VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

HORIZON CHILD DEV., INC. et al. **Plaintiffs,** v. **REBECCA GONZALEZ** **Defendant.**	**Case No. 2014-02858**

DEFENDANT'S MEMORANDUM OF POINTS
<u>AND AUTHORITIES IN SUPPORT OF HER DEMURRER</u>

Defendant Rebecca Gonzalez, by counsel, pursuant to Va. Code § 8.01-273, has demurred to the Complaint filed by Plaintiffs. This entire lawsuit is based on a negative review posted on Yelp with respect to Horizon Child Development's daycare operation, expressing concerns about its "extremely mean" owner, Sonjia Jackson, and expressing concerns about the safety of the children in such an environment. The Court should sustain the Demurrer because no reasonable reader would have interpreted Ms. Gonzalez's expressions of concern as a direct accusation that Ms. Jackson is guilty of child abuse, and because the Yelp reviews in question do not amount to "outrageous and intolerable" conduct.

<u>Argument</u>

I. COUNT I FAILS TO STATE A CAUSE OF ACTION BECAUSE THE YELP REVIEWS AT ISSUE DO NOT CONTAIN A FALSE STATEMENT OF FACT.

"Whether an alleged defamatory statement is one of fact or opinion is a question of law and is, therefore, properly decided by a court instead of a jury." *Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 132-33 (2003). A demurrer is an appropriate vehicle for resolving the question of whether a particular statement will support a defamation action. *See Yeagle v.*

Collegiate Times, 255 Va. 293 (1998) (affirming dismissal of defamation action based on statement calling university official "Director of Butt Licking").

Applicable Principles of Defamation Law

Unlike many torts, the elements of a cause of action for defamation have not been succinctly expressed by any one particular case. The test is usually expressed as consisting of the "(1) publication of (2) an actionable statement with (3) the requisite intent." *See Jordan v. Kollman*, 269 Va. 569, 575 (2005). Standing alone, this test sheds little light on what it required to state a valid claim because it begs the questions of what an "actionable statement" really is. Reading the pertinent Virginia Supreme Court cases together reveals that to state a claim for defamation in Virginia, a plaintiff must allege that a defendant (1) published to a third party (2) a false, (3) factual, (4) and defamatory statement that (5) concerns the plaintiff and (6) harms the plaintiff or the plaintiff's reputation (7) with the requisite intent. *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 46 (2009) (citing *WJLA–TV v. Levin*, 264 Va. 140, 152-54 (2002); *The Gazette, Inc. v. Harris*, 229 Va. 1, 15 (1985)); *Jackson v. Hartig*, 274 Va. 219, 227-28 (2007) (citing *Jordan v. Kollman*, 269 Va. 569, 575 (2005)).

To satisfy the third element (*i.e.*, "factual"), the statement must be one that can be reasonably interpreted as an assertion of fact. *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 714 (2006) ("statements which cannot reasonably be interpreted as stating actual facts about a person, are not actionable"). Expressions of opinion are not actionable. *Hyland*, 277 Va. at 47. Similarly, statements that can only be reasonably understood as rhetorical hyperbole are not actionable. *Yeagle*, 255 Va. at 297.

When interpreting a statement claimed to be defamatory, courts look to both the apparent intent of the speaker as well as to how it would presumably be interpreted by a reasonable

listener. *See, e.g., Carwile v. Richmond Newspapers*, 196 Va. 1, 7 (1954) (holding that courts and juries should interpret such statements "as other people would understand them,...according to the sense in which they appear to have been used"). The defendant's words must be considered "as a whole," including consideration "of any accompanying opinion and other stated facts." *Hyland,* 277 Va. at 47-48. This is because the falsity needed to support a defamation action is not necessarily of the literal wording of the statement but of what a reasonable listener would have understood the speaker to have said. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990) (explaining constitutional prohibition against imposing defamation liability in cases where circumstances of speech indicate defendant's statement not intended literally).

Earlier this year, the Supreme Court of Virginia held that trial courts perform an important threshold, gatekeeping function in defamation cases. In *Webb v. Virginian-Pilot Media Companies, LLC*, 287 Va. 84, 90 (2014), the court held that "[e]nsuring that defamation suits proceed only upon statements which actually may defame a plaintiff, rather than those which merely may inflame a jury to an award of damages, is an essential gatekeeping function of the court." *Webb* stands for the proposition that trial courts should sustain demurrers to defamation claims where it appears as a matter of law that the statement in question "is not reasonably capable of the defamatory meaning" the plaintiff ascribes to it. *Webb*, 287 Va. at 91 (finding that circuit court erred by overruling demurrer).

<u>Analysis of the Statement at Issue</u>

The alleged statement in this case is set forth in its entirety in Exhibits A and B to the Complaint. Reading the two Yelp reviews together, the import of the statement is that, in the opinion of Ms. Gonzalez, Horizon's owner, Ms. Jackson (a) has a nasty and unpleasant personality, and (b) might possibly have been the reason Ms. Gonzalez's one-year-old son came

home with a bruised ear. The statements relating to Ms. Jackson's personality are non-actionable expressions of opinion, and the statements speculating that Ms. Jackson might have bruised her son's ear cannot reasonably be interpreted as direct accusation of child abuse.

First, calling Ms. Jackson "extremely mean" and "a MONSTER" are statements of pure opinion as they are relative in nature and depend entirely on the speaker's viewpoint. *See Raytheon Tech. Servs. Co. v. Hyland*, 273 Va. 292, 303-06 (2007). As such, they are not actionable. *Hyland*, 277 Va. at 47.

Second, with respect to the "bruised ear" reference, Ms. Gonzalez was very careful in her review not to make any false statement of fact. Plaintiffs argue that "Ms. Jackson did not physically abuse Defendant's son while at Horizon" (Compl. ¶ 19), but this presupposes that Ms. Gonzalez falsely accused her of physical abuse, which (according to the Plaintiffs' own allegations) she didn't do. Specifically, Ms. Gonzalez is alleged to have written:

> My son came home with a bruise [*sic*] ear, we ***do not know*** what happened when that lady took him to her office three times on one day and ***we will never know***. ... To date, we ***do not know*** what happened when that lady took him into her office and ***we will probably never know***, but ***I believe*** someone pulled my child's ear.

(*See* Compl. Exs. A, B) (emphasis added). This statement is not reasonably capable of the defamatory meaning the Plaintiffs ascribes to it. Taken in context,[1] any reasonable reader would interpret this statement as mere speculation regarding what may have happened to her toddler's ear, based solely on her perception that Ms. Jackson is a nasty person. Because the statement cannot be interpreted as a direct accusation of child abuse, it is not actionable. *See Tronfeld*, 272 Va. at 714. Therefore, the Court should sustain the Demurrer. *See Webb*, 287 Va. at 91.

---

[1] When analyzing a statement claimed to be defamatory, the words must be considered in context rather than in isolation. *American Communications Network, Inc. v. Williams*, 264 Va. 336, 341-42 (2002).

II. COUNT II SHOULD BE DISMISSED BECAUSE THE ALLEGED CONDUCT IS NOT "OUTRAGEOUS AND INTOLERABLE."

The tort of intentional infliction of emotional distress is not favored in Virginia. *Ruth v. Fletcher*, 237 Va. 366, 373 (1989). A plaintiff alleging a claim for intentional infliction of emotional distress must allege in her complaint all facts necessary to establish the cause of action in order to withstand challenge on demurrer. *Almy v. Grisham*, 273 Va. 68, 77 (2007). The elements of a prima facie case are (1) intentional or reckless conduct; (2) outrageous and intolerable conduct; (3) a causal connection between the alleged wrongful conduct and the emotional distress; and (4) severe distress. *Russo v. White*, 241 Va. 23, 26 (1991). For conduct to satisfy the "outrageous and intolerable" element, the alleged conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Russo*, 241 Va. at 27. It is not enough that the defendant acted with tortious or even criminal intent. *Hatfill v. New York Times Co.*, 416 F.3d 320, 336 (4th Cir. 2005) (applying Virginia law).

The question whether the defendant's conduct is so extreme and outrageous as to permit recovery is a question of law for the court. *Womack v. Eldridge*, 215 Va. 338, 342 (1974); *see Supervalu, Inc. v. Johnson*, 276 Va. 356 (2008) (finding that emotional-distress claim "should not have been submitted to the jury").

Here, all that is alleged is that Ms. Gonzalez posted a negative review on Yelp, expressing concerns about child safety. Despite her strong belief that Ms. Jackson is guilty of child abuse, Ms. Gonzalez did not write that Ms. Jackson abused her child. Rather, she carefully identified her suspicion as no more than that. As a matter of law, the reviews posted on Yelp are neither outrageous nor "intolerable in a civilized community." Therefore, they are insufficient to support a claim for emotional distress and the Court should sustain the Demurrer.

REBECCA GONZALEZ
By Counsel

Lee E. Berlik (VSB# 39609)
BERLIKLAW, LLC
1818 Library Street
Suite 500
Reston, Virginia 20190
Tel: (703) 722-0588
Fax: (888) 772-0161
LBerlik@berliklaw.com

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2014, a true and correct copy of the foregoing Memorandum of Points and Authorities was served by first-class mail, with a courtesy copy by email, on:

Dena M. Roudybush (VSB No. 41920)
803 West Broad Street, #110-A
Falls Church, VA 22046
DRoudybush@compliance-counsel.com

Lee E. Berlik