clarksburg Publishing. No accusations of wrongdoing were ever lodged in the ads. Instead, the readers were asked a question to which only they knew the answer. When the facts and circumstances alleged in Petitioner's amended complaint are evaluated in light of these persuasive decision, it is clear that the subject ad cannot, as a matter of law, serve as the basis of a claim for defamation.

Second, other courts have concluded legal advertisements are absolutely privileged from defamation suit as part of a judicial or quasi-judicial proceeding. In this regard, the Restatement

(Second) of Torts directly addresses whether pre-suit litigation advertisements enjoy absolute privilege in a defamation case. The Restatement states: "an attorney at law is absolutely privileged to publish defamatory matters concerning another in communications *preliminary* to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." Restatement (Second) of Torts at § 586. The comments to that section indicate that absolute privilege extends to communications made prior to the filing of suit when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. Restatement (Second) of Torts at § 586 at cmt. e. One such Court, the Supreme Court of Tennessee has followed the guidance offered by the Restatement, concluding that pre-suit advertisements made by attorneys enjoy absolute privilege in a defamation suit. *Simpson Strong-Tie Co. v. Stewart, Estes & Donnell,* 232 S.W.3d 18, 21 (Tenn. 2007). In that case, a plaintiff's firm ran this advertisement in a newspaper: "Phillips Screws and Fasteners and/or Simpson's Screws and Fasteners–We are investigating the accelerated corrosion due to defectively manufactured screws and fasteners caused by pressure treated wood." *Id.* The court held that an attorney is privileged to publish what may be defamatory information prior to a proposed judicial proceeding even when the communication is directed at recipients unconnected with the proposed proceeding. *Id.* at 27. In so holding, the Tennessee Court took notice that courts elsewhere have likewise held that the privilege is applicable to defamatory communications made in client solicitations. *Id*. at 25. *(*citing *Rubin v. Green*, 4 Cal.4th 1187, 17 Cal.Rptr.2d 828, 847 P.2d 1044 (Cal.1993) (soliciting clients in anticipation of litigation is privileged); *Popp v. O'Neil*, 313 Ill.App.3d 638, 246 Ill.Dec. 481, 730 N.E.2d 506 (Ill.App.Ct.2000) (defamatory letter to a prospective client was privileged because of the need for open communication); *Kittler v. Eckberg, Lammers, Briggs, Wolff & Vierling*, 535

N.W.2d 653 (Minn.Ct.App.1995) (law firm could not be liable for defamatory statements made in a solicitation letter to potential plaintiffs); *Samson Inv. Co. v. Chevaillier*, 988 P.2d 327 (Okla.1999) (draft complaint sent to a prospective client was protected by the litigation privilege where the document was meant to solicit clients)). Like these other jurisdictions, West Virginia law already recognizes that "[j]udicial and quasi-judicial proceedings" enjoy absolute privilege. *See Crump v. Beckley Newspapers, Inc.,* 320 S.E.2d 70, 173 W.Va. 699 (W. Va. 1983). In light of the aforementioned persuasive authority, such privilege should be extended to presuit client solicitations, especially where it is a matter of public interest to educate the reading public on potential harms and their rights when they have sustained an injury from such harm. An extension of such absolute privilege would protect the ad published with Clarksburg Publishing in this litigation.

II. The Circuit Court did not err when it evaluated the allegations set forth in Petitioner's Amended Complaint in the context of West Virginia law to determine whether relief could be granted under any set of facts that could be proved consistent with those allegations.

Petitioner essentially takes issue with the entirety of the Circuit Court's order, claiming that the Circuit Court improperly usurped the role of the jury by making findings regarding disputed evidence in favor of Respondents prior to the discovery stage. Importantly, in making this argument, Petitioner ignores the fact that, as a threshold matter, it is the Court's duty to determine as a matter of law whether a statement is "capable of a defamatory meaning." *Belcher v. Wal-Mart Stores, Inc.*, 568 S.E.2d 19, 26, 211 W.Va. 712 (W. Va. 2002). In the present litigation, when presented with the actual statement that forms the basis of Petitioner's Amended Complaint, the Circuit Court was charged with making this determination, and, in doing so, rightfully observed the shortcomings with Petitioner's allegations, particularly that the ad failed to contain any identifying information whatsoever that could possibly link it to Petitioner.

Citing to *In re Callaghan*, 796 S.E.2d 604, No. 16-0670 (W. Va. 2017) (*citing Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 23-24, 110 S.Ct. 2695 (1990) (Brennan, J., dissenting), Petitioner contends that the Court erred because the Court failed to take into consideration "what a reasonable reader would have understood the author to have said," and not what was literally said or published, to support his contention that the Circuit Court invaded the province of the jury by making a determination of what a "reasonable reader" might understand. This principle is noted in passing in *In re Callaghan*. Moreover, it is important to point out that the statements considered in *In re Callaghan* are striking different and easily distinguishable from the nonspecific, nonidentifying question asked in this litigation. There, the West Virginia Supreme Court of Appeals was asked to consider a direct-mail flyer approved by Judge-Elect Callaghan emblazoned with "photoshopped" photographs of President Obama and Judge Gary L. Johnson, along with the caption "Barack Obama & Gary Johnson Party at the White House …" while on the opposite side, the flyer concluded "… While Nicholas County loses hundreds of jobs." *Id.* at 613. There, the Court was charged with the duty of considering whether this flyer, which directly identified Judge Johnson, could be considered, among other things, "rhetorical hyperbole," or speech which cannot "reasonably [be] interpreted as stating actual facts about the [individual] involved." *Id.* at 625-626. Importantly, unlike in the present litigation, it was not the identity of the purportedly defamed individual that was issue, but rather the interpretation of the statements being said about the clearly identified individual and whether they could be perceived by a reasonable reader as factual statements. In other words, would the reasonable reader perceive the statements made about a specifically identified individual as factual statements.

Similarly, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), the dissent of Justice Brennan, which was cited by *In re Callaghan* for the reasonable

reader standard, also involved a case of direct identification of the plaintiff alleging defamation. There, the Court was asked to determine whether an article containing, among other declarations, the following statement: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." was constitutionally protected opinion regarding the individuals specifically named therein. *Milkovich,* at 5-9. Here, the question before the Circuit Court was not whether a "reasonable reader" would reasonably interpret the ad as stating actual facts about Petitioner. Instead, the question before the Circuit Court was a threshold question, does the ad make any statement about the Petitioner at all? The answer is no. Indeed, there was no identification of or reference to Petitioner whatsoever. As such, neither the West Virginia Supreme Court of Appeal's holding in *In re Callaghan* nor its citations to *Milkovich* is applicable to the facts and circumstances of this litigation.

For approximately two and one-half pages, Petitioner identifies various errors he believes were committed by the Circuit Court while invading the province of the jury. Notably, however, he cites no legal authority to support his contentions that the Circuit Court erred with any of its findings. In that regard, he claims the Circuit Court erred in determining that the defamatory advertisements referenced in Petitioner's Amended Complaint contained a question rather than a statement. By its very definition, a question is an interrogative expression used to elicit information or test knowledge. The ad specifically stated, "Have you been sexually assaulted by a gynecologist in the local area?" One cannot dispute that this is a question asked to elicit information or test the knowledge of those reading it. Moreover, regardless of the sentence's type, the real issue here is, as a matter of law, whether it is capable of a defamatory meaning. As the discussion above has clearly demonstrated, it is not.

Likewise, the Petitioner also takes issue with the fact that the Circuit Court likened this question to a similar question asked by other attorneys "have you been injured by a truck?" In that regard, Petitioner claims that "[a]n important difference between Respondents' advertisements and advertisements for auto injuries is that Respondents' advertisements were specific to Petitioner." Importantly, Petitioner tries to generalize the Circuit Court's comparison to "auto injuries" in general, which is plainly wrong. The Circuit Court compared the question posed in the subject ad to those inquiring about injuries caused by large trucking companies and/or companies whose businesses involve the use of commercial trucks to conduct their business. Contrary to Petitioner's assertion, the subject ad was no more specific to Petitioner than the ads seeking litigation against a corporation utilizing trucks in their business, and, as a result the plain language of the ad clearly demonstrates that it was not directed at Petitioner and it did not "levy criminal felony accusations against Petitioner."

Furthermore, Petitioner takes issue with the Circuit Court's finding that the phrase "local area" casts a wider net than just Weston, and can include Morgantown, Clarksburg/Bridgeport, and Buckhannon. In his Brief submitted to this Court, Petitioner provides no legal authority to suggest that the Circuit Court's finding was improper or inappropriate at this stage of the litigation. The West Virginia Rules of Evidence explicitly permit a circuit court to take judicial notice of an adjudicatory fact if it "is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." W.V.R. Evid. 201(b) (2014). The use of judicial notice is often an expression of common sense: "[W]here a fact is well-known by all reasonably intelligent people in the community, or its existence is so easily determinable with certainty from unimpeachable sources, it would be not good sense to require formal proof." *In re*

S.C., 248 W.Va. 628, 889 S.E.2d 710 (2023) (quoting *Harper v. Killion,* 345 S.W.2d 309, 311 (Tex.Civ.App.), *affirmed*, 162 Tex. 481, 348 S.W.2d 521 (1961)). It is certainly generally known within the jurisdiction of Lewis County, West Virginia, and, for that matter most jurisdictions within West Virginia, that our state is a primarily rural state with many individuals who require healthcare living in areas with little or no healthcare opportunities. As a result, many, if not most, of our State's residents travel to other more populated areas to receive the care they require and/or to obtain choice of healthcare providers, a choice important to most individuals seeking healthcare. Certainly, all reasonably intelligent people in the community of Weston, West Virginia and the larger area of Lewis County understand that Weston and Lewis County are no different than other rural jurisdictions within the state where residents traveling to other more populated areas to receive healthcare and to obtain choice in providers.

Additionally, as noted previously, anytime an attorney advertises for a specific type of case whether it be for cases involving trucks or wrongful discharge or sexual assault, implicit in all of those ads is the notion that these incidents have occurred in a "local area," hence the reason attorneys have chosen to advertise there at all. Attorneys wish to reach residents and those residents' actions necessarily determine the "local area." For example, how far do they travel to seek medical treatment, how far to they travel to work, etc. In a rural state like West Virginia, it is a matter of judicial notice that the "local area" is wider than a single, small city like Weston, West Virginia.

Petitioner's assignments of error to the Circuit Court's conclusions that (1) the ad neither set forth a false statement nor showed a reckless disregard for the truth and (2) the defamatory advertisements were not limited by timeframe, also gain little, if any, traction to demonstrate why dismissal of his claims for defamation was improper. As the discussion above clearly illustrates

the ad contained no false statement(s) about any particular individual. In fact, it does not even suggest that sexual assault has occurred. Instead, it asks a question. The ad set forth no identifying information whatsoever of any individual, *i.e.,* name, place of employment, location of potential sexual assault, timing of sexual assault and/or timing of employment of any individual.

Moreover, a conclusory allegation that, given the statute of limitations on claims of sexual assault, the ad directly published the identity of Petitioner is not sufficient to defeat a motion to dismiss given the plain language of the ad itself. *See Fass v. Nowsco Well Serv., Ltd.*, 177 W. Va. 50, 52-53, 350 S.E.2d 562, 563-64 (1986). This is especially true when the alternative is considered. Had the ad set forth a timeframe that encompassed Petitioner's employment with Stonewall Jackson Hospital, then Petitioner would have without question argued that the ad directly identified him to other third parties. Petitioner's assignments of error with regard to the Circuit Court findings in this regard are little more than an attempt to distract this Court from Petitioner's own admission that any adverse consequences Petitioner claims to have suffered were the result of his own actions and/or "guilty conscience," which attributed an ad containing a non-specific, non-identifying question to himself.

For the foregoing reasons, the Circuit Court properly carried out its duty to determine, as a threshold matter, whether the question contained in the subject ad was "capable of a defamatory meaning." In doing so, the Circuit Court did not usurp the role of the jury.

III. The Circuit Court did not err when it considered the ad which forms the basis of Petitioner's allegations of defamation against Clarksburg Publishing.

First, had the Circuit Court not considered the ad which forms the basis of Petitioner's allegations of defamation against Clarksburg Publishing, then, on its face, Petitioner's Amended Complaint was deficient, failing to state a cause of action upon which relief could be granted because Petitioner failed to set forth any allegedly defamatory statement. As such West Virginia

law would have dictated dismissal. After all, under West Virginia law, for a cause of action for libel or slander to be correctly pleaded, the exact words charged to have been used must be alleged with particularity. *See Shawkey v. Lowe's Home Ctrs. Inc.,* 2:09-cv-01264 (S.D. W.Va. Mar 30, 2011) (citing *Susko v. Cox Enterprises, Inc.,* 5:07-cv-144, 2008 WL 4279673, at *3 (N.D. W. Va. Sept. 16, 2008) ((citing *Kondos v. W. Va. Bd. of Regents,* 318 F. Supp. 394, 398 (S.D. W. Va. 1970)).

Certainly, Petitioner's sensationalized general allegations that "On or about April 2023, Defendant The Weston Democrat advertised non-privileged defamatory statements to third parties, in Weston, West Virginia, which falsely alleged sexual assault was or has been committed by Dr. Harris" and that "Defendant The Weston Democrat advertised defamatory statements, via news media publication, in Weston, West Virginia, stating sexual assault by a local gynecologist, which was directed at Dr. Harris" fail to set forth "the exact words charged to have been used." *See* App. at 101-102. In a case alleging libel, or written publication of a defamatory statement, failure to set forth the exact words charged to have been used is inexcusable. Of course, when the actual words used in the ad that is the subject of this litigation, "Have you been sexually assaulted by a gynecologist in the local area?", are considered, they certainly do not bring about the shock and awe elicited by the wrongly stated, overly generalized allegation made by Petitioner. In fact, they raise the question of how defamation could have occurred at all, and, at first glance, they suggest dismissal is appropriate.

Second, the Circuit Court's review and consideration of the ad upon which Petitioner basis his claim of defamation was not err. In fact, West Virginia law is clear that some evidence may properly be considered without converting a motion to dismiss to one for summary judgment. In that regard, the West Virginia Supreme Court of Appeals has held "[a] circuit court ruling on a

motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure may properly consider exhibits attached to the complaint without converting the motion to Rule 56 motion for summary judgment." *Forshey v. Jackson*, 222 W.Va. 743, 744, 671 S.E.2d 748, 749, syl. pt. 1 (2008). The Court has also recognized that a court may consider a document that is outside of the pleading if (1) the pleading implicitly or explicitly refers to the document; (2) the document is integral to the pleading's allegations; and (3) no party questions the authenticity of the document. Syl. Pt. 6, *Mountaineer Fire & Rescue Equip. LLC v. City Nat'l Bank of W.Va.*, 244 W.Va. 508, 854 S.E.2d 870 (2020). Without question, this Court may consider the very ad(s) upon which Petitioner relies to support his defamation, and, as noted previously, given the deficiencies with Petitioner's Amended Complaint as pled, it was necessary. Unfortunately for Petitioner, the plain language of the ad, alone, was enough to defeat Petitioners' Amended Complaint. In his Brief submitted to this Court, Petitioner contends that the advertisements should have only been viewed by the Circuit Court for the purpose of determining if they state what Petitioner has alleged they stated, in the case of Clarksburg Publishing, in his Amended Complaint. Indeed, that is exactly what the Circuit Court did, and, what the Circuit Court found was that, in fact, the ads stated something far different, something far more innocuous than what Petitioner alleged in his Amended Complaint, which was not capable of defamatory meaning.

IV. The Circuit Court did not err when it concluded that running an innocuous ad asking the question, "Have you been sexually assaulted by a gynecologist in the local area?" cannot serve as the basis of a cause of action for intentional infliction of emotional distress.

Although in support of his claim for intentional infliction of emotional distress, Petitioner makes salacious allegations against himself under the guise of assigning meaning to the ad placed with The Weston Democrat, *i.e.,* "the Weston Democrat advertised defamatory statements alleging Dr. Harris committed sexual assault," the ad, itself, proves Plaintiff's allegations are, in fact,

untrue. As explained previously, Petitioners' case is one that arises from his own actions and not by allegedly atrocious, intolerable actions on the part of Clarksburg Publishing that are so extreme and outrageous to exceed the bounds of decency.

Under West Virginia law, for a plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress, four elements must be established. It must be shown: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. *See* Syl. pt. 5, *Williamson v. Harden*, 214 W.Va. 77, 585 S.E.2d 369 (2003); *Bine v. Owens*, 208 W.Va. 679, 684, 542 S.E.2d 842, 847 (2000); 18 M.J., Torts, § 2, p. 556 n. 3 (2005).

The Court in *Travis v. Alcon Labs., Inc.*, 202 W. Va. 369, 504 S.E.2d 419 (1998) explained a circuit court's initial role when assessing a defendant's conduct in an intentional infliction of emotional distress claim. There the Court explained:

> In evaluating a defendant's conduct in an intentional or reckless infliction of emotional distress claim, the role of the trial court is to first determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress. Whether conduct may reasonably be considered outrageous is a legal question, and whether conduct is in fact outrageous is a question for jury determination.

Id. at Syl. Pt. 4. The Court explained that the conduct giving rise to an action for intentional infliction of emotional distress must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an

average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" *Tanner v. Rite Aid of W. Va., Inc.*, 194 W. Va. 643, 651, 461 S.E.2d 149, 157 (1995) (quoting Restatement (Second) of Torts § 46(1) Comment (d) (1965)).

In the present case, Clarksburg Publishing's conduct cannot reasonably be considered to be so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress. Clarksburg Publishing, at the request of a well-known law firm, published an ad that asked a question regarding gynecologist in an undefined "local area." The ad made no reference to a specific individual, hospital, practice group or timeframe. Instead, the ad asks that the readers who have sought gynecological care to reflect on such care and to answer the question of whether they have been sexually assaulted. As explained previously, one would expect that "the local area" would extend as far as the readers travel to obtain their gynecological care. Again, much of West Virginia is rural, and, it goes without saying that many West Virginia residents seek "local" healthcare beyond the boundaries of the town in which they live. It does not exceed the bounds of decency or offend community notions of acceptable conduct for a publishing company to run an ad for a well-known law firm soliciting specific types of cases in a local area. After all, the practice of law is often highly specialized and plaintiff attorneys often develop a reputation for pursuing specific types of cases. Seeking the assistance of and receiving assistance from a publishing company to solicit specific types of cases in a local area is not extreme and outrageous conduct as a matter of law, especially where the ad run does not contain any specific identifying information whatsoever and "the local area" for healthcare can span multiple towns and cities. Accordingly, under these circumstances, where the ad at issue is not capable of a defamatory meaning and no action on the part of Clarksburg Publishing when publishing the ad can be said to have exceeded

the bounds of decency or offended community notions of acceptable conduct, the Circuit Court properly dismissed Petitioner's claim for intentional infliction of emotional distress.

V. Inclusion of the Record Delta on the style of the case does not render the Circuit Court's dismissal improper.

It would appear that inclusion of the Record Delta in the style of the case when dismissing Petitioner's Amended Complaint was a clerical error as Petitioner's Amended Complaint does not identify the Record Delta as a defendant. Certainly, inclusion of the same on the style of the case does not, alone, render the Circuit Court's decision to dismiss Petitioner's Amended Complaint with regard to Clarksburg Publishing improper or incorrect. Also, to the extent that Petitioner represents that the Circuit Court "relied on characteristics of the non-party as a basis to dismiss the complaint" is plainly wrong. Other than inadvertently listing The Record Delta as a defendant, the only other mention of The Record Delta is to acknowledge that the ad was run in it, and, that The Record Delta is a newspaper published in Buckhannon, Upshur County. The Circuit Court made no findings regarding the publication of the ad in The Record Delta as support for the conclusions of law it made in support of its decision to dismiss Petitioner's Amended Complaint. As the discussion above clearly demonstrates, the ad alone, which was run in the Weston Democrat, the publication at issue in Petitioner's Amended Complaint, defeats Petitioner's Amended Complaint.

CONCLUSION

The Circuit Court's order granting Respondent Clarksburg Publishing Motion to Dismiss should be affirmed by this Court. As a matter of law, Petitioner cannot state a claim upon which can be granted for defamation, defamation *per se* or intentional infliction of emotional distress. The ad that are the subject of Petitioner's Amended Complaint never identified Petitioner by name. Moreover, it never accused any specific individual of any wrongful behavior, never identified a

specific hospital association or practice name and never identified a specific practice location. The ad also did not limit the timeframe in which the wrongful behavior may have occurred. Instead, the ad merely asked a question regarding a type of medical provider "in the local area." As such, the Circuit Court of Lewis County, West Virginia did not commit reversible error when granting Respondent's Clarksburg Publishing's Motion to Dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2024, a copy of the foregoing **RESPONDENT CLARKSBURG PUBISHING COMPANY D/B/A THE WESTON DEMOCRAT, RESPONSE TO PETITIONERS' BRIEF** was served electronically using File and Serve Express, the Intermediate Court of Appeals of West Virginia's electronic file and serve system:

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