No. 18-465

In the Supreme Court of the United States

SADE GARNETT,

Petitioner,

v.

REMEDI SENIORCARE OF VIRGINIA, LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CORRECTED PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit improperly exercised its discretion to consider a new issue on appeal when it *sua sponte* decided to affirm the dismissal of petitioner's Complaint based on an argument that was not passed on below by the District Court, was unbriefed, unasserted, and undeveloped in both the District Court and the Court of Appeals, and was only raised for the very first time at oral argument *by the Court of Appeals*.

PARTIES TO THE PROCEEDINGS

Petitioner is Sade Garnett. Respondent is Remedi SeniorCare of Virginia, LLC ("Remedi").

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sade Garnett respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's decision is published and is reported at 892 F.3d 140. It is reproduced in the Appendix ("App") at 1a-13a. The Fourth Circuit's unreported order denying rehearing *en banc* is reproduced at App. at 24a. The District Court's memorandum order granting Remedi's motion to dismiss is unpublished and is reproduced at App. at 19a-23a. The District Court's memorandum order granting in part and denying Garnett's Motion to Alter or Amend Judgment is unpublished and is reproduced at App. at 14a-18a.

JURISDICTION

The Fourth Circuit denied rehearing on July 7, 2018. App. at 24a. This Petition is timely filed within ninety days thereafter[1], and this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides, in pertinent part: "nor shall

[1] Pursuant to Supreme Court Rule 30.1, and recognizing that Monday, October 8, 2018 is Columbus Day, two days have been added to this calculation to move the due date from Sunday, October 7, 2018 to the "next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed," namely October 9, 2018.

any person . . . be deprived of life, liberty, or property, without due process of law."

INTRODUCTION

This petition arises from the Fourth Circuit's *sua sponte* decision to usurp the adversarial process and affirm the dismissal of Garnett's Complaint based on an argument that was never passed on below, never briefed at any level, and not even invited on appeal by Remedi, the appellee and prevailing party. In other words, the Court of Appeals granted a full and final judgment against Garnett without allowing her any chance to present authorities or develop evidence to respond to the reason for its decision. That reason – that Garnett could not show that Remedi could be liable for its employee's conduct under the doctrine of respondeat superior – disregards that in Virginia, (i) determining whether an employee acted within the scope of his employment for respondeat superior purposes is usually an issue of fact for a jury, and (ii) at the motion to dismiss stage, the stage at which the case was dismissed here, an employee can establish a prima facie presumption *in favor* of such liability simply by showing the existence of an employment relationship. Despite this, the Court of Appeals concluded, *on its own*, *on the face of the Complaint*, and *as a matter of law,* that Garnett had no path to liability against Remedi.

In *Singleton v. Wullf*, 426 U.S. 106 (1976), this Court confronted an almost identical situation. There, the Eighth Circuit *sua sponte* decided the merits of a case, even though the only issue actually presented for review was whether the petitioner there had standing to bring the lawsuit. *Id.* at 119. This Court reversed the Eighth Circuit's uninvited effort and

held that the appeals court's proactive action failed to give the petitioner a proper opportunity to introduce evidence or arguments in support of his position. *Id.* at 120-121. This Court called the Eighth Circuit's *sua sponte* action "an unacceptable exercise of its appellate jurisdiction," *id* at 120, and said that although there are circumstances where a federal appellate court is justified in resolving an issue not passed upon below, "[s]uffice it to say that this is not such a case." *Id.* at 121.

This too is "not such as case." Just like the Eighth Circuit did in *Singleton*, the Fourth Circuit here failed to give Garnett a meaningful opportunity to present authorities or evidence in her favor on the issue of respondeat superior liability. Also, just as the Eighth Circuit did in *Singleton*, the Fourth Circuit here wrongfully concluded, based solely on the face of the Complaint, that resolution of the respondeat superior issue was beyond any doubt. To the contrary, Virginia law holds that "proof of the employment relationship creates a prima facie rebuttable presumption of the employer's liability." *Gina Chin & Associates v. First Union Bank*, 537 S.E.2d 573, 577 (Va. 2000). The burden then shifts *to the employer* "to prove that the [employee] was <u>not</u> acting within the scope of his employment when he committed the act complained of." *Id.* at 578 (emphasis added). Here, the Complaint plainly alleges an employment relationship, thus creating a presumption in favor of vicarious liability. Remedi, however, never even raised the defense of respondeat superior liability, much less tried to rebut the presumption of liability. *A fortiori*, the rebuttable presumption stands unrebutted. The Fourth Circuit nowhere mentioned these presumptions in its decision.

The Fourth Circuit justified its *sua sponte* frolic into Virginia's respondeat superior jurisprudence by saying that it had asked Garnett's counsel about such liability at oral argument but he was "unable to provide any satisfactory answers." App. at 4a. However, as this Court acknowledged in *Singleton*, this self-fulfilling rationale is improper where the party at issue has never had any opportunity to develop or flesh out the issue prior to oral argument. In rejecting the same basic rationale by the Eighth Circuit, this Court in *Singleton* said:

> We have no idea what evidence, if any, petitioner would, or could, offer in defense [of his position], but this is ***only because*** petitioner *has had no opportunity to proffer such evidence.*

Singleton, 428 U.S. at 120 (emphasis added). So too here. Where a party is deprived of a chance to address an issue because of its *sua sponte* nature, such deprivation cannot then be used as a cudgel against that party.

In short, this Court should grant Garnett's petition for a writ of certiorari and should reverse the Fourth Circuit's decision below. And indeed, the decision below is so clearly erroneous that summary reversal is warranted.

STATEMENT OF THE CASE

A. The District Court Proceedings

This is a defamation case. Garnett alleges that while she was in the employ of Remedi but out on medical leave, one of Remedi's supervisors, Aaron Try, told other employees at the worksite that Garnett "was having surgery on her vagina because

she's got an STD [sexually transmitted disease] cause that's the only reason a female has surgery on her vagina." JA40.[2] This statement is false and defamatory. Most notably, it falsely implies that Garnett had a loathsome and contagious disease that excluded her from society and lowered her in the estimation of others. JA40, 42. Garnett sued by filing a Complaint against Remedi.[3]

Remedi moved to dismiss the Complaint under Fed.R.Civ.P 12(b)(6). Its motion rested on four – and ***only*** four – grounds: (1) that "Plaintiff fails to identify any actionable statement"; (2) that "the alleged statements do not fall within one of the four enumerated categories of *per se* defamatory statements"; (3) "Plaintiff has failed to allege facts which support a contention that her reputation was damaged."; and (4) "Plaintiff has not alleged sufficient facts to support her claim of malice." JA46. Neither Remedi's motion nor its supporting legal memorandum said anything about the doctrine of respondeat superior, and Remedi did ***not*** seek dismissal of the Complaint based on that doctrine.

The District Court granted Remedi's motion, relying on the first ground. App. at 20a. It said: "[Remedi's] central argument is that [its employee's] statement is not defamatory as a matter of law. The Court agrees and will grant Defendant's motion." *Id*. It then made one – and ***only*** one – holding, that Try's statement that Garnett has "a STD" was merely an

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[2] "JA" refers to the Joint Appendix filed in the Fourth Circuit.

[3] Garnett initially filed her lawsuit in state court. Remedi removed it to federal court, however, and then for reasons unrelated to this petition, Garnett filed a First Amended Complaint in federal court. *See* JA39-44. It is this Complaint that Remedi moved to dismiss.

opinion, not a fact. App. at 22a-23a. The District Court said nothing about the doctrine of respondeat superior in its order and did not in any way pass upon that issue in dismissing the Complaint.

Garnett then submitted a Second Amended Complaint (*see* JA65-72), which had a few more factual details, and asked the District Court to amend or alter its prior dismissal decision. JA63-64. The additional details did not sway the District Court, however, and it upheld dismissal. It explained:

> . . . the statement constituting the basis of Plaintiff's claim is still based solely on Try's faulty reasoning that vaginal surgery could only be the result of an STD. Anyone hearing that statement would know that it is pure conjecture, not fact.

JA77. As it did in its earlier decision, the District Court said nothing at all about the doctrine of respondeat superior in denying Garnett's motion and did not in any way pass upon that issue.

B. The Briefing Before The Fourth Circuit

Garnett timely appealed to the Fourth Circuit. JA79-80. As expected, she prosecuted her appeal by focusing on the *only* issue that the District Court addressed: whether the defamatory statement at issue was fact or opinion. She identified this issue in her Docketing Statement[4], and she made it the main focus of the argument sections of both of her appellate briefs.[5]

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[4] *See* Dkt Entry No. 7.

[5] *See* Dkt Entry No. 17, pp. 10-20, & Dkt Entry No. 27, pp. 1-13.

Remedi did likewise in its own Fourth Circuit brief.[6] And, although it asserted two extra arguments in support of affirming the District Court's decision (both of which were part of its initial motion to dismiss), Remedi said nothing in its brief about respondeat superior liability. It neither defended the District Court's decision based on an alleged failure by Garnett to plausibly show that Remedi was liable for Try's actions under a theory of respondeat superior nor did it independently invite the Fourth Circuit to raise or pass upon the issue.

Indeed, when all was said and done in the Fourth Circuit, the parties wrote thirteen thousand four hundred and eighty-three (13,483) words of text in their three briefs, *none* of which included the words "respondeat superior."

C. Oral Argument Before The Fourth Circuit

Things changed at oral argument, however. At that time, *for the very first time*, the Fourth Circuit panel asserted that the lack of respondeat superior liability was a possible ground for affirming the District Court's decision. *See* Oral Argument at 2:10-3:49; 4:11-6:20.[7] Garnett, through counsel, disagreed with the panel. He noted, for example, that the tortfeasor was Garnett's night shift supervisor *and* that he had made the statements at issue *while on the job* and in the context of telling other employees about Garnett's medical leave. *Id.* at 3:52-4:10; 6:20-6:31, 6:41-7:17. Given this factual landscape, counsel argued that, at least at the motion to dismiss stage,

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[6] *See* Dkt. Entry No. 21

[7] *Garnett v. Remedi SeniorCare of Virginia, LLC*, No. 17-1890 (4th Cir. Argued May 9, 2018), http://coop.ca4.uscourts.gov/OAarchive/mp3/17-1890-20180509.mp3.

these allegations were sufficient to get the Complaint "to the next step." *Id.* at 7:17-7:18.

Garnett's counsel also pointedly noted that a respondeat superior liability defense had never been raised below, and that, as such, counsel had not had an opportunity to address the issue. *See id.* 7:21-7:51; 36:34-36:43. Counsel stated:

> I will tell you, if *that* argument [i.e., the respondeat superior argument] had been raised -- as Your Honor is raising it here today -- we would have had an opportunity to amend the complaint to address *exactly* those points. That has not happened.
>
> . . .
>
> . . . . Your Honor, even if you express the concerns that you have, I think the proper course of action is to analyze the issue that is addressed before the Court [i.e., the opinion/fact issue] and to send it back to allow the employer to raise that [respondeat superior] argument, if that's something the employer wishes to do, and to allow us a sufficient opportunity under the Federal Rules to provide our evidence.

Id. at 12:46-13:24 (emphasis added).

The panel responded to these comments by invoking the well-settled "We can affirm on any basis" rule. But Garnett's counsel pushed back and continued to press the lack of notice/opportunity point, stating:

> . . . I think procedurally, because we come to this case – or come to this Court -- on a Rule 12(b)(6) motion, it's not unfettered discretion to

> affirm on such a [new] basis. There has to be an opportunity for the party against whom a ruling is based to make an argument. And I submit that, especially when we are talking about something like furtherance of the employer's interests [related to respondeat superior liability], we should be given an opportunity to provide a factual basis upon which the Court can make an assessment. . . . That hasn't happened.

Id. at 13:28-13:59.

D. The Fourth Circuit's Decision

Ultimately, the Fourth Circuit affirmed the dismissal of Garnett's Complaint. It did not rest its decision, however, on the rationale put forward by the District Court. To the contrary, the Court of Appeals expressly *rejected* the District Court's reasoning below, stating:

> We are ***not willing to say at the motion to dismiss stage*** that Try's statement was not defamatory. To do so would be to hold that no action could be brought against Try personally, and possibly that a plaintiff could never prevail against a supervisor who boasts of inside knowledge of the plaintiff's sexual activities and medical history without any factual basis.

App. at 4a (emphasis added). In other words, the Fourth Circuit ***reversed*** the District Court's holding that the "She's got a STD" statement was a non-actionable opinion statement. *Id.*

But the Fourth Circuit still believed that dismissal was required based on the new issue it had raised *sua sponte* at oral argument: the lack of respondeat

superior liability. Indeed, it discussed the doctrine at length, waxing philosophically about the virtues of a narrow version of the doctrine in the workplace and invoking legal authorities far and wide for its discussion.[8] App. at 4a-9a. Remarkably, despite the fact that the doctrine had *never* been mentioned by either party in their appellate papers, the court of appeals devoted almost five full pages of its thirteen-page opinion to a general discussion of vicarious liability before it even got to how the doctrine is specifically applied in Virginia. *Id.* And, of course, even then, as already noted, the appeals court failed to even acknowledge, much less address, the fact that, at least under Virginia law, a presumption *in favor* of respondeat superior liability automatically arises once the plaintiff shows the existence of an employee/employer relationship. App. at 9a-13a. *See e.g., Gina Chin & Associates v. First Union Bank*, 537 S.E.2d 573, 577 (Va. 2000).

Finally, the Court of Appeals justified its uninvited incursion into the realm of respondeat superior jurisprudence on the grounds that Garnett's Complaint asserted the scope of employment issue as to Try and thus was fair game. App. at 4a. The Fourth Circuit, however, said that the scope of employment assertions were made "without the benefit of any explanation" and it did not identify the parts of the Complaint to which it was referring.

This Petition followed.

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[8] Among others, the Fourth Circuit cited to the Restatement (Third) of Agency, a Harvard Law Review article, a Seventeenth Century decision from the Crown's Bench, and caselaw from the Title VII and Section 1983 contexts (neither of which, of course, involves Virginia law). *See* App. at 4a-9a.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit Improperly Exercised Its Appellate Jurisdiction To Consider *Sua Sponte* A New Issue Not Passed Upon Below

A. The General Rule And *Singleton v. Wulff*

As stated by this Court, "[i]t is the general rule . . . that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). This rule is "essential in order that parties may have an opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision of which upon which they have had no opportunity to introduce evidence." *Id.* (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)).

Singleton provides the paradigm for how the general rule operates. There, the Eighth Circuit, at the appellate level, *sua sponte* held that a Missouri statute that excluded certain abortions from the services for which needy persons could obtain Medicaid benefits was unconstitutional, even though the only issue that was before the court of appeals was a question of standing. *Id.* at 109-112. The court of appeals rationalized its action by saying that "the question of the statute's validity could not profit from further refinement and indeed was one whose answer was in no doubt." *Id.* at 111. According to the Eighth Circuit, "[t]he statute was obviously unconstitutional." *Id.*

This Court, relying on the general rule above, reversed the Eighth Circuit's *sua sponte* action. It held that the Eighth Circuit's resolution of the merits

of the case was an "unacceptable exercise of its appellate jurisdiction," *id.* at 119, because the petitioner there had "never been heard in any way on the merits of the case." *Id.* at 120. This Court also flatly rejected the Eighth Circuit's belief that the petitioner could have added nothing to its decision-making process. It stated:

> We have no idea what evidence, if any, petitioner would, or could offer in defense of the statute, but this is only because petitioner has had no opportunity to *proffer such evidence*. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present *whatever legal arguments he may have* in defense of the statute.

Id. (emphasis added). Indeed, under such circumstances, this Court explained that "injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard." *Id.*

For purposes of this petition, then, the key "takeaway," from *Singleton* is that "appellate courts need to be sure that interested litigants have had a fair opportunity to be heard before they resolve issues that the lower courts have not resolved." Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1575 (2013). As has been recognized, this is the "overriding rationale" for the general rule in the first place. *U.S. v. Hardman*, 297 F.3d 1116, 1123 (10th Cir. 2002).

B. The Fourth Circuit Improperly Affirmed Dismissal Based On A Non-Jurisdictional Ground That Had Never Been Passed Upon Below

Here, the Fourth Circuit improperly exercised its discretion to consider a new issue on appeal when it *sua sponte* affirmed the dismissal of the Complaint based on the defense of respondeat superior, an issue that had never been passed upon below, had never been developed, asserted, or briefed in the District Court or the Fourth Circuit, and was only raised for the first time at the oral argument before the Court of Appeals. Three points confirm this.

1. The Fourth Circuit's Exercise Of Appellate Discretion Is Irreconcilably At Odds With *Singleton*

The first and most fundamental flaw in the Fourth Circuit's decision is that it is completely, and irreconcilably, at odds with the "fair opportunity to be heard" considerations from *Singleton*. While the Fourth Circuit said that it raised the issue of respondeat superior liability with Garnett's counsel at oral argument and thus she was put on notice that the scope of Try's employment at Remedi was an issue, such assertion is plainly belied by the oral argument itself. Far from discussing the nuances and intricacies of Virginia's version of the doctrine of respondeat superior, Garnett, through counsel, repeatedly emphasized that vicarious liability had *never* been raised before either the District Court or Court of Appeals and that it should *not* serve as a basis for the court's decision. In other words, Garnett fully invoked the essence of *Singleton* and forcefully demanded that she "not be surprised on appeal by

final decision of which upon which [she had] had no opportunity to introduce evidence." *Singleton*, 428 U.S. at 121.

That the Fourth Circuit saw fit to fully discuss *and reject* the scope of employment allegations in Garnett's Complaint only proves this point – that is, that Garnett was improperly denied a fair opportunity to respond to the respondeat superior defense raised by that court. The Court of Appeals, for example, took repeated pot-shots at the seeming lack of facts in the Complaint, saying (i) that it "hardly made any attempt to connect Try's remarks to Remedi's business interests or to explain how the offensive remarks otherwise fell within the scope of his employment"; and (ii) that "[o]nly five of the thirty-three paragraphs in the entire second amended complaint mentioned Remedi's role at all."; (iii) that the Complaint lacked context about the "nature of Try's supervisor position"; and (iv) that it lacked any "corroborating details" about how Remedi ratified and condoned Try's defamatory conduct. App. at 11a-12a. This is an unfair and fallacious analysis, however. The Court of Appeals knew full well, especially from oral argument, (i) that the scope of employment issue had never been briefed or argued by any party in any court, (ii) that Garnett strenuously objected to its consideration for the first time on appeal, (iii) that Garnett had never had – nor needed – an opportunity to add factual detail to the Complaint to address the defense of respondeat superior, *and* (iv) that Garnett had specifically requested at oral argument that she be given such an opportunity.

In essence, the Fourth Circuit whipsawed Garnett. It chastised her for failing to include sufficient detail to address the defense of respondeat superior, yet it

consciously and intentionally refused to remand the case back to the District Court to give her the opportunity to add precisely such details. In this sense, then, the Fourth Circuit's *sua sponte* actions are even more unacceptable than those of the Eighth Circuit in *Singleton*.

2. The Proper Resolution Of The Respondeat Superior Issue Is Not Beyond Any Doubt

Second, the Fourth Circuit was plainly wrong to say that the resolution of the vicarious liability issue was "beyond any doubt" in favor of Remedi. As previously noted, the Court of Appeals discussed vicarious liability at great length, expending substantial effort to underscore the potential "parade of horribles" that might occur if employers had to "police all employee interactions and thereby ensure that employee conversation never crosses decorous lines." App. at 7a. Yet, the court's grandiose, even eloquent, discussion of vicarious liability ignored perhaps the two most important features of Virginia's version of the doctrine: first "proof of the employment relationship creates a prima facie rebuttable presumption of the employer's liability," *Gina Chin & Assoc., Inc. v. First Union Bank*, 537 S.E.2d 573, 577 (Va. 2000); and, second, if the presumption *is* established, "the burden is *on the employer* to prove that the employee was not acting within the scope of his employment when he committed the act complained of," i*d.* at 578 (emphasis added).

On the latter point, the Supreme Court of Virginia has keenly observed that if the employer establishes the initial presumption of liability, there must *then* be "sufficient facts" on the face of the Complaint which

"would permit [a court] to hold, *as a matter of law*, that the defendant has met its burden of showing that its employee was not acting in the scope of his employment." *Plumber v. Center Psychiatrists, Ltd.*, 476 S.E.2d 172, 175 (Va. 1996) (reversing grant of demurrer in favor of employer on respondeat superior liability). As well, "any doubt based on the evidence must be resolved *by a jury*." *Id.* at 174 (emphasis added). In other words, it is not for the *court* to determine unprovoked whether the face of the Complaint establishes respondeat superior liability; it is for the defendant.

The Supreme Court of Virginia also has expressly rejected a narrow version of vicarious liability and has reversed trial courts for granting a demurrer or motion for summary judgment on that issue. *See Chin, supra*, at 579-80 (reversing grant of summary judgment to employer on respondeat superior liability); *Plummer v. Center Psychiatrists, Ltd.*, 476 S.E.2d 172, 175 (Va. 1996) (reversing grant of demurrer in favor of employer on respondeat superior liability). *See also Gutierrez de Martinez v. DEA*, 111 F.3d 1148, 1156 (4th Cir. 1997) (describing Virginia's scope of employment test as having a "fairly broad view" of the concept) (citing *Plummer*). Lower courts in Virginia have followed suit and have regularly denied dispositive motions by holding that the scope of employment issue is a question of fact for a jury, not a question of law for a court. *Heywood v. Va. Peninsula Reg'l Jail Auth.*, 217 F. Supp.3d 896, 901 (E.D. Va. 2016) (holding that "[t]here is a genuine dispute of fact as to whether Koehler was acting within the scope of his employment at the time of the incident."); *Heckenlaible v. Va. Peninsula Reg'l Jail*

Auth., 491 F. Supp. 2d 544, 551, 555 (E.D. Va. 2007) (same).[9]

Guided by this Virginia precedent, the Fourth Circuit was simply incorrect to say *on the face of the Complaint* that no various liability could *ever* exist *as a matter of law* for Remedi. In fact, its analysis is

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[9] These cases, and the holdings upon which they rest, stand in stark contrast to the Fourth Circuit's repeated – and glaringly incorrect – attempts to describe Virginia's version of the doctrine of respondeat superior as "carefully balanc[ing]" employer needs versus employee rights and "defining clear limits to the doctrine of respondeat superior." App. at 9a. To the contrary, the Supreme Court of Virginia pointedly and candidly stated that:

> While the law upon this question appears to be simple, there has always been very great difficulty in its application, and it has been frequently said that it is impossible to state it briefly and comprehensively so as to be clearly applicable to all cases, because of the ever-varying facts and circumstances of particular cases.

Broaddus v. Standard Drug Co., 179 S.E.2d 497, 503 (1971) (quoting *Appalachian P. Co. v. Robertson*, 129 S.E.2d 224 (1925)).

The Fourth Circuit's obvious focus on Try's seemingly personal *motive* for his defamatory remarks, *see* App. at 12a (citing a case from 1922), also is inconsistent with Virginia's doctrine of respondeat superior. As the Supreme Court of Virginia has made emphatically clear as it has refined its doctrine,

> courts ... have long since departed from the rule of non-liability of an employer for wilful or malicious acts of his employee. Under the modern view, the wilfulness or wrongful *motive* which moves an employee to commit an act which causes injury to a third person does not of itself excuse the employer's liability therefor. The test of liability is *not the motive of the employee* in committing the act complained of, but whether that act was within the scope of the duties of employment and in the execution of the service for which he was engaged.

Plumer, 476 S.E.2d at 174 (citation omitted) (emphasis added).

directly contrary to the burden-shifting scheme adopted by the Supreme Court of Virginia, because the Complaint here plainly shows on its face the existence of an employee/employer relationship sufficient to create a rebuttable presumption *in favor* of vicarious liability. Since Remedi never challenged this presumption, it must stand. As has been explained, "a rebuttal [sic] presumption involves consideration of *evidence* to determine whether the presumption has been rebutted." *Garcia v. Mae*, 794 F. Supp. 2d 1155, 1165 (D. Or. 2011) (declining to address presumptions on Rule 12(b)(6) motion) (emphasis added). Where, as here, no such evidence is proffered on the face of the complaint, all that is required to plausibly allege vicarious liability under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) is the fact of the employment relationship itself and that the tortious conduct occurred while on the job.[10] And any further exploration of the issue would require the resolution of factual questions, which can *never* be beyond doubt. *See Stewart v. Dept. of HHS*, 26 F.3d 115, 116 (11th Cir. 1994) ("Although this court may hear an issue not raised in the lower court when the proper resolution is beyond any doubt, issues involving the resolution of factual questions can *never* be beyond doubt.") (emphasis added).

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[10] *See, e.g., Sewell v. Wells Fargo Bank, N.A.*, 2012 WL 253832, at *7 (W.D. Va. Jan. 27, 2012) (finding plaintiff's allegations that "bank employees made several false, factual statements ... that concerned and harmed her or her reputation to bank customers and member of the community" sufficed to show respondeat superior liability at 12(b)(6) stage); *Suarez v. Loomis Armored US, LLC*, 2010 WL 5101185, at *3 (E.D. Va. Dec. 7, 2010) (finding one paragraph allegation that employee was servicing an ATM when making the defamatory statement was sufficient to show employee was acting within scope of employment).

3. Not Only Did The Fourth Circuit Incorrectly Say That Remanding The Case Would Work An Injustice, Its *Sua Sponte* Ruling Has Actually *Caused* An Injustice To Garnett

Finally, the Fourth Circuit wrongfully concluded that failing to *sua sponte* resolve the issue of respondeat superior liability at the appellate level "would work an injustice on the parties and the trial court by forcing them to undergo another round of pointless litigation." App. at 4a. This statement, of course, assumes its own correctness. If Garnett's response to a respondeat superior defense would necessarily fail, then it follows that any further briefing on the matter would be a pointless exercise. But this puts the cart before the horse. How can the Fourth Circuit have the clairvoyance to know *ex ante* that Garnett's arguments will fail if she has never even been given an opportunity to put them forward?

Indeed, phrases such as "work an injustice" "are almost meaningless" because any such "injustice" is in the eye of the beholder. *See* Barry Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1252, 1285 (2002). As this Court thoughtfully noted in *Singleton*, where, as here, a party has been deprived of any meaningful chance to confront a dispositive issue as the result of a *sua sponte* ruling by a federal appellate court, injustice is "more likely *be caused than avoided*." 428 U.S. at 121 (emphasis added). That is certainly the case here.

II. The Fourth Circuit's Decision Not Only Is At Odds With *Singleton*, It Conflicts With Its Own Precedent

The Fourth Circuit's decision below also conflicts with its own precedent and creates an odd internecine split between its own competing decisions. As the Fourth Circuit stated, "[i]n ***this circuit***," the discretion to take up new issues on appeal is exercised only "***sparingly***." *U.S. v. Lavabit, LLC (In re Under Seal)*, 749 F.3d 276, 285 (4th Cir. 2014) (emphasis added). It said: "[o]ur settled rule is simple: '[a]bsent exceptional circumstances, ... we do not consider issues raised for the first time on appeal.'" *Id*. (quoting *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 242 (4th Cir. 2009)). And "[e]xceptional circumstances" are "limited" *Osborne v. Georgiades,* Record No. 15-2468, p. 18 (4th Cir. Feb. 8, 2017).

The Court of Appeals has also advised that "very good reasons" counsel against "decid[ing] issues on the basis of theories first raised on appeal." *Skipper v. French*, 130 F.3d 603 (4th Cir. 1997). Echoing this Court's sentiments in *Singleton*, the Fourth Circuit said: "one of [the] surest boundaries [on the discretion to consider new issues on appeal] is that imposed by requirements of fairness to affected litigants." *Abril v. Com. of Virginia*, 145 F.3d 182, 185 n.4 (4th Cir. 1998). Under such circumstances, the Court of Appeals noted, "it would be patently unjust" to decide an appeal against a party "on the basis of an issue . . . on which it has had no opportunity to be heard." *Id.* In fact, in *Abril*, the Fourth Circuit said that in such situations, "we may *not* properly consider [such as issue] *as a matter of discretion*." *Id.* (emphasis added). It also expressly noted that, while it has "considerable discretion" to take up and resolve

matters for the first time on appeal, "that discretion is not unbounded." *Id.*

Here, the Fourth Circuit not only failed to follow the general rule from *Singleton*, it failed to follow its own clear articulation of that rule because, without question, it resolved a dispositive matter *sua sponte* without giving Garnett any fair opportunity to be heard on the issue.

III. The Fourth Circuit's Decision Is Contrary To Basic Notions Of Due Process

The Fourth Circuit's decision below also violates due process. In the appellate context, "due process interests are implicated when a court recasts the questions presented and decides a case on issues not discussed by the parties without remanding or providing an opportunity for briefing." Miller, *infra*, at 1260. "The core of due process is the right to notice and a meaningful opportunity to be heard." *Lachance v. Erickson*, 522 U.S. 262, 266 (1998).[11]

In this case, Garnett had neither notice nor an opportunity to be heard on the issue of respondeat superior liability. She completed briefing in both the District Court and the Fourth Circuit without any reason to believe this Court might consider such issue. It was never raised below, and it was never raised by Remedi in the Court of Appeals. Instead, as is obvious from the oral argument colloquy between Garnett's counsel and the panel, Garnett's counsel

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[11] While this Court has not directly addressed the due process implications of a *sua sponte* decision at the appellate level, it has clearly stated the importance of notice and an opportunity to be heard at the trial court level when such court is addressing a dismissal motion under Rule 12(b)(6). *See Neitzke v. Williams*, 490 U.S. 319, 329-300 & 329 n.8 (1989).

was totally surprised when the Fourth Court - on its own - raised the issue for the *very first time* at oral argument. While counsel did his best to address the Court's questions on the fly, it cannot be seriously said that he made his "best arguments," *see* Miller, *supra*, at 1266, on this issue. Due process was unquestionably denied.

IV. The Fourth Circuit's Decision Is Inconsistent With The Adversarial Process

The Fourth Circuit's decision also is at odds with the adversarial process inherent in our judicial system. "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.)). As the Chief Justice explained in his confirmation hearings, "Judges are like umpires. Umpires don't make the rules, they apply them."[12] And as Justice Stevens wrote, albeit in dissent, "As I have said before, 'the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.'" *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 194-95 n.4 (1994) (Stevens, dissenting) (quotations omitted).

The Fourth Circuit's interest here in *sua sponte* enforcing a respondeat superior defense falls short of that necessary to outweigh the benefits derived from the adversarial process. If Remedi had wanted to

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[12] http://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process (visited on Oct. 9, 2018).

raise vicarious liability as a defense, it could, and should, have. Garnett would then have opposed it, marshalled the legal arguments (such as the rebuttable presumption) in her favor and, if necessary, amplified her complaint with factual details about Try's role and his relationship to her. The Fourth Circuit's *sua sponte* actions usurped Garnett's ability to fight for her defamation claim under the adversarial process and is flatly inconsistent with the principles espoused and endorsed by this Court.

Sua sponte decision-making undermines the adversarial process "because it eliminates from the deliberative process the very persons who are most strongly motivated to assure its full and accurate consideration." Adam A. Milani; Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions By Appellate Courts*, 69 TENN. L. REV. 245, 261 (2002). That happened here, and as a result it led to an erroneous decision by the Fourth Circuit.

V. Since *Singleton*, The Circuits Have Failed To Articulate Any Type Of Uniform Rule Of Law On The Matter Of *Sua Sponte* Discretion

Separate and apart from the fatal errors that have already been noted regarding the Fourth Circuit's decision below, review of the Fourth Circuit's decision is warranted so that this Court can provide clear guidance about what are the proper circumstances for courts of appeals to exercise their discretion to consider matters not passed upon below. *Singleton* was clearly helpful in this regard, but it is not enough. As has been noted, "the Supreme Court and other appellate courts have failed to follow any consistent practice about sua sponte holdings." Miller, *infra*, at

1256. And at least one circuit judge has lamented, "[t]he conditions under which a court may consider a nonjurisdictional matter sua sponte have never adequately been considered and have caused a great deal of confusion among jurists." *Thomas v. Crosby*, 371 F.3d 782, 793 (11th Cir. 2004) (Tjoflat, Circuit Judge, specially concurring). Rather than reaching a consensus test, the Circuits have adopted a collection of differing, yet somewhat similar, criteria for exercising their appellate jurisdiction *sua sponte*. *Compare Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010) (adopting an "exceptional circumstances" test and then defining "exceptional circumstances") *with Comty. House, Inc. v. City of Boise*, 468 F.3d 1118, 1128 (9th Cir. 2006) (setting forth three circumstances where *sua sponte* rulings are appropriate) and *even Davis v. Nordstrom, Inc.*, 755 F.3d 1089 (9th Cir. 2014) (stating that new matters can only be considered on appeal where "the issue is a purely legal one and the record below has been fully developed").

V. The Fourth Circuit's Decision Is Wrong

As previously explained, review and reversal are warranted because the Fourth Circuit's decision is plainly wrong. Regardless of whether this Court concludes that the Fourth Circuit inappropriately exercised its discretion to consider a new issue *sua sponte*, its decision to act as the fact-finder on the question of respondeat superior liability – at the motion to dismiss stage – is improper.

VI. This Case Is An Ideal Vehicle To Provide Guidance On *Sua Sponte* Exercises Of Appellate Jurisdiction

As well, this case is an excellent vehicle for purposes of providing guidance to the courts of appeals regarding the proper criteria to be used for purposes of *sua sponte* exercises of appellate jurisdiction. It involves the undisputed fact that the respondeat superior issue which was resolved by the Fourth Circuit was never passed upon, briefed or argued below. It involves a straightforward motion to dismiss context. And it involves a situation where the petitioner clearly requested the chance to be more fully heard on the respondeat superior issue and the court of appeals clearly denied that request.

VII. Summary Reversal Is Appropriate

Finally, while this Court would be justified in granting the requested writ and choosing this case as a means to further develop the rule of law from *Singleton*, summary reversal would also be appropriate. As has been noted, "[s]ummary reversal is usually reserved for cases where 'the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.'" *Pavan v. Smith*, 137 S. Ct. 2075, 2079, 198 L. Ed. 2d 636 (2017) (Gorsuch, J., dissenting) (internal quotation omitted). That is certainly the case here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The Court may also wish to consider summary reversal.

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No. 18-465

In the Supreme Court of the United States

SADE GARNETT,

Petitioner,

v.

REMEDI SENIORCARE OF VIRGINIA, LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CORRECTED APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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[ENTERED JUNE 11, 2018]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1890

SADE GARNETT,

Plaintiff - Appellant,

v.

REMEDI SENIORCARE OF VIRGINIA, LLC,

Defendant - Appellee,

and

AARON TRY,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, Senior District Judge. (3:17-cv-00128-HEH)

Argued: May 9, 2018 Decided: June 11, 2018

Before WILKINSON, and NIEMEYER, Circuit Judges, and Richard M. GERGEL, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Niemeyer and Judge Gergel joined.

ARGUED: Richard F. Hawkins, III, THE HAWKINS LAW FIRM, PC, Richmond, Virginia, for Appellant.Elena D. Marcuss, MCGUIREWOODS LLP, Baltimore, Maryland, for Appellee. **ON BRIEF:** Adam T. Simons, MCGUIREWOODS LLP, Baltimore, Maryland, for Appellee.

WILKINSON, Circuit Judge:

When Sade Garnett took off work to undergo a medical procedure, her coworker Aaron Try engaged in crude, baseless, and ignorant speculation about the reasons for her absence. Garnett filed this defamation suit against their mutual employer, Remedi SeniorCare of Virginia. The district court concluded that the statement was not defamatory and dismissed the suit. We affirm, but on different grounds. The alleged statement, while offensive and odious, will not support an action against Remedi under Virginia law because a company cannot be held liable for employee statements made outside the scope of employment.

I.

Remedi SeniorCare is an institutional pharmacy that ships medications to nursing homes and other long-term care facilities. Garnett worked at its Ashland, Virginia location, often alongside Try, a night supervisor.

On January 14, 2015, Garnett told Try she would be out the next day to undergo surgery. During that absence, Garnett alleges that Try told other Remedi employees that "Sade was having surgery on her vagina because she got a STD [be]cause that's the only reason a female gets surgery on her vagina," and that "Sade was having a biopsy of her vagina." J.A. 67.

Garnett filed suit against Remedi in the Circuit Court for the City of Richmond. Remedi removed the case to the United States District Court for the Eastern District of Virginia based on diversity jurisdiction.

The district court dismissed Garnett's claims. Because Try's statement was "clearly only Try's opinion based on his faulty reasoning," and "no reasonable person would take Try's statement to be anything more than pure conjecture," the court concluded that it was not actionable under Virginia law. J.A. 61. The court then denied Garnett's request to amend her complaint on the grounds that it would "retain the same deficiencies as the one previously dismissed." *Id.*

This appeal followed. We "review de novo the grant of a motion to dismiss for failure to state a claim." *Gerner v. County of Chesterfield*, 674 F.3d 264 (4th Cir. 2012). We review for abuse of discretion a denial of leave to amend a complaint.

II.

In Virginia, "a private individual asserting a claim of defamation first must show that a defendant has published a false factual statement that concerns and harms the plaintiff or the plaintiff's

reputation." *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 46, 670 S.E.2d 746, 750 (2009). We are not willing to say at the motion to dismiss stage that Try's statement was not defamatory. To do so would be to hold that no action could be brought against Try personally, and possibly that a plaintiff could never prevail against a supervisor who boasts of inside knowledge of the plaintiff's sexual activities and medical history without any factual basis. But assuming arguendo that Try's statements were defamatory, we must still consider whether those statements were within the scope of his employment and thus whether his employer can be held vicariously liable.

Ordinarily, "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). However, where "the proper resolution is beyond any doubt" or "where injustice might otherwise result," we may affirm on alternate grounds. *Id.* at 121 (citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). This case qualifies as an exception to the general rule. The outcome is not in doubt and a remand would work an injustice on the parties and the trial court by forcing them to undergo another round of pointless litigation. Moreover, as we shall explain, the parties were certainly aware of the scope of employment issue because it was asserted in the complaint, though without the benefit of any explanation. And the issue was taken up at some length at oral argument, where appellant was unable to provide any satisfactory answers. We therefore consider vicarious liability as an alternate ground for affirmance in this case.

A.

The deeply offensive nature of Try's statement gives rise to an understandable temptation to hold his employer responsible in some way for what happened. After all, Try was in Remedi's employ and he made the statement at work. To understand why we cannot pursue this course under law requires some discussion of the origins and purposes of the doctrine of respondeat superior and why limitations on employer liability in circumstances such as these are necessary.

Vicarious liability is somewhat different from most other forms of tort liability because one party is held responsible for the actions of another. *See* Restatement (Third) of Agency Law § 7.07. It is elementary that tort law aims to redress private wrongs and deter misconduct. *See, e.g.*, Ernest J. Weinrib, *The Idea of Private Law* 3-11 (2012). The goal of redressing private wrongs is based on principles of justice. An individual should be able to witness justice by bringing his wrongdoer to court and winning a monetary judgment or an injunction. Social welfare concerns justify the deterrent goal. In order to reduce social harms, tort liability makes wrongdoers pay a price for injuring another and thereby disincentivizes countless forms of careless or antisocial conduct.

Under a theory of vicarious liability, an employer may be held liable even though an individual employee is the actual tortfeasor. That makes sense when the employee action furthers the interests of the employer or when the individual tortfeasor uses his workplace responsibilities to facilitate the tort. In such circumstances, the employer both bears some

responsibility for the tort and might have been able to prevent its commission by adopting different or more stringent workplace policies.

There is thus little question that employers can be held liable when they order or actually ratify a tort. *See, e.g., Bishop v. Montague*, Cro. Eliz. II (1600). Employers also bear legal responsibility when their own negligence facilitates the commission of a tort. *See, e.g., Fletcher v. Baltimore & P.R. Co.*, 168 U.S. 135, 138 (1897). It is easy to assign responsibility in such circumstances because the employer's wrongful conduct was directly related to the commission of the tort.

An employer can also sometimes be held liable even when it did not intend or sanction any wrongful conduct. In these cases, employer liability can still serve the deterrent purpose of tort law, because the employer might be able to implement policies that will reduce the likelihood that its employees will engage in tortious conduct. For that reason, the doctrine of vicarious liability can act as a useful deterrent.

B.

But this is not to say that the principle of vicarious liability is without limits. It is more problematic for states to impose legal liability on an employer for conduct that cannot possibly be connected to it. As a general matter, the employer can only be held responsible for an employee's misconduct if that conduct falls within the "scope of employment." See Restatement (Third) of Agency Law § 2.04. This requirement limits vicarious liability to situations in which the employee was either (a) performing work assigned by the employer

or (b) engaging in a course of conduct subject to the employer's control. *Id.* § 7.07 (2006) ("An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control."); *see also Alan O. Sykes, The Boundaries of Vicarious Liability: An Economic Analysis of The Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L. Rev. 563, 582 (1988). The employer may therefore avoid liability when an employee acts independently or in a manner that does not serve any goal of the employer. The "scope of employment" requirement thus ensures that vicarious liability remains tethered to the general goals of tort law: Liability will attach only if the employer (a) bears at least partial responsibility for the tortious conduct or (b) has some ability to limit the likelihood that the employee would commit a tort.

It would hardly be possible for an employer to successfully police all employee interactions and thereby ensure that employee conversation never crosses decorous lines. There are literally millions of verbal workplace interactions, some of which may, unfortunately, be quite offensive. But to hold that such statements invariably give rise to vicarious liability admits of no limiting principle.

Without the scope of employment requirement, employers such as the one here could hardly protect themselves from liability without proctoring the minutiae of a worker's daily life or imposing draconian restrictions on employee speech. Workplace statements can be endlessly litigated: What was said? Was a given statement serious or in jest? In what context was it made and was it

misunderstood? There is no reason to hold employers liable for an employee's statements when those statements serve no plausible employer interest, the employee's workplace responsibilities did not facilitate the tort, and only the most heavy-handed workplace policies would have stood a chance of preventing the offensive conduct. It is difficult to see how employers could prevent all offensive or defamatory speech at the proverbial watercooler without transforming the workplace into a virtual panopticon. For all its undoubted value, respondeat superior and the resultant fear of liability should not propel a company deep into the lives of its workers whose privacy and speech interests deserve respect.

The law thus abounds with instances where respondeat superior is tempered but without eliminating the obligation on employers to make reasonable efforts to improve the workplace environment and head off deleterious conduct. To take but one example, the Supreme Court has recognized that employers can raise an affirmative defense in a Title VII sexual harassment suit if the employer has "exercised reasonable care to avoid harassment and to eliminate it when it might occur." *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742, 757 (1998). The same tempering of respondeat superior is apparent in the public sphere, where courts have limited municipal and supervisory liability in suits brought under 42 U.S.C. § 1983. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978) ("Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort."); *Slakan v. Porter*, 737

F.2d 368, 373 (4th Cir. 1984) (A plaintiff asserting supervisory liability "must show that the supervisor's corrective inaction amounts to deliberate indifference or 'tacit authorization of the offensive [practices].'"). In this way, law supplements but does not supplant the self-interest that companies (and public institutions) have in curbing harmful workplace conduct and boosting employee morale.

C.

Virginia has recognized the importance of this careful balance by refusing to reflexively expand vicarious liability and instead defining clear limits to the doctrine of respondeat superior. In Virginia, "an employer is liable for the tortious acts of its employee if the employee was performing his employer's business and acting within the scope of his employment when the tortious acts were committed." *Plummer v. Ctr. Psychiatrists, Ltd.*, 252 Va. 233, 237, 476 S.E.2d 172, 174 (1996). In other words, there must be a nexus between the employee's workplace responsibilities and the offensive act.

The Supreme Court of Virginia has clarified that an employee's act falls within the scope of his employment only if (1) the act "was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed . . . with the intent to further the employer's interest." *Kensington Assocs. v. West*, 234 Va. 430, 432, 362 S.E.2d 900, 901 (1987). Where an agent's tortious actions promote an employer's interests, respondeat superior generally applies.

The situation is slightly more complex when an employee acts against the wishes of his employer. But again, Virginia has been careful to limit respondeat superior to situations in which the employer bears some responsibility. If a tort does not further an employer's interests, the employer can only be held liable if the tort can be fairly and reasonably traced to the employee's workplace responsibilities. *Gina Chin & Assocs., Inc. v. First Union Bank*, 260 Va. 533, 542, 537 S.E.2d 573, 578 (2000). Of course, vicarious liability can arise in a number of different contexts, and Virginia has recognized vicarious liability when a tort is closely tied to workplace performance. *See id.* (finding that a bank could be held vicariously liable when a bank teller used his position to facilitate a forgery scheme); *Plummer*, 476 S.E.2d at 174 (finding that a psychiatric center could be held vicariously liable when a psychologist engaged in sexual intercourse with a patient). While the employees in both *Gina Chin* and *Plummer* acted out of self- interest and in violation of workplace policies, their misconduct could nevertheless be considered "within the ordinary course" of business because it occurred through the execution of their professional responsibilities. *See Gina Chin*, 537 S.E.2d at 579.

D.

Garnett makes much of the fact that Try's comment occurred at work. That, however, is hardly dispositive. The cases recognize that some things occur at work that bear little or no relationship to an employer's business mission. *See Blair v. Def. Servs., Inc.*, 386 F.3d 623, 628 (4th Cir. 2004) (finding that a janitorial worker's sexual assault of a student was clearly outside the scope of his employment because

it deviated from his workplace duties); *Lacasse v. Didlake, Inc.*, 712 F. App'x 231, 235-36 (4th Cir. 2018) ("It is well established that the simple fact that an employee is at a particular location at a specific time as a result of his employment is not sufficient to impose respondeat superior liability on the employer.") (citing *Cary v. Hotel Rueger, Inc.*, 195 Va. 980, 81 S.E.2d 421, 424 (1954)). That a remark occurred at work is thus one factor in a scope of employment analysis, but it is not without more sufficient to impute vicarious liability.

Garnett simply fails to supply the "more" that would be necessary to hold Remedi responsible for Try's vulgar remarks. As a result, her complaint fails the basic test, set forth by the Supreme Court in *Ashcroft v. Iqbal*, that "only a complaint that states a plausible claim for relief survives a motion to dismiss." 556 U.S. 662, 679 (2009). The problem is that Garnett's complaint hardly made any attempt to connect Try's remarks to Remedi's business interests or to explain how the offensive statements otherwise fell within the scope of his employment. Only five of the thirty-three paragraphs in the entire second amended complaint mentioned Remedi's role at all. By contrast, twenty-four paragraphs discussed Try's remarks and sought to stress the all too obvious fact that they were offensive and degrading. Moreover, the five paragraphs that did mention Remedi's role were wholly conclusory. The complaint alleged that "Try was an employee of Remedi" and was "acting within the scope and course of his employment," Second Amended Complaint ¶ 25, but provided no additional support for this claim. The other four paragraphs essentially repeated—without providing a scintilla of factual support— that Try

was acting within the scope of his employment. One stated vaguely, without any corroborating details, that Remedi "condoned, ratified and authorized the actions of Try." Second Amended Complaint ¶ 28. Another asserted that the remarks were made "in the execution of the service for which he was engaged by the company." Second Amended Complaint ¶ 27. But this is simply untrue. The service for which Try was engaged was to help send medications to long-term care facilities and to manage Remedi employees. His responsibilities did not involve gossiping to his co-workers. And while the complaint alleged nebulously that Try was a "supervisor," there is not the slightest indication of the nature of Try's supervisory position or what the term in the context of this case even means.

In short, the conclusory language in the complaint does not begin to establish vicarious liability. Try made insulting and offensive statements about a colleague. They were distasteful, to say the very least. But the suit is against Remedi, not against Try. And the district court was right to dismiss it and to deny further leave to amend. Try was not carrying out any task on Remedi's behalf. He was not giving instructions to subordinates, or even having a conversation that related in any way to Remedi's commercial interests. Nor, from all we know from the complaint, did Remedi ever direct or encourage or condone the alleged offense. Try's remarks seemed to "arise wholly from some external, independent, and personal motive." *Davis v. Merrill*, 133 Va. 69, 112 S.E. 628, 631 (1922) (citing 2 Mechem on Agency (2d Ed.) § 1960). Not all comments that warrant internal discipline or even a lawsuit against the one who committed the wrong

warrant the imposition of respondeat superior liability. Try's comments, though beyond tasteless, did not fall within the scope of his employment. As a result, Remedi cannot be held vicariously responsible.

IV.

For the reasons discussed above, the judgment of the district court is

AFFIRMED.

[ENTERED JULY 20, 2017]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:17cv128-HEH

SADE GARNETT,)
Plaintiff,)
v.)
REMEDI SENIORCARE)
OF VIRGINIA, LLC,)
Defendant.)

MEMORANDUM OPINION
(Granting in Part Motion to Alter or Amend Judgment)

This matter is before the Court on Plaintiff Sade Garrett's ("Plaintiff") Motion to Alter or Amend Judgment, filed on June 5, 2017. (ECF No. 25.) On May 8, 2017, the Court entered a Memorandum Opinion and Order Granting Defendant Remedi Seniorcare of Virginia, LLC's ("Defendant") Motion to Dismiss without prejudice. (ECF Nos. 23, 24.) In the instant Motion, Plaintiff seeks the Court's leave to amend her Complaint or, in the alternative, an alteration of the Court's prior Order, changing the dismissal to one with prejudice. (Pl.'s Mem. Supp. Mot. Amend or Alter 3, 4, ECF No. 26.)

Plaintiff's Complaint alleges that a co-worker, Aaron Try, while acting within the scope of his employment, made false and defamatory statements about Plaintiff to other employees. (Pl.'s First Am. Compl. ¶¶ 19-21, ECF No. 12.) The allegedly

defamatory statements were (1) "Sade was having surgery on her vagina because she got [a sexually transmitted disease ("STD")] cause that's the only reason a female gets surgery on her vagina;" and (2) "Sade was having a biopsy of her vagina." (*Id.* ¶¶ 9-10.) Plaintiff conceded that the portion of the statements concerning surgery and a biopsy were not defamatory. (Pl.'s Mem. Opp'n Mot. Dismiss 8, ECF No. 17.) As such, on Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court only considered whether the portion of the statement regarding Plaintiff having an STD was actionable.

The Court held that the statement that Plaintiff had an STD was merely Try's opinion when considered in context. (Mem. Op. 5, ECF No. 23.) The only basis for Try's assertion was his faulty reasoning that STDs are "the only reason a female gets surgery on her vagina." (*Id.*) Therefore, no reasonable person would take his statement to be anything more than pure conjecture based on that reasoning. (*Id.*) Accordingly, the Court granted Defendant's Motion to Dismiss without prejudice. (ECF No. 24.)

Plaintiff now seeks relief pursuant to Federal Rule of Civil Procedure 59(e).[1] (Pl.'s Mem. Supp.

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[1] Plaintiff alleges that Try made the defamatory statements on January 15, 2015. (Pl.'s First Am. Compl. ¶ 7.) However, she waited until January 19, 2016, to bring this suit, which she initially filed in the Circuit Court for the City of Richmond, Virginia. (Notice of Removal 1, ECF No. 1.) So, Plaintiff contends that Virginia's one year statute of limitations for defamation bars her from initiating a new action and a dismissal without prejudice prevents her from appealing. *See Goode v. Cent. Va. Legal Aid Soc'y, Inc.*, 807 F.3d 619, 623 (4th Cir. 2015) ("An order dismissing a complaint without prejudice

Mot. Alter or Amend.) Rule 59(e) allows a party to move for an alteration or amendment to a judgment within twenty-eight days of the judgment. Typically, a Rule 59(e) motion is permissible in the following situations: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error oflaw or prevent manifest injustice." *Ingle v. Yelton*, 439 F.3d 191, 197 (4th Cir. 2006).

In this case, Plaintiff is using Rule 59(e) as a vehicle to amend her complaint. The Court may grant post-judgment leave to amend, but only if "the court first vacates its judgment pursuant to Fed. R. Civ. P 59(e) or 60(b)." *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 470-71 (4th Cir. 2011). "To determine whether vacatur is warranted, however, the court need not concern itself with either of those rules' legal standards. The court need only ask whether the amendment should be granted, just as it would on a prejudgment motion to amend pursuant to Fed.R.Civ.P. 15(a)." *Id; see Laber v. Harvey*, 438 F.3d 404, 429 (4th Cir. 2006) (finding that a plaintiff's motion to amend should have been granted, despite being filed post-judgment, because the motion complied with the liberal standards of Rule 15(a)).

Federal Rule of Civil Procedure 15(a) states, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The Fourth Circuit interprets this provision to mean that "leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing

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is not an appealable final order under § 1291 if 'the plaintiff could save his action by merely amending the complaint.'") (internal citation omitted).

party, there has been bad faith on the part of the moving party, or the amendment would [be] futile." *Laber*, 438 F.3d at 426 (quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986); *see Foman v. Davis*, 371 U.S. 178, 182 (1962) ("In the absence of any apparent or declared reason- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.- the leave sought should, as the rules require, be 'freely given'").

In the present matter, Plaintiff has submitted a copy of her proposed "Second Amended Complaint." (Proposed Second Am. Compl., ECF No. 28-1.) Defendant appears to concede that it would not be prejudiced by the Amendment, and that the proposed Amendment was not made in bad faith. (Opp'n. Pl.'s Mot. Alter or Amend, ECF No. 27.) However, the Court finds that the Amendment would be futile. Plaintiff s proposed Second Amended Complaint retains the same deficiencies as the one previously dismissed.

The alleged defamatory statement, as pleaded in the proposed Second Amended Complaint, is identical to that of the First Amended Complaint. (Proposed Second Am. Compl. ¶ 11 ("Sade was having surgery on her vagina because she got a STD cause that's the only reason a female gets surgery on her vagina.").) The only changes made by Plaintiff are additional facts relating to the setting or background of the incident. For example, Plaintiff asserts Try worked a nearby machine and found out about her upcoming surgery. (*Id.* ¶¶ 8, 9.) She contends that upon learning this information, Try

badgered her about why she was getting surgery-an inquiry she refused to answer. (*Id.* ¶ 10.) She also vaguely alleges that Try "surrounded his false factual statements about [her] with false negative sexual innuendoes." (*Id.* ¶ 12.) Finally, she states that Try "openly wondered how [Plaintiff] could have gotten an STD if she had only had one sexual partner," thereby implying that Plaintiff had been "recklessly sleeping around and that she had gotten an STD from such promiscuity." (*Id.*)

Despite these additional facts, the statement constituting the basis of Plaintiff s claim is still based solely on Try's faulty reasoning that vaginal surgery could only be the result of an STD. Anyone hearing that statement would know that it is pure conjecture, not fact. Thus, the proposed Second Amended Complaint fails to correct the pleading's fatal deficiency. As such, the proposed Amendment is futile and does not satisfy the requirements of Rule 15(a). The Motion will denied to the extent that it seeks leave to file an Amended Complaint.

However, based on the Plaintiff s proposed Amendment, the Court concludes that she is unable to plead any additional words or context that make the Defendant's statements actionable. For this reason, the Court will vacate its previous dismissal order. The Court will grant in part Plaintiff s Motion and dismiss the case with prejudice.

An appropriate order will accompany this memorandum.

/s/
Henry E. Hudson
United States District Judge

Date: July 20, 2017
Richmond, Virginia

[ENTERED MAY 8, 2017]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:17cv128-HEH

SADE GARNETT,)
Plaintiff,)
v.)
REMEDI SENIORCARE)
OF VIRGINIA, LLC,)
Defendant.)

MEMORANDUM OPINION
(Granting Motion to Dismiss)

Plaintiff Sade Garnett ("Plaintiff ') brings this suit against her former employer, Remedi SeniorCare of Virginia, LLC ("Defendant"). According to Plaintiff, on or about January 15, 2015, one of her coworkers, Aaron Try, made two defamatory statements about her: (1) "Sade was having surgery on her vagina because she got a [sexually transmitted disease ("STD")] cause that's the only reason a female gets surgery on her vagina;" and (2) "Sade was having a biopsy of her vagina." (Am. Compl. ¶¶ 7, 9-10, 21, ECF No. 12.)

Plaintiff alleges that Try's employment duties include "communicating with others at work." (*Id.* at 23.) She therefore contends that Try's statements were made "within the scope and course of his employment." (*Id.* ¶ 21.) Plaintiff has sued Defendant for defamation.

This matter comes before the Court on Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 14.) Its central argument is that Try's statement is not defamatory as a matter of law.[1] The Court agrees and will grant Defendant's Motion.

"A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (citation omitted). The Federal Rules of Civil Procedure "require[] only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A complaint need not assert "detailed factual allegations," but must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555 (citations omitted). Thus, the "[f]actual allegations must be enough to raise a right to relief above the speculative level," to one that is "plausible on its face," rather than merely "conceivable." *Id.* at 555, 570. In considering such a motion, a plaintiff s well-pleaded allegations are taken as true and the complaint is viewed in the light most favorable to the

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[1] Each side has filed memoranda supporting their respective positions. The Court will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court, and oral argument would not aid in the decisional process. E.D. Va. Local Civ. R. 7(J).

plaintiff. *T.G. Slater*, 385 F.3d at 841 (citation omitted). Legal conclusions enjoy no such deference. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To state a claim for defamation under Virginia law, a plaintiff must establish three elements: "(1) publication of (2) an actionable statement with (3) the requisite intent." *Schaecher v. Bouffault*, 772 S.E.2d 589, 594 (Va. 2015) (quoting *Tharpe v. Saunders*, 737 S.E.2d 890, 892 (Va. 2013)). To be actionable, a statement must be both false and defamatory-it must tend to "harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* (citations omitted).

Causes of action for defamation, while arising under state common law, are subject to free speech protections of the First Amendment to the United States Constitution. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14-17 (1990); *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1285 (4th Cir. 1987); *Schaecher*, 772 S.E.2d at 599-600. As such, "statements that cannot 'reasonably be interpreted as stating actual facts' about an individual" are not subject to defamation liability. *Milkovich*, 497 U.S. at 20 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

In determining whether a statement is a non-actionable expression of opinion, the Court "must consider the statement as a whole." *Hyland v. Raytheon Tech. Services Co.*, 670 S.E.2d 746, 751 (Va. 2009). It may not "isolate one portion of the statement at issue from another portion of the statement." *Id.* Thus, even a statement which could be verified as true or false "may still be protected if it

can best be understood from its language and context to represent the personal view of the author or speaker who made it." *Potomac Valve*, 829 F.2d at 1288.

Plaintiff alleges that Try made two defamatory statements: (1) "Sade was having surgery on her vagina because she got a STD cause that's the only reason a female gets surgery on her vagina;" and (2) "Sade was having a biopsy of her vagina." (Am. Compl. ¶¶ 9-10.)

As an initial matter, Plaintiff concedes that the false statements about having surgery and a biopsy are not actionable because they are not defamatory. (Pl.'s Br. Opp'n Mot. Dismiss 8, ECF No. 17.) Therefore, the Court need only determine whether the portion of the statement regarding Plaintiff having an STD is actionable.

The law is clear that "even [a] statement capable of being proved false would be understood as author's opinion where it was a conclusory punch line following fully- disclosed facts." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993) (citing *Potomac Valve*, 829 F.2d at 1289-90). In *Potomac Valve*, the Fourth Circuit affirmed the district court's decision that an alleged statement was not defamatory. The statement included an accusation that the plaintiff had designed a test of its products in order to deceive its customers. *Potomac Valve*, 829 F.2d at 1285. While the court found that the statement was verifiable-either the test was or was not designed to deceive the customers-it was nonetheless a non-actionable opinion. When considered in the context of the entire article in which it was published, the

"statement is merely [the defendant's] conclusion from the seven specific points he outlines in the text of the article." *Id.* at 1290.

Applying the same analysis in this case, the Court concludes that Try's remark that "she got a STD" is not actionable. When that portion of the statement is considered in context, it is clearly only Try's opinion based on his faulty reasoning that "the only reason a female gets surgery on her vagina" is because she has an STD. "The premise[] is explicit, and the [listener] is by no means required to share in [Try's] conclusion." *Potomac Valve*, 829 F.2d at 1290.

Standing alone, the statement that Plaintiff has an STD may very well be defamatory. However, the Court need not reach that issue because when considered in context, no reasonable person would take Try's statement to be anything more than pure conjecture.

Based on the foregoing, Defendant's Motion to Dismiss (ECF No. 14) will be granted. This action will be dismissed without prejudice.

An appropriate Order will accompany this Memorandum Opinion.

/s/
Henry E. Hudson
United States District Judge

Date: May 8, 2017
Richmond, Virginia

[ENTERED JULY 9, 2018]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1890
(3:17-cv-00128-HEH)

SADE GARNETT,

Plaintiff - Appellant,

v.

REMEDI SENIORCARE OF VIRGINIA, LLC,

Defendant - Appellee,

and

AARON TRY,

Defendant.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Niemeyer, and District Judge Gergel.

For the Court
/s/ Patricia S. Connor, Clerk

No. 18-465

In The Supreme Court of the United States

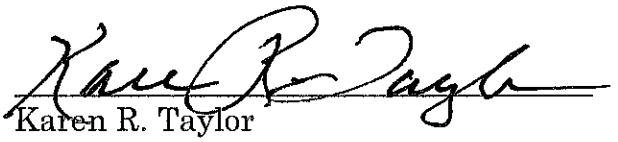
Sade Garnett v. Remedi Seniorcare of Virginia, LLC

CERTIFICATE OF COMPLIANCE

As required by the Supreme Court Rule 33.1(h), I certify that the document contains 6,650 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on October 26, 2018.



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No. 18-465

In The Supreme Court of the United States

Sade Garnett v. Remedi Seniorcare of Virginia, LLC

AFFIDAVIT OF SERVICE

I, Karen R. Taylor, being eighteen years or older, do certify under penalty of perjury that the foregoing is true and correct. That, on this, 26th day of October, 2018, I filed forty (40) copies of the foregoing with the United States Supreme Court via UPS Ground Transportation, and served three (3) copies of same, via UPS Ground Transportation, to the following:

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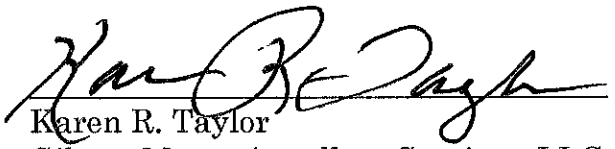

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Signed and subscribed before me on this the 26th day of October, 2018.

Bradford E. Moore, Notary