

No. _____

In The
Supreme Court of the United States

FIDELIS AGBAPURUONWU,

Petitioner,
v.

NBC SUBSIDIARY (WRC-TV), LLC D/B/A NBC4
WASHINGTON; AND NBCUNIVERSAL MEDIA, LLC

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents NBCUniversal Media, LLC and NBC Subsidiary (WRC-TV), LLC d/b/a NBC4 published a television broadcast and online print article about Petitioner, Fidelis Agbapuruonwu, a private individual. In its publications, Respondents partially quoted a statement about Petitioner from a public record which imputed criminal activity to Petitioner and amounted to defamation *per se* under Virginia law. The United States Court of Appeals for the Fourth Circuit concluded that Petitioner could not overcome application of the fair report privilege to this statement, as the actual malice Petitioner would be required to prove had not been plausibly pled in his Complaint. The questions presented are:

1. Whether *Twombly* and *Iqbal* require heightened factual pleading of allegations of malice in a common law defamation complaint brought by a private individual against a media defendant, beyond the requirement of F.R.Civ.P. 9(b) that “[m]alice . . . may be alleged generally”?
2. Whether a private individual bringing a common-law defamation claim in federal court based on diversity jurisdiction is entitled to discovery to adduce evidence of malice for the purpose of overcoming a qualified privilege?

PARTIES

Petitioner is Fidelis Agbapuruonwu, who was the plaintiff at the District Court for the Eastern District of Virginia and appellant at the United States Court of Appeals for the Fourth Circuit.

Respondents are NBC Subsidiary (WRC-TV), LLC d/b/a NBC4 Washington and NBCUniversal Media, LLC. Respondents were the defendants at the District Court for the Eastern District of Virginia and the appellees at the United States Court of Appeals for the Fourth Circuit.

RELATED CASES

Fidelis Agbapuruonwu v. NBCUniversal Media, LLC et. al, No. 1:18-cv-01555, U.S.

District Court for the Eastern District of Virginia. Judgment entered Feb. 1, 2019.

Fidelis Agbapuruonwu v. NBCUniversal Media, LLC et. al, No. 19-1236, U.S. Court

of Appeals for the Fourth Circuit. Judgment entered Aug. 18, 2020.

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No. 19-1236
(Docket No. 38)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fidelis Agbapuruonwu respectfully petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and reported at 821 F. App'x 234 (4th Cir. 2020), and has been reproduced as Appendix A.

The opinion of the District Court for the Eastern District of Virginia is unreported but has been reproduced as Appendix B.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on August 18, 2020. Petitioner did not seek rehearing or *en banc* review. The petition is timely, being filed within 150 days of entry of the judgment, S.Ct. Rule 13 subd. 1 (normal deadline to file petitions extended to 150 days pursuant to Court's Order dated Mar. 19, 2020 in response to COVID-19). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Federal jurisdiction below was based upon diversity of citizenship, 28 U.S.C. § 1332(a).

STATUTES

Fed. R. Civ. P. 9. Pleading Special Matters

...

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Virginia Code § 8.01-223.2. Immunity of Persons for Statements Made at Public Hearing or Communicated to Third Party.

A. A person shall be immune from civil liability for . . . a claim of defamation based solely on statements . . . regarding matters of public concern that would be protected under the First Amendment to the United States Constitution made by that person that are communicated to a third party The immunity provided by this section shall not apply to any statements made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false.

B. Any person who has a suit against him dismissed . . . pursuant to the immunity provided by this section may be awarded reasonable attorney fees and costs.

STATEMENT OF THE CASE

On March 10, 2017, Respondents NBCUniversal Media, LLC and NBC Subsidiary (WRC-TV), LLC d/b/a NBC4 Washington (referred to collectively as “NBC4”) authored and published a television broadcast (the “Broadcast”) and an online print article (the “Article”). NBC4 titled the Article “Virginia Woman Charged with Welfare Fraud for Collecting Benefits While Husband Earned Millions.”

The Broadcast and Article addressed criminal charges filed against Helen Agbapuruonwu (hereinafter “Helen”), Petitioner’s wife, for four counts of welfare fraud in violation of Virginia law. Mr. Agbapuruonwu does not dispute that criminal charges were filed against his wife or the truth of the statements related to those charges in the publications.

Instead of focusing its report on the criminal charges against Helen, however, NBC4’s Broadcast and Article primarily focused on Mr. Agbapuruonwu. One of the false and defamatory statements Mr. Agbapuruonwu challenges included quoted

language from a public record that Mr. Agbapuruonwu had “fled the country and is somewhere in Africa.” Article, 1 J.A. 055; Broadcast 2 J.A. at [01:23].¹

Mr. Agbapuruonwu also challenges the false and defamatory implication of the Article and Broadcast, taken as a whole, that he participated in criminal wrongdoing and suffered professional consequences as a result of either suspicion or allegations of illegal activity.

To the contrary, Petitioner cooperated fully with the criminal investigation of Helen and was neither suspected of wrongdoing nor charged in relation to Helen’s alleged crime. He remained in the United States through the duration of the investigation and at the time of publication.

Although both publications do address Helen’s criminal investigation and arrest, only two of more than a dozen total statements in NBC4’s Article relate to Helen. The Article cites to statements made by the Arlington County Police Department to report that:

¹ Citations to “J.A.” refer to the Joint Appendix filed in this matter with the Fourth Circuit. *Fidelis Agbapuruonwu v. NBCUniversal Media, LLC et. al*, No. 19-1236, 821 F. App’x 234 (4th Cir. 2020) (Dkt. 18).

- Helen “was arrested this week and charged with four counts of welfare fraud for collecting over \$100,000.00 in benefits – all while her husband was a high-earning attorney in D.C.”
- Helen was the subject of a six-month investigation, the conclusion of which was that “the mother of four had collected benefits like food stamps and Medicaid assistance for the past six years.”²

Article, 1 J.A. 055. The remainder of the Article focuses on Mr. Agbapuruonwu, with citations to myriad other sources.

The Article cites to unspecified court documents to report that “Fidelis Agbapuruonwu, was earning \$1.5 million per year as a lawyer.” *Id.* It refers to Mr. Agbapuruonwu’s LinkedIn page to detail his profession as an attorney who “works for the D.C. firm of Mayer Brown,” and lists his receipt of the prestigious Paul and Daisy Soros Fellowship in 2001, noting it “helped pay his way through law school.” *Id.*

NBC4 states that it contacted Mr. Agbapuruonwu’s former employer, Mayer Brown, to report that “today the firm said [Petitioner] no longer works there.” Article, 1 J.A. 055. NBC4 also refers to a conversation between one of its reporters and the

² The Article additionally notes an unsuccessful attempt to contact Helen’s defense lawyer.

director of a preschool Mr. Agbapuruonwu’s children once attended to report the community’s “shock[] by the allegations against the *family*.” *Id.* (emphasis added).

Finally, the Article refers to information provided by “unnamed Court Officials” to report that Mr. Agbapuruonwu is an immigrant from Nigeria and that he is believed to have “fled the country and [be] somewhere in Africa.” Article, 1 J.A. 055. While the Broadcast displays a document containing the latter statement as a handwritten note, it is unclear where or how NBC4 learned of Mr. Agbapuruonwu’s status as an immigrant or about his country of origin. Broadcast, 2 J.A. at [01:23].

The Broadcast and Article both strongly imply that Mr. Agbapuruonwu participated in the criminal acts for which Helen had been charged, and then fled the country in an effort to avoid prosecution, leaving behind his career as well as his family. Article, 1 J.A. 055; Broadcast, 2 J.A. *generally*.

Under Virginia law, the handwritten statement about Mr. Agbapuruonwu having fled the country is defamatory *per se*, as, standing alone, it is capable of a defamatory meaning: an accusation of criminal acts. The additional defamation alleged by Mr. Agbapuruonwu is actionable based on the implication created by NBC4’s omission of the fact that Mr. Agbapuruonwu himself was not under suspicion for the crimes alleged against Helen, as well as NBC4’s misplaced focus on him, including his location during and after the events in question.

NBC4 intended the defamatory implication of the Article and Broadcast. Absent this implication, none of the additional information NBC4 included about Mr. Agbapuruonwu would have any bearing on the subject matter of the publications. NBC4 endorsed the defamatory reading of this statement in order to include sensational details about Mr. Agbapuruonwu in its publications that would not otherwise be relevant.

The impact of the Article and Broadcast on Mr. Agbapuruonwu was immediate and devastating and continues to the present day. These publications prompted a violent response from readers and viewers, which included multiple threats to Mr. Agbapuruonwu's safety and the safety of his children. Petitioner has suffered and continues to suffer harm to his personal and professional reputation as a result of Respondents' publications.

The Daily Caller, a conservative news website, cited Respondents' publications as the main sources for its own article titled "Soros Fellow Flees Country While Wife Arrested for Welfare Scam," which was shared by controversial political commentator Ann Coulter via Twitter and retweeted by over four thousand Twitter users.

Respondents' Articles were shared and quoted on a number of other web pages and blogs, evoking commentary in response that contained death threats against Mr. Agbapuruonwu and his family, threats of sexual violence against his wife, and calls for deportation of he and his children from the United States along with many other hateful racist and anti-immigrant statements.

Mr. Agbapuruonwu's business and professional reputation have suffered as a result of NBC4's publications. Following the publication of the Article and Broadcast, Mr. Agbapuruonwu lost customers and clients who believed him to be complicit in the crimes alleged against Helen. Mr. Agbapuruonwu has struggled, and continues to struggle, to secure loans from financial institutions as a result of NBC4's publications.

The Present Action

1. Proceedings in the District Court.

Mr. Agbapuruonwu filed an action in the Circuit Court for Arlington County, Virginia on March 9, 2018. NBC4 removed this matter to the United States District Court for the Eastern District of Virginia on December 17, 2018.

On February 1, 2019, the district court granted a Rule 12(b)(6) motion to dismiss filed by NBC4 in response to Mr. Agbapuruonwu's complaint.³ Pet. App. B. The district court determined that Virginia's fair report privilege applied to the alleged false statements in the Article and Broadcast about Mr. Agbapuruonwu that were credited by NBC4 as part of the public record. The court made this finding despite Mr. Agbapuruonwu having alleged NBC4's malicious intent in his Complaint and, therefore, having alleged facts sufficient to demonstrate NBC4 abused the privilege such that it had been lost. Pet. App. B at 11-14.

The court found that a reasonable person could not read the remaining, non-privileged statements about Mr. Agbapuruonwu in the Article and Broadcast as giving rise to the defamatory implication Mr. Agbapuruonwu alleged. Pet. App. B at 14-17.

The district court also held that Mr. Agbapuruonwu had failed to plead facts sufficient to demonstrate that NBC4 intended or endorsed the defamatory meaning of these privileged statements so as to overcome the immunity contemplated in Section 8.01-223.2 of the Virginia Code.

³ NBC4 moved to dismiss Mr. Agbapuruonwu's claims of defamation and inciting words under Virginia Code § 8.01-45 and moved for attorneys' fees pursuant to Virginia Code § 8.01-223.2. The court granted in part and denied in part NBC4's motion to dismiss. Mr. Agbapuruonwu's claims were dismissed and NBC4's motion for attorneys' fees was denied. Appendix B.

2. The Appeal to the Fourth Circuit.

On appeal to the United States Court of Appeals for the Fourth Circuit (“Fourth Circuit”), Mr. Agbapuruonwu challenged the district court’s application of the fair report privilege to the statements quoted from the public record and the court’s failure to consider Mr. Agbapuruonwu’s allegations of NBC4’s malicious intent as potentially obviating the fair report privilege. Mr. Agbapuruonwu further challenged the district court’s finding that NBC4’s remaining statements concerning him, when viewed in the context of the publications as a whole, did not give rise to an actionable claim of defamation. Pet. App. A.

The Fourth Circuit upheld the district court’s finding with respect to the fair report privilege. Pet. App. B. In response to Mr. Agbapuruonwu’s argument that NBC4 had lost its entitlement to the fair report privilege because it published the statements at issue with actual malice, the court found Mr. Agbapuruonwu’s Complaint made “no plausible allegation of actual malice” and therefore could not overcome NBC4’s fair report privilege defense. Pet. App. A at 11-14.

The Fourth Circuit relied on *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.* in holding that Mr. Agbapuruonwu’s assertion in his Complaint that NBC4 published the false, defamatory *per se* statements in the Article and Broadcast with

actual malice to be conclusory and therefore not sufficient to overcome the fair report privilege.⁴ Pet. App. A at 13.

The Fourth Circuit held Mr. Agbapuruonwu could not overcome the conditional privilege asserted by NBC4 in its 12(b)(6) motion, and, as a result, could not prevail on his claim of defamation *per se* based on the underlying, privileged statements concerning him quoted from the public record. Pet. App. A at 11-14.

Based on this conclusion, the Fourth Circuit looked only to the remaining statements concerning Mr. Agbapuruonwu in the publications, absent the context provided by the public record, in upholding the district court's determination that they alone did not reasonably imply a defamatory meaning. Pet. App. A at 14-17.

REASONS FOR GRANTING THE PETITION

1. Application of Federal Pleading Standards to Allegations of Intent in State Law Defamation Claims Unduly Hinders an Individual's Right to Protect His Reputation.

Federal courts recognize the protection of individuals against defamation is a protection of individual liberty. *See, e.g., Rosenblatt v. Baer*, 383 U.S. 75, 93 (1966) (Stewart J., concurring) (providing reputation is “a concept at the root of any decent

⁴ *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012) (holding a plausible allegation of actual malice requires “factual allegations” that “raise a right to relief above the speculative level”).

system of ordered liberty.”). “Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.” *Id.* at 86.

The Commonwealth of Virginia similarly recognizes the importance of one’s interest in protecting his or her reputation. In Virginia, an “individual’s right to personal security includes his uninterrupted entitlement to enjoyment of his reputation.” *Gazette v. Harris*, 229 Va. 1 (1985) (citing *Fuller v. Edwards*, 180 Va. 191, 197 (1942)).

Virginia defamation law takes into account the need to balance this individual interest with the constitutional privilege afforded to media defendants publishing matters of public concern. Defamation claims should be evaluated under a pleading standard which permits allegations of intent, such as malice, be alleged generally. However, the plausibility pleading standard set forth in *Iqbal* and *Twombly*, when applied to state defamation claims, offsets this balance of individual interest with the constitutional privilege in a manner unjustly detrimental to plaintiffs.⁵

a. This Court’s Precedent Gives Deference to Individual States’ Defamation Laws.

A review of precedent demonstrates that application of *Iqbal* and *Twombly*’s plausibility pleading standard to defamation claims runs counter to this Court’s

⁵ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

expressed interest in an individual's right to protect his or her reputation and counter to the deference this Court intended to give states in determining how best to strike a balance between that interest and First Amendment concerns.

This Court has looked primarily to the public or private nature of the plaintiff bringing the suit to determine the level of protection owed to a defendant's speech under the First Amendment. In *Gertz v. Robert Welch, Inc.*, this Court recognized that private individuals, unlike public officials or public figures, have not voluntarily inserted themselves into matters of public controversy and likely lack access to certain resources, including channels of effective communication, necessary to protect their reputation. 418 U.S. 323, 345 (1974). As a result, the *Gertz* Court held that it would be up to each state to determine the level of intent a private individual would be required to prove to succeed on a claim of defamation. *Id.*

Virginia law, following this guidance from the Court, requires a private figure must only prove negligence in order to succeed on a claim of defamation. *Hyland v. Raytheon Tech Servs. Co.*, 670 S.E2d 746, 750 (Va. 2009) (acknowledging a private figure must typically "show that the defendant knew that the statement was false, or believing that the statement was true, lacked a reasonable basis for such belief, or acted negligently in failing to determine the facts on which publication was based.").

This Court has also found the subject matter of the speech itself, specifically whether it is of public or private concern, also merits consideration. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (“speech on matters of purely private concern is of less First Amendment concern” than speech on matters of public concern) (internal citations omitted).

Virginia has since added an additional statutory protection for media defendants who publish matters of public concern. Section 8.01-223.2 of the Virginia Code provides immunity to persons alleged to have made certain defamatory statements regarding matters of public concern.

This immunity has been interpreted in the same manner as other qualified privileges in Virginia, in that it may be obviated where a defendant is shown to have acted with actual malice. *See, e.g., Cashion v. Smith*, 749 S.E.2d 526, 532 (Va. 2013) (holding the question of whether a qualified privilege attaches is a matter of law, and a “plaintiff bears the burden to prove that the privilege has been lost or abused by virtue of the defendant’s improper mental state (e.g., personal spite or ill will); *see also Alexis v. Kamras*, 2020 WL 2616705 at *21 (E.D. Va. May 22, 2020) (“whether [a qualified] privilege is overcome by virtue of the defendant’s improper mental states . . . is a jury question.”)).

b. Application of *Iqbal* and *Twombly* to Virginia Defamation Claims Leads to Unjust and Unintended Results.

The application of *Iqbal* and *Twombly's* plausibility pleading standard to allegations of intent significantly alters the balance between the individual interest and the First Amendment intended under Virginia law. A private plaintiff bringing a state law defamation claim removed to federal court, while once faced with a challenging burden of proof to overcome, now faces an insurmountable barrier to successfully pleading his or her claim at the outset of litigation.

Prior to widespread application of the plausibility standard in federal courts, actual malice presented a high bar for private figure plaintiffs, but they had the benefit of discovery to support their claim and prove this essential element of their case, as they were only required to plead actual malice generally. *See, e.g., Church of Scientology Int'l v. Behar*, 238 F. 3d 168, 173 (2d. Cir. 2001) (providing resolution of the actual malice inquiry in a defamation claim “typically requires discovery” and permitting extensive discovery rather than attempting to resolve the issue at the pleading stage); *United States Med. Corp. v. M.D. Buyline, Inc.*, 753 F. Supp. 676, 680 (F. Supp. 1990) (allegation that defendant acted with actual malice sufficient to

withstand 12(b)(6) motion)); *Hoth v. Am. States Ins. Co.*, 735 F. Supp. 290, 293 (N.D. Ill. 1990) (similar)).⁶

Now, in federal courts, private figure plaintiffs are deprived of an opportunity for discovery but must still plead specific factual allegations sufficient to plausibly demonstrate a defendant's intent. In Virginia, a plaintiff must prove actual malice when the defamatory statement(s) at issue are subject to a qualified privilege or pertain to a matter of public concern. These requirements, considered in the context of *Iqbal* and *Twombly*, call for an insurmountable standard of pleading that effectively bars private figures from seeking redress for harm inflicted upon their reputation.

Such a result stands contrary to this Court's prior refusal to "modify firmly established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving knowing or reckless falsehood by the publisher of an alleged libel, elements that are critical to plaintiffs [who are required to prove actual malice]." *Herbert v. Lando*, 441 U.S. 153, 169 (1979).

⁶ See also Judy M. Cornett, *Pleading Actual Malice in Defamation Actions After Twiqbal: A Circuit Survey*, 17 Nev. L.J. 709 (2017) ("... prior to *Twiqbal*, the actual malice element was understood as an evidentiary matter to be proved at trial or disposed of on summary judgment.").

The plausibility pleading standard is at its most demanding for claims in which intent or state of mind is an element. *See, e.g., A.B. Spencer, Plausibility Pleading*, 49 B.C. L. Rev. 431, 459 (2008). This difficulty is complicated by the inability of plaintiffs to put forward direct evidence supporting their allegations at the complaint stage due to information asymmetry. *Id.* (*citing Scott Dodson, Pleading Standards After Bell Atlantic v. Twombly*, 93 L. Rev. In Brief 121, 124-25 (2007)).

A private plaintiff like Mr. Agbapuruonwu is unlikely to know the reasoning or intentions of a journalist and has no practical way to sufficiently allege actual malice under the plausibility pleading standard. “[W]hen the defendant controls critical private information, *Iqbal* creates an apparent catch-22 for plaintiffs, requiring them to plead information they do not know but denying them a means of discovering that information.” Noll, *The Indeterminacy of Iqbal*, 99 Geo L.J. 117, 120 (2010). Such a result is incompatible with long-standing notions of fairness and a right of access to justice.

Requiring a defamation plaintiff to plead specific facts pertaining to a media defendant’s state of mind, impossible to know without discovery, effectively denies a private individual access to a forum in which to pursue his claims.⁷

⁷ U.S. Const. amend. I (“Congress shall make no law . . . abridging. . . the right of the people . . . to petition the Government for a redress of grievances.”); *see also Cal.*

Federal courts are routinely confronted with this question. *See, e.g., Kerik v. Tacopina*, 64 F. Supp. 3d 542, 571 and n. 9 (S.D.N.Y. 2014) (“[w]hether a plaintiff is ordinarily required plausibly to allege actual malice at the pleading stage appears to be an open question.”); *Arista Records, LLC v. Doe* 3, 604 F.3d 110, 120 (2d Cir. 2010) (“[t]he heightened pleading standard does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant.”); *compared to Schatz v. Republican State Leadership Comm.*, 669 F.3d 50 (1st Cir. 2012) (citing *Iqbal* and *Twombly* in affirming dismissal of complaint for failure to adequately plead actual malice); *Scharpenberg v. Carrington*, 686 F. Supp. 2d 655 (E.D. Va. 2010) (similar).

The resource and information asymmetry between Mr. Agbapuruonwu and NBC4 render this case a particularly suitable vehicle for this Court to revisit application of *Iqbal* and *Twombly* to allegations related to intent in instances where fairness and public policy dictate claims be permitted to proceed to discovery.

2. Application of Different Pleading Standards to Allegations of Malice in State Law Defamation Claims Creates an Unacceptable Inconsistency Between Outcomes in State and Federal Courts.

Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (stating that the First Amendment serves as the constitutional basis for the right of access to courts).

Application of the federal plausibility pleading standard to allegations of malice in state law defamation claims would run afoul of substantive rights provided under Virginia common law, which are inextricably bound up with pleading requirements that permit malice be alleged in general terms. As a result, a claim that can survive a demurrer and proceed to trial in state court under Virginia's notice pleading standard is likely to be dismissed for failure to state a claim at the outset of litigation if removed to federal court.

Had this case been litigated in Virginia state court, it almost certainly would not have been dismissed prior to discovery for lack of plausibility. *See, e.g., Ziglar v. Media Six, Inc.* 61 Va. Cir. 173 (Roanoke City 2003) (finding allegation defendant acted with malice to be a “fact” to which the court gave deference upon a demurrer); *Jennings v. Jones*, 70 Va. Cir. 56 (2005) (City of Petersburg) (plaintiff’s general allegation of actual malice sufficient to overcome demurrer on basis of conditional privileges, as conditional privileges would be vitiated if actual malice proven); *Matthew v. Carr*, 70 Va. Cir. 297 (2006) (City of Charlottesville) (finding that although plaintiff’s allegations were “conclusory,” the court on a demurrer is required to make all reasonable inferences from facts alleged, and plaintiff’s allegation that defendant knew her claim to be false was sufficient to allege actual malice).

In Virginia state court, the plaintiff would be provided the benefit of discovery and would be permitted to *prove*, rather than *plead*, factual circumstances giving rise to an inference of actual malice, and present that evidence to a jury. *See, e.g., Fuste v. Riverside Healthcare Ass'n, Inc.* 575 S.E.2d 858, 863 (2003) (citing *Alexandria Gazette Corp.* West, 93 S.E.2d 274, 279-80) (1956) (quoting *Bragg v. Elmore*, 147 S.E 275, 279 (1929)).

The consequences of inconsistent outcomes between state and federal courts include the risk of increased uncertainty for plaintiffs seeking redress through the courts and the creation of an opportunity for forum shopping by diverse defendants.

To require allegations of malice to meet a plausibility pleading standard functionally creates an additional barrier to success on state law defamation claims. Such an application is violative of the Erie Doctrine and this Court's express goal of construing the Federal Rules of Civil Procedure so that the outcome of a diversity case, governed by state common law principles, is the same in federal court as it would be in state court. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Hannah v. Plumer*, 380 U.S. 468, 467-68 (1965) (goal of the Erie Doctrine is to avoid "substantial variations [in outcomes] between state and federal litigation" which would "likely . . . influence the choice of a forum . . . "); *see also Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

In *Shady Grove*, this Court held:

[F]ederal rules must be interpreted with some degree of sensitivity to important state interests and regulatory policies, and applied to diversity cases against the background of Congress' command that such rules not alter substantive rights and with consideration of the degree to which the Rule makes the character and result of federal litigation stray from the course it would follow in state court....

A federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right of remedy that it functions to define the scope of a state-created right.

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 292, 418-23

(2010) (quotation marks and citations omitted).

In this case, the long-standing rule permitting private figure defamation plaintiffs in Virginia to plead malice generally, without factual detail, defines the scope of their right to adjudicate their claims. The lower court's dismissal of a state common-law defamation claim that, in state court, would have been permitted to proceed to discovery violates principles of *Erie* federalism.

This Court should grant certiorari in a case where "a United States court of appeals has . . . decided an important federal question in a way that conflicts with a decision by a state court of last resort." S.Ct. Rule 10(a). The lower courts' application of a heightened federal pleading standard to allegations of malice in a state law defamation case creates an intractable conflict between the federal and state courts, and this Court should grant certiorari to resolve that question.

3. The Text and Historical Intent of Federal Rule of Civil Procedure 9(b) Expressly Permits Malice be Plead Generally.

The current application of the *Iqbal* and *Twombly* plausibility pleading standard to allegations of the knowledge, intent, or other conditions of the mind described in Rule 9(b) is unduly prohibitive on the ability of plaintiffs to adjudicate such claims. Lower courts have widely interpreted *Iqbal* and *Twombly* to require pleaders to state facts showing that allegations of conditions of the mind were plausible.⁸ This Court should correct and abate the lower court's interpretation of *Iqbal* and *Twombly* currently trending, which is not only unfair, but also contrary to the intended meaning of Rule 9(b).

⁸ See, e.g., *Ibe v. Jones*, 836 F.3d 516, 525 (5th Cir. 2016); *Biro v. Conde Nast*, 807 F.3d 541, 44-45 (2d Cir. 2015); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013); *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012).

For additional examples at the circuit and district court level, see also, 5A Charles A. Wright, Arthur R. Miller, & A. Benjamin Spencer, *Federal Practice and Procedure* § 1301 (4th ed. 2018).

Although the majority of district courts have followed this trend, it is still not being applied uniformly at the district court level. See, e.g., *United States ex. Rel. Dildine v. Pandya*, 389 F. Supp. 3d 1214, 1222 (N.D. Ga. 2019) ("Since Federal Rule of Civil Procedure 9(b) provides '[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally' and since the Complaint alleges Defendants submitted false claims with actual knowledge, reckless indifference, or deliberate ignorance to the falsity associated with such claims, the Government satisfies the scienter element.").

The text of Rule 9(b) is notably and meaningfully different than other provisions within the same Rule. While Rule 9(a)(2) contains an express obligation to “state any supporting facts, this language is absent from Rule 9(b). *Cf.* F. R. Civ. P. 9(a)(2) and F.R. Civ. P. 9(b). *See also Federal Practice & Procedure*, § 1301 at 1049-50 (“If Rule 9(a)(2) imposes a special obligation to state supporting facts in the narrow context to which it is confined, it cannot be that the general standard applicable to allegations found in Rule 8(d)(1) and alluded to in the second sentence of Rule 9(b) also requires the statement of supporting facts *sub silentio*.”)

An interpretation of 9(b) to require the statement of supporting facts is therefore contrary to a tenant of interpretation of legal texts that provides the expression of one condition implies the exclusion of others, or *expression unius est exclusion alterius*. *See* Antonin Scalia & Bryan Gardner, *Reading Law: The Interpretation of Legal Texts* at 107 (2012).

If conditions of the mind can be pleaded generally, as the plain language of the Rule itself states, then an interpretation of *Twombly* and *Iqbal* that requires specific facts and circumstances be alleged imposes an additional requirement not within the Rule’s text. Such an interpretation would be tantamount to amending Rule 9(b) without having fulfilled the procedural requirements for making such a change.

Moreover, it is clear from the history of Rule 9(b) that its drafters intended to permit such conditions of a person's mind be alleged without setting forth the facts or circumstances from which the condition may be inferred. The committee notes to the original version of Rule 9(b), promulgated in 1938, refer to "English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22 for guidance. That rule reads:

Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

A note to this rule further provides that, with respect to allegations of malice, a plaintiff "need not . . . set out the evidence by which he hopes to establish malice at the trial." *Id.* The intent here is clear. While allegations of malice must be sufficiently proven at trial to succeed on a claim, the facts and circumstances supporting the allegation need not be set forth with particularity at the pleading stage.

Applying *Iqbal* and *Twombly* to defamation claims in a manner that requires actual malice to be plausibly pled runs contrary to the text and historical intent of the pleading standards set forth in Rule 8 and 9 of the Federal Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

RESPECTFULLY SUBMITTED.

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January 15, 2021.

APPENDIX A

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 19-1236

FIDELIS AGBAPURUONWU,

Plaintiff – Appellant,

v.

NBC SUBSIDIARY (WRC-TV), LLC, d/b/a NBC4 Washington;
NBCUNIVERSAL MEDIA, LLC,

Defendants – Appellees.

No. 19-1272

FIDELIS AGBAPURUONWU,

Plaintiff – Appellee,

v.

NBC SUBSIDIARY (WRC-TV), LLC, d/b/a NBC4 Washington;
NBCUNIVERSAL MEDIA, LLC,

Defendants – Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, District Judge. (1:18-cv-01555-AJT-MSN)

Submitted: June 1, 2020

Decided: August 18, 2020

Before MOTZ, KING, and DIAZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Joshua Erlich, Katherine L. Herrmann, THE ERLICH LAW OFFICE, PLLC, Arlington, Virginia, for Appellant/Cross-Appellee. Jay Ward Brown, BALLARD SPAHR LLP, Washington, D.C., for Appellees/Cross-Appellants.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Fidelis Agbapuruonwu filed this defamation action against NBCUniversal Media, LLC, and its subsidiary, NBC4 Washington (collectively, “NBC”). Agbapuruonwu alleges that NBC4 published a television news segment and internet news article (together, the “Report”) that falsely suggested his involvement in a welfare fraud scheme perpetrated by his wife, Helen.¹ The district court determined that Agbapuruonwu did not state a claim for defamation *per se* because Virginia’s fair report privilege protected the purportedly false statements in the Report and Agbapuruonwu did not allege an actionable defamatory implication. Additionally, the court determined that Agbapuruonwu failed to show that the immunity provision of Virginia Code section 8.01-223.2 did not apply to the Report. The court dismissed the Complaint for failure to state a claim and denied NBC’s request for attorney fees. These cross-appeals followed. As explained below, we affirm.

I.

A.

We accept the facts alleged in the Complaint as true and recite them in the light most favorable to Agbapuruonwu. *See Dawson-Murdock v. Nat’l Counseling Grp., Inc.*, 931 F.3d 269, 271–72 (4th Cir. 2019).

Agbapuruonwu immigrated to the United States from Nigeria. Thereafter, he received the prestigious Paul and Daisy Soros Fellowship for New Americans to study law

¹ We refer to Fidelis Agbapuruonwu as “Agbapuruonwu” and Helen Agbapuruonwu as “Helen.”

at The Ohio State University Moritz College of Law. From 2006 to 2011, he worked as an associate in Mayer Brown’s Washington, D.C., office. In 2011, Agbapuruonwu left Mayer Brown to start his own business. But while Agbapuruonwu was succeeding professionally, his wife, Helen, was fraudulently collecting welfare benefits. On March 7, 2017, Helen was arrested and charged with four counts of welfare fraud in contravention of Virginia law. As a result of her fraud, Helen allegedly collected more than \$100,000 in benefits. Agbapuruonwu cooperated fully with Arlington County’s investigation of Helen and was neither suspected of wrongdoing nor charged in relation to Helen’s crime.

Three days after Helen’s arrest, NBC4 published the Report.² The Report’s television news segment lasts about two minutes and combines interviews and narration to describe the circumstances of the Arlington County investigation of Helen and her subsequent arrest for welfare fraud. NBC4’s news anchors introduce the segment on “one of the biggest welfare fraud investigations ever in Arlington County,” describing the investigation’s “focus” as “a mother of four, whose husband was a D.C. attorney making more than a million dollars last year.” *See Julie Carey, Virginia Woman Charged with Welfare Fraud for Collecting Benefits While Husband Earned Millions*, NBC4 Wash. (Mar. 10, 2017) at 0:00–0:18, <https://www.nbcwashington.com/news/local/virginia-woman-charged-with-welfare-fraud-for-collecting-benefits-while-husband-earned-millions/39316/>.

² We consider the Report’s television news segment because it was attached to the Complaint and the parties do not question its authenticity. *See Dawson-Murdock*, 931 F.3d at 272 n.2. We also consider the Report’s internet news article because the Complaint explicitly relied on it and it is integral to the claims therein. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011).

The television segment displays Helen’s mug shot, and the field reporter, Julie Carey, explains that Helen is accused of falsifying welfare applications and “pocketing more than \$100,000 in welfare benefits.” *Id.* at 0:25–0:37.

Carey is then shown knocking on the door of the “Arlington County townhome where [Helen] lives with her four children,” but “no one answered the door.” *Id.* at 0:38–0:43. The segment cuts to clips of the Arlington County Department of Human Services and an Arlington County Police cruiser while Carey explains that “the welfare fraud investigation into [Helen’s] benefits began months ago,” when the Arlington County Department of Human Services and the Arlington County Police reviewed six years of Helen’s records. *Id.* at 0:44–0:52. Next, Carey interviews an Arlington County Police representative, who says that “[i]t’s a lot of money and it’s money that is intended for those that are truly in need, who are low-income and really need the government’s assistance.” *Id.* at 0:53–0:59.

After the interview, Carey relates that NBC4 obtained “court documents . . . that reveal while Helen was collecting welfare benefits, her husband was working as an attorney in D.C.” *Id.* at 1:00–1:07. As Carey narrates, Helen’s mug shot is replaced onscreen by Agbapuruonwu’s headshot. A screen capture of Agbapuruonwu’s LinkedIn profile replaces the headshot, and Carey explains that the profile “shows he’s with Mayer Brown, but when I called the firm today, they say Fidelis Agbapuruonwu is no longer there.” *Id.* at 1:08–1:15. Carey then remarks that Agbapuruonwu “won a prestigious fellowship that helped pay his way through law school.” *Id.* at 1:16–1:22.

Turning back to the “court documents,” Carey explains that “courtroom notes specify that Agbapuruonwu’s business “made \$1.5 million last year” and that he “is believed to have fled the country and is somewhere in Africa.” *Id.* at 1:23–1:34. Excerpts from these “courtroom notes”—a form memorandum completed by the Arlington County magistrate who presided over Helen’s arraignment and registered her request for a court-appointed attorney (the “Magistrate’s Notes”)—are displayed onscreen as Carey narrates.³

Wrapping the segment up, Carey relates that Helen’s lawyer declined to comment and that the director of the preschool that Helen’s children attended was “shocked” by the charges and believed that they were “not true” because the Agbapuruonwus were a “loving and lovely family.” *Id.* 1:35–1:52. The segment concludes with Carey explaining that the Arlington County Police hope that the charges will deter others from “cheating the system.” *Id.* at 1:53–2:03.

The Report’s internet news article sets forth substantially the same information, but it does not include the images of Agbapuruonwu, Helen, or the Magistrate’s Notes. *See* Carey, *supra*.

³ In their entirety, the Magistrate’s Notes consist of a form “Memo” for the “General District Court.” That memo sets forth a series of checkboxes to indicate that “[t]he accused named on the attached warrant(s) or capias has been advised of his / her right to request a court appointed attorney” and (1) “[r]equests a court appointed attorney,” (2) “[d]oes not want an attorney,” (3) “[w]ants an attorney and will employ his / her own,” or (4) “[o]ther.” *Id.* With respect to Helen, the magistrate checked the boxes for “[r]equests a court appointed attorney” and “[o]ther.” *Id.* In the comment space adjacent to the “[o]ther” box, the magistrate noted: “[T]otal alleged [f]raud is 100K + over 5 years. Husband[’]s business grossed over [\$]1.5 million last year. Husband is believed to have fled country and is somewhere in Africa. He is also a D.C. lawyer.”

B.

After Agbapuruonwu filed the Complaint against NBC in Virginia state court, NBC removed the case to the Eastern District of Virginia. In the Complaint, Agbapuruonwu alleges a common law claim for defamation per se.⁴

As relevant here, the Complaint alleges that the Report contains “false factual information concerning” Agbapuruonwu, including that he earned “more than a million dollars last year” and that “[c]ourt officials write, quote, husband is believed to have fled the country and is somewhere in Africa.” The Complaint further alleges that the Report omits “the fact that [Agbapuruonwu] was not suspected by the Arlington County Police of having participated in the crimes alleged against [Helen] or any related criminal activity” and “the fact that [Agbapuruonwu] has not worked at [Mayer Brown] since 2011.” The Complaint faults NBC4 for displaying images of Agbapuruonwu and his LinkedIn profile immediately after Helen’s mug shot. The Complaint also faults NBC4 for displaying a cropped version of the Magistrate’s Notes and alleges that the Report’s failure to show the entire memorandum and its omission of the fact that the memorandum concerned Helen’s request for a court-appointed attorney “robs the document of its context and creates false and defamatory implications.” Predicated on those allegedly false factual statements and omissions, the Complaint alleges that the Report’s “clear implication” is that (1) Agbapuruonwu “was guilty of criminal conduct and had fled the country to avoid

⁴ The Complaint also alleges a claim for insulting words under Virginia Code section 8.01-45. Agbapuruonwu does not challenge the dismissal of that claim in his appeal.

prosecution, leaving behind his wife and children” and (2) Agbapuruonwu “was terminated or resigned [from his position at Mayer Brown] due to the criminal charges pending against [Helen].”

Pursuant to Federal Rule of Civil Procedure 12(b)(6), NBC moved to dismiss the Complaint for failure to state a claim. And, as part of its motion, NBC requested attorney fees under Virginia Code section 8.01-223.2. Immediately following a hearing on NBC’s motion, the district court, ruling from the bench, granted the motion in part and dismissed the Complaint.

First, the district court determined that Virginia’s fair report privilege applies to the Report’s coverage of the allegedly false statements in the Magistrate’s Notes. The court explained that the fair report privilege “immunizes publishers from liability for articles that accurately describe or summarize the contents of an official statement or report” and applies “even if it turns out that the underlying report is incorrect or it contains falsehoods.”

Second, the court determined that the Report could not reasonably be understood to imply that Agbapuruonwu was involved in, or that his departure from Mayer Brown was related to, Helen’s crime. The court pointed out that discussion of Agbapuruonwu’s income in the Report was relevant to whether Helen committed welfare fraud, and the discussion of his employment status simply related information that Agbapuruonwu maintained on his LinkedIn profile and Mayer Brown’s statement that he no longer worked there. Moreover, the court noted that the Complaint did not allege facts suggesting that NBC intended or endorsed either implication.

Accordingly, the court concluded that Agbapuruonwu failed to state a claim for defamation per se based on the Report's coverage of the Magistrate's Notes or based on a defamatory implication. Additionally, the court ruled that "for similar reasons" Agbapuruonwu failed to demonstrate that the Report was not protected by the immunity provision of Virginia Code section 8.01-223.2.⁵ The court denied NBC's request for attorney fees without elaboration.

Agbapuruonwu timely appealed from the district court's dismissal of his defamation per se claim, and NBC timely cross-appealed from the court's denial of its request for attorney fees under Virginia Code section 8.01-223.2. We possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We begin with Agbapuruonwu's appeal from the dismissal of his defamation per se claim. This Court reviews the dismissal of a complaint under Federal Rule of Civil

⁵ In relevant part, that statute provides:

A. A person shall be immune from civil liability for . . . a claim of defamation based solely on statements . . . regarding matters of public concern that would be protected under the First Amendment to the United States Constitution made by that person that are communicated to a third party The immunity provided by this section shall not apply to any statements made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false.

B. Any person who has a suit against him dismissed . . . pursuant to the immunity provided by this section may be awarded reasonable attorney fees and costs.

Va. Code § 8.01-223.2.

Procedure 12(b)(6) de novo. *See Dawson-Murdock v. Nat'l Counseling Grp., Inc.*, 931 F.3d 269, 274 (4th Cir. 2019). In undertaking that review, we accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Id.* at 274–75. Only if the complaint does not “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face” can a court dismiss pursuant to Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

On appeal, Agbapuruonwu challenges the district court’s application of Virginia’s fair report privilege to the Report’s statement that, according to the Magistrate’s Notes, Agbapuruonwu “is believed to have fled the country and is somewhere in Africa.” Agbapuruonwu also contests the court’s conclusion that the Report does not reasonably imply that he was involved in Helen’s crime. Under Virginia law, whether the fair report privilege applies and whether a statement is reasonably capable of conveying a defamatory implication are matters of law to be decided on a motion to dismiss. *See Webb v. Virginian-Pilot Media Cos., LLC*, 752 S.E.2d 808, 811 (Va. 2014); *Alexandria Gazette Corp. v. West*, 93 S.E.2d 274, 279 (Va. 1956).⁶

⁶ Agbapuruonwu has waived any challenge to the Report’s statements about his income or departure from Mayer Brown by failing to develop his appellate argument insofar as it pertains to those statements. *See Grayson O Co. v. Agadir Int’l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (recognizing that “[a] party waives an argument by failing to present it in its opening brief or by failing to develop its argument”).

A.

Agbapuruonwu contends that Virginia's fair report privilege does not apply to the Report because the Report (1) was not a substantially correct account of the Magistrate's Notes and (2) was made with actual malice, obviating the privilege altogether.

Virginia's fair report privilege protects the publication of "accounts of public proceedings or reports" — for example, records of judicial proceedings — "despite their defamatory nature." *See Lee v. Dong-A Ilbo*, 849 F.2d 876, 878 (4th Cir. 1988) (citing, *inter alia*, *Alexandria Gazette Corp.*, 93 S.E.2d at 279); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 254 (4th Cir. 1988) (applying fair report privilege to "republications of reports of judicial proceedings"). The fair report privilege applies "so long as the report [is] accurate and either complete or fairly abridged." *See Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1097 (4th Cir. 1993) (citing Restatement (Second) of Torts § 611 (Am. Law Inst. 1977)). Especially pertinent here, selective quotation from a report of an official proceeding constitutes a fair abridgement when it is a "substantially correct" account. *See Rushford*, 846 F.2d at 254. Indeed, the fair report privilege applies even if the statement quoted from the record is false. *See Alexandria Gazette Corp.*, 93 S.E.2d at 279.

As he must, Agbapuruonwu concedes that the Report quotes directly from the Magistrate's Notes. Nevertheless, Agbapuruonwu maintains that the Report is not a fair and substantially correct account of the Magistrate's Notes because it presented the statement concerning Agbapuruonwu's whereabouts without context and misattributed that statement "to court officials and police." Opening Br. at 17–20. We disagree as to both points.

The quotation in the Report of the statement from the Magistrate’s Notes is accurate. The Report’s attribution of the statement to “court officials” — that is, the magistrate (a Virginia judicial officer) — is substantially correct. *See* Va. Code §§ 19.2-33, 19.2-45. The Report’s characterization of the Magistrate’s Notes documenting Helen’s arraignment as “courtroom notes” or “court documents” is also substantially correct. And Agbapuruonwu’s contention that the Report falsely attributed the statement to the Arlington County Police is entirely without merit. The Report’s presentation of the Magistrate’s Notes does not even mention — let alone attribute the statement to — the police. At bottom, the message conveyed by the Report’s selective coverage of the Magistrate’s Notes is no different than that conveyed by the Magistrate’s Notes themselves. Therefore, the Report, which is an accurate account and fair abridgement of the Magistrate’s Notes, fits within Virginia’s fair report privilege. *See Rushford*, 846 F.2d at 255; *see also* Restatement (Second) of Torts § 611 & cmt. f (Am. Law Inst. 1977).

Agbapuruonwu contends that even if the fair report privilege applies, NBC obviated the privilege by publishing the Report with actual malice. A statement is made with “actual malice” if it is made “with knowledge that it [is] false or with reckless disregard of whether it [is] false or not.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). “Reckless disregard” occurs when a publisher entertains “serious doubts as to the truth of [the] publication.” *St. Amant v. Thompson*, 390 U.S. 727, 730–31 (1968).

Whether a showing of actual malice can vitiate the fair report privilege seems to be an unsettled question under Virginia law. *See Bateman Litwin N.V. v. Swain*, No. 4:07cv138, 2009 WL 10688302, at *7 (E.D. Va. Mar. 18, 2009) (collecting cases).

Here, however, we need not delve any further into the effect of actual malice on Virginia’s fair report privilege because the Complaint makes no plausible allegation of actual malice. A plausible allegation of actual malice requires “factual allegations” that “raise a right to relief above the speculative level.” *See Mayfield v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012) (internal quotation marks and alterations omitted). A conclusory allegation of knowledge of falsity or reckless disregard thereof — that is, “a mere recitation of the legal standard” — does not constitute a plausible allegation of actual malice. *Id.* at 378. Thus, the assertion in the Complaint that the Report contained statements made “with the knowledge they were false and . . . so recklessly as to amount to a willful disregard for the truth” is “entirely insufficient.” *Id.*

Agbapuruonwu insists that actual malice is evidenced by NBC4’s inclusion of the magistrate’s notation that Agbapuruonwu “is believed to have fled the country and is somewhere in Africa” in order to sensationalize the Report. But the Complaint’s allegation that Agbapuruonwu was, in fact, present in the United States does not demonstrate that NBC4 knew that the statement in the Magistrate’s Notes was false or that NBC4 entertained doubts about its veracity. Indeed, the Magistrate’s Notes, which document information reported during Helen’s arraignment, reasonably bear indicia of truthfulness. *See Horne v. WTVR, LLC*, 893 F.3d 201, 211 (4th Cir. 2018) (“The failure to investigate, where there was no reason to doubt the accuracy of the sources used[,] cannot amount to reckless conduct.” (internal quotation marks and alterations omitted)).

Furthermore, the allegations in the Complaint that the statement was false and that Agbapuruonwu was not charged with a crime do not suggest that NBC4 possessed

information inconsistent with the statement and yet included it in the Report. *Cf. Tomblin v. WCHS-TV8*, 434 F. App'x 205, 210 (4th Cir. 2011). Nor do those allegations suggest that NBC4 intended to make Agbapuruonwu the focus of the Report. Rather, the Report's collateral coverage of Agbapuruonwu highlights the seriousness of Helen's crime. And, crucially, the Report simply relayed the statement contained in the Magistrate's Notes. *See Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 714 (4th Cir. 1991). Without a plausible allegation of actual malice, Agbapuruonwu's contention that actual malice obviates Virginia's fair report privilege stumbles before it starts. We are thus satisfied that the fair report privilege applies to the Report. Accordingly, we conclude that Agbapuruonwu fails to allege a plausible defamation *per se* claim based on the statement from the Magistrate's Notes.

B.

Next, Agbapuruonwu contends that the Report implied he was involved in Helen's crime. According to Agbapuruonwu, that defamatory implication arises from the Report's (1) failure to "state that there were no criminal charges against" him, (2) misattribution of the statements from the Magistrate's Notes, and (3) inclusion of admittedly true information about his background. *See* Opening Br. at 25–26. We agree with the district court's conclusion that no defamatory implication can reasonably be gleaned from the Report.

Virginia law specifies that, when viewed in context, a defamatory implication "must be reasonably drawn from the words actually used." *See Webb*, 752 S.E.2d at 811. Moreover, the First Amendment "greatly restrict[s] the common law where" — as here —

“the defendant is a member of the press . . . [and] the subject matter of the supposed libel touches on a matter of public concern.” *Chapin*, 993 F.2d at 1091–92 (applying Virginia law); *cf. Pendleton v. Newsome*, 772 S.E.2d 759, 764 (Va. 2015) (distinguishing *Chapin* from defamation case not involving public figures, issues of public concern, or press). Accordingly, “a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true.” *Chapin*, 993 F.2d at 1092–93. Specifically, “[t]he language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference.” *Id.* at 1093. Important here, the fair report privilege proscribes liability for “any actionable implication that may be contained” in a protected statement. *Id.* at 1098.

As we have explained, Virginia’s fair report privilege applies to the Report’s statement that court officials believe Agbapuruonwu “fled the country and is somewhere in Africa.” And Agbapuruonwu has waived argument regarding the application of the fair report privilege to the remaining statements in the notes. We are therefore mindful that Agbapuruonwu’s defamation *per se* claim cannot rest on any purportedly defamatory implication conveyed by the statements in the Magistrate’s Notes. *See Chapin*, 993 F.2d at 1098.

Furthermore, the Report makes no explicit statement that Agbapuruonwu was involved in Helen’s crime. Rather, the Report specifies that Helen — a “Virginia Woman” — was the sole target of the welfare fraud investigation and that Helen alone was charged with a crime. The implication that Agbapuruonwu was somehow involved in Helen’s crime cannot reasonably be drawn from the Report’s discussion of Agbapuruonwu

following its coverage of Helen’s investigation and arrest. On the contrary, the Report’s portrayal of Agbapuruonwu as a successful attorney and businessman simply supports the statement that Helen had, in fact, committed welfare fraud.

Moreover, as discussed above, the Report did not misattribute the statements in the Magistrate’s Notes. And the Report’s incorporation of true information about Agbapuruonwu, including that he immigrated to the United States from Nigeria, received a prestigious fellowship to study law, and previously worked for Mayer Brown in Washington, D.C., also does not reasonably imply that he committed a crime. Although we are sensitive to the Report’s subsequent appropriation by several pundits and media outlets espousing anti-immigrant sentiments, those malicious reactions to the Report do not expand what it is reasonably capable of implying. *See Webb*, 752 S.E.2d at 812 (reinforcing that defamatory-implication inquiry is a matter of law, not fact).

In sum, the Report does not reasonably imply that Agbapuruonwu was involved in Helen’s crime. We therefore conclude that Agbapuruonwu fails to allege a plausible claim for defamation per se based on implication.

III.

Having concluded that Agbapuruonwu fails to state a claim of defamation per se, we turn to NBC’s cross-appeal of the district court’s denial of its request for attorney fees pursuant to Virginia Code section 8.01-223.2. “[T]he decision whether and in what amount to award attorney fees is one committed to the award court’s discretion, subject only to review for abuse of that discretion.” *See Brown & Pipkins, LLC v. Serv. Emps. Int’l Union*,

846 F.3d 716, 729 (4th Cir. 2017) (internal quotation marks and alterations omitted); *see also Med. Protective Co. v. Pang*, 740 F.3d 1279, 1282 (9th Cir. 2013) (applying the same standard of review to the denial of attorney fees under state law).

Because Agbapuruonwu waived argument regarding Virginia Code section 8.01-223.2's applicability to the Report by failing to raise the issue in his opening brief, we are left only to determine whether the district court abused its discretion in denying NBC's request for attorney fees pursuant to the fee-shifting provision of the statute. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017). The fee-shifting provision of Virginia Code section 8.01-223.2 provides that “[a]ny person who has a suit against him dismissed . . . pursuant to the immunity provided by [Virginia Code section 8.01-223.2(A)] may be awarded reasonable attorney fees and costs.” Va. Code § 8.01-223.2(B) (emphasis added). “The word ‘may’ means just what it says: that a court has discretion to award (or not to award) attorney’s fees.” *Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1335 (4th Cir. 1996). Informed by our reading of the fee-shifting provision, we discern no abuse of discretion in the district court’s denial of NBC’s request for attorney fees.

IV.

For the foregoing reasons, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this Court and argument would not aid in the decisional process.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

3 FIDELIS AGBAPURUNOWU,) Case 1:18-cv-01555
4)
4 Plaintiff,)
5)
5 v.) Alexandria, Virginia
6) February 1, 2019
6 NBC SUBSIDIARY, LLC, et al.,) 10:15 a.m.
7)
7 Defendants.)
) Pages 1 - 18

TRANSCRIPT OF DEFENDANTS' MOTION TO DISMISS

BEFORE THE HONORABLE ANTHONY J. TRENGA

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 interpreted to mean -- in other words, what Ann Coulter
2 may have interpreted the article to mean is not legally
3 relevant. The question is what a reasonable person
4 would. The U.S. Supreme Court in *New York Times v.*
5 *Sullivan* rejected what the jurors in that case found an
6 article meant and held that it was a question of law
7 for the court. So what Ms. Coulter might have said is
8 just not legally relevant here.

9 THE COURT: All right. Thank you.

10 The Court has reviewed the defendants' motion
11 to dismiss. The plaintiff in this case asserts claims
12 of common law defamation and insulting words liability,
13 in violation of Virginia Code 8.01-45, against the
14 defendants, NBC Subsidiary and NBCUniversal Media.

15 The plaintiff's claims arise out of a
16 two-minute news story broadcast by NBC 4 and a related
17 article on its website concerning the arrest of the
18 plaintiff's wife on welfare fraud charges for
19 collecting welfare benefits while the plaintiff, her
20 husband, was a financially successful attorney.

21 The plaintiff does not dispute the truth of
22 the report's statements as to his wife. He challenges,
23 however, and alleges that the reports contained false
24 statements about him and implied wrongdoing on his
25 part. Specifically, he claims that the reports falsely

1 stated that he made more than a million dollars per
2 year as a lawyer and had fled to Africa at the time of
3 his wife's arrest and, secondly, implied that he was
4 also suspected of committing welfare fraud and had been
5 fired from his law firm in connection with his wife's
6 arrest.

7 The plaintiff alleges these false statement
8 implications were made with reckless indifference,
9 caused damage to his personal and professional
10 reputation and lead to threats to his personal safety.

11 The Court is going to first address the First
12 Amendment issues. The first issue is whether the
13 plaintiff's claims are barred by the fair report
14 privilege. Virginia law affords a fair report
15 privilege that applies to press coverage, press reports
16 of such official proceedings as court records and
17 government actions, and immunizes publishers from
18 liability for articles that accurately describe or
19 summarize the contents of an official statement or
20 report. Publishers cannot be held responsible for
21 accurately describing or summarizing the contents of an
22 official report even if it turns out that the
23 underlying report is incorrect or it contains
24 falsehoods.

25 This encourages the media to disseminate

1 official records whether verbatim or in fair summary
2 without fear of liability for any false or defamatory
3 material that they might contain. The privilege thus
4 serves the important function of enabling the press to
5 fulfill its role to inform citizens of what the
6 government is doing without having to fear a defamation
7 suit.

8 A defendant cannot invoke the fair report
9 privilege if it abuses that privilege by publishing a
10 report in bad faith or by failing to publish a
11 substantially accurate account of the public record or
12 proceedings as long as the account of the public
13 proceeding is a substantially accurate, selective
14 representation of the report's contents does not
15 constitute abuse. Furthermore, if the gist or sting of
16 the statement is substantially true, minor inaccuracies
17 will not give rise to a defamation claim.

18 The plaintiff here claims that the NBC 4
19 reports are defamatory because they included false
20 statements about him. As I mentioned, first, he made
21 over \$1.5 million a year as a lawyer and that he was
22 believed to have fled the country to Africa around the
23 time of his wife's arrest.

24 These statements were drawn directly from the
25 Arlington General District Court document related to

1 the plaintiff's wife's arrest. Specifically, the
2 magistrate's notes from her arraignment and request for
3 a court-appointed attorney, which was expressly cited
4 in the reports. The magistrate's notes indicate that
5 the plaintiff's business made \$1.5 million in the
6 previous year and that he was a D.C. lawyer and that he
7 was believed to have fled to Africa.

8 Plaintiff does not dispute that these
9 statements were withdrawn from the record of an
10 official proceeding. Instead, he argues that the NBC 4
11 reports omitted important context and included other
12 information not found in court documents resulting in a
13 report that was not a substantially accurate account of
14 the public record.

15 However, the fair report privilege is not
16 initiated by a failure to include every detail of the
17 government record in the report as the privilege does
18 not require the published reports to be verbatim of the
19 official report, but it must only be substantially
20 correct. Nor does the privilege require that the
21 published report solely discuss the contents in the
22 official report.

23 In comparing the statements in the published
24 reports with those in the magistrate's notes, it is
25 clear that the defendants' reports provide a

1 substantially accurate account of the relevant contents
2 of the court document, particularly as there is nothing
3 anywhere in the document that contradicts the
4 assertions that plaintiff was a D.C. lawyer, made
5 \$1.5 million in the previous year, and had fled to
6 Africa.

7 For these reasons, the plaintiff fails to
8 state a defamation claim based on these alleged false
9 statements.

10 The plaintiff also alleges that the NBC
11 reports were defamatory because they implied that he
12 was also suspected of committing welfare fraud and had
13 been fired from his law firm in connection with his
14 wife's arrest.

15 In order to state a claim for defamation
16 under Virginia law, a plaintiff must allege facts
17 showing that a false and defamatory statement was
18 published with a requisite intent. Whereas here the
19 plaintiff bases a defamation claim on facts that are
20 literally true but alleges that they create a false and
21 defamatory implication.

22 He is required to make an especially rigorous
23 showing that the challenged statements are reasonably
24 read to impart the false *innuendo* and, secondly, that
25 they affirmatively suggest that the author intends or

1 endorses the inference.

2 In determining whether the challenged
3 statements can be reasonably read to impart the false
4 *innuendo*, courts must also consider the broadcast or
5 publication as a whole and how a reasonable person
6 would interpret it in context considering the plain and
7 natural meaning of the words used.

8 Here a reasonable person could not interpret
9 the NBC 4 reports to imply that the plaintiff was also
10 suspected of committing welfare fraud and had been
11 fired from his law firm in connection with his wife's
12 arrest, nor does plaintiff allege any facts that
13 suggest that NBC 4 intended or endorsed these
14 inferences. Nothing in the reports themselves suggest
15 that this was the case. There's no language in the
16 reports that suggest that plaintiff was involved in
17 welfare fraud himself.

18 The reports reference his professional
19 income, but that information is relevant in the context
20 of a report on his wife's arrest on welfare fraud
21 charges as it indicates the welfare benefits his wife
22 obtained were, in fact, fraudulently obtained. The
23 reports include specific statements about the charges
24 against the plaintiff's wife but do not include any
25 statements that even imply that the plaintiff himself

1 was charged, suspected, or otherwise involved in the
2 fraud.

3 As the Ninth Circuit recognized in *Dodds v.*
4 *American Broadcast Company*, a 1998 opinion, simply
5 including a reference to the plaintiff in the same
6 segment as the wife, whose actual or alleged conduct
7 was criminal, does not imply that the plaintiff was
8 involved in criminal activity.

9 The statement that the plaintiff is no longer
10 at Mayer Brown, his former law firm, is both
11 undisputedly true and does not impart the implication
12 that he was terminated from his position at that firm.
13 That statement, which as the reports themselves
14 implicated, was based on plaintiff's own published
15 LinkedIn profile listing that firm as his most recent
16 employer and a statement from Mayer Brown stating that
17 he no longer worked there. Those statements cannot
18 reasonably be read to imply that he was recently fired
19 from that law firm in connection with his wife's
20 arrest.

21 The reports include no information about the
22 timing, reasons, or circumstances of his departure from
23 the firm and thus provide no basis for a reasonable
24 person to infer the reason for his departure. The
25 plaintiff, therefore, fails to allege facts that make

1 plausible the defamation claim based on these alleged
2 implications.

3 Let me also say that the complaint for
4 similar reasons fails to allege facts that make
5 plausible that the statements are outside the immunity
6 conferred under Section 8.01-223.2.

7 Finally, the defendant in Count 2 asserts a
8 claim for insulting words under Virginia Code 8.01-45,
9 which provides that all words shall be actionable,
10 which from their usual construction and common
11 acceptance are construed as insults and tend to
12 violence and breach of the peace.

13 The statute has been interpreted as analogous
14 to the United States Supreme Court's interpretation of
15 the fighting words exception to the First Amendment.
16 Fighting words are defined as words that by their very
17 utterance inflict injury or tend to incite an
18 immediate breach of peace. A claim for insulting words
19 typically must involve a face-to-face confrontation
20 that presents a clear and present danger, a violent
21 physical reaction.

22 Here the plaintiff has alleged no facts that
23 demonstrate that the alleged defamatory statements
24 could tend to violence and breach of the peace. Both
25 the substance and the context of the alleged fighting

1 words taken largely from court records concerning an
2 arrest for welfare fraud on his wife are far removed
3 from the kind of face-to-face confrontations presenting
4 a clear and present danger of a violent physical
5 reaction the Virginia courts have interpreted Virginia
6 Code 8.01-45 as encompassing. For those reasons, the
7 plaintiff has failed to state a claim for insulting
8 words under that statutory provision.

9 So for these reasons, the defendants' motion
10 is granted, and the case is dismissed.

11 The Court will deny defendants' motion for
12 attorney's fees.

13 The Court will issue an order.

14 Is there anything further?

15 MR. ERLICH: Thank you, Your Honor.

16 MR. BROWN: Thank you, Your Honor.

17 THE COURT: All right. Thank you.

18 -----
19 Time: 10:36 a.m.
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21
22
23
24
25

I certify that the foregoing is a true and
accurate transcription of my stenographic notes.

/s/

Rhonda F. Montgomery, CCR, RPR