CASE NO. 23-1342

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

NICHOLAS W. CUPP,

Plaintiff - Appellant,

v.

DELTA AIR LINES, INC.;
ENDEAVOR AIR, INC.; CHERYL THOMAS,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT NEWPORT NEWS

OPENING BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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No. 23-1342 Caption: Cupp v. Delta Air Lines, Inc., et.al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Nicholas W. Cupp by counsel
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Peter Pentony Date: 4/12/23

Counsel for: Appellant

Print to PDF for Filing

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

When a complaint alleges that an airline employee maliciously made a false report to law enforcement that a passenger had abused his daughter on a flight, but a statute only grants immunity for good faith child abuse complaints made to the Virginia Department of Social Services, it is error for a court to find that the complaint fails to state a claim upon which relief could be granted. This is particularly so where the statutory immunity language is expressly defined. The error is then compounded where the court incorrectly applies the Virginia derivative liability bar to also dismiss the false reporter's employers.

And yet that is exactly what the district court did in this case. Appellees' malicious and false accusations of human trafficking and sexual abuse caused extreme emotional harm and other damages to Appellant, a disabled, decorated United States Army veteran. The questions in this appeal are whether a malicious reporter is entitled to immunity for her false report of abuse to law enforcement when the pertinent statute only immunizes complaints to the Virginia Department of Social Services ("DSS"), and even if she is immune, whether the district court should have applied the derivative liability bar to also dismiss her employers.

The district court broadly construed the immunity-granting statute and narrowly construed the Appellant's complaint in order to conclude that the flight attendant whose false and reckless conclusion caused harm to the Appellant was

immune on the basis that the difference between a complaint to DSS and a complaint to law enforcement is a "distinction without a difference," even though the statutory language *only* immunizes reports to DSS. The district court then concluded that the complaint insufficiently alleged that the flight attendant acted in bad faith and with malicious intent, yet to reach this conclusion, made inferences *against* Appellant, the nonmoving party. Lastly, the district court simply brushed away the claims against the wrongdoers' employers by incorrectly applying the derivative liability bar. It was thus error for the district court to have dismissed all claims against all defendants for failure to state a claim upon which relief could be granted.

STATEMENT OF JURISDICTION

The district court exercised jurisdiction over this matter pursuant to 28 U.S.C. § 1332 as a result of complete diversity of citizenship amongst the plaintiff and defendants and an amount in controversy in excess of $75,000. This Court has appellate jurisdiction over this matter pursuant to 28 U.S.C. § 1291 because this is an appeal from a final order issued by the United States District Court for the Eastern District of Virginia on March 3, 2023, which order was a final judgment that disposed of all parties' claims. The Appellant timely noted his appeal on March 29, 2023.

STATEMENT OF ISSUES

1. The district court erred when it concluded that FA Thomas' false report to law enforcement entitled her to the immunity that is statutorily reserved to a person who makes a complaint to DSS.

2. The district court erred when it concluded that the exceptions to the immunity statute were not sufficiently pled, because the Complaint plausibly sets forth FA Thomas' bad faith or malicious intent.

3. The district court erred in concluding that Appellant's claims against Delta and Endeavor should also be dismissed, because the derivative liability bar does not apply when the employee has been dismissed for procedural reasons.

STATEMENT OF THE CASE

1. Procedural Posture

Appellant Nicholas Cupp filed a five-count Complaint against Appellees Cheryl Thomas, Delta Air Lines, Inc., and Endeavor Air, Inc., in the Circuit Court of Newport News, Virginia, on December 16, 2021. JA12. The Complaint concerned events that occurred on December 18, 2019, when Appellee Cheryl Thomas was a flight attendant on a commercial flight operated by Appellee Endeavor Air, Inc., a wholly owned subsidiary of Appellee Delta Air Lines, Inc.

Appellees removed the case to the United States District Court for the Eastern District of Virginia, JA6, and filed a Motion to Dismiss the Complaint for failure to

state a claim, based upon an assertion of immunity pursuant to Va. Code § 63.2-1512. JA 49. Appellant opposed the motion, arguing that the statute only immunizes *good faith, non-malicious* complaints of suspected child abuse *made to social services*. JA55. The motion was fully briefed on April 4, 2022, but Appellees never requested a hearing on the motion. Thereafter, the parties conducted a planning meeting, exchanged Rule 26(a) disclosures, engaged in discovery, and participated in a scheduling conference.

On March 3, 2023, less than two weeks after entering the scheduling order, almost eleven months after the briefing was complete, and without conducting a hearing, the district court granted the Motion to Dismiss and entered an order dismissing all of Appellant's claims with prejudice. JA78. Appellant timely noticed his appeal on March 29, 2023. JA91.

2. Statement of Facts

Appellant Nicholas Cupp is a disabled veteran of the United States Army and resides in Paragould, Arkansas, with his wife and caregiver Sheila Cupp. Mr. Cupp is a decorated, twenty-one-year service member who received an Honorable Discharge in 2013. JA12. Sheila and Nicholas have two children, an adult son and "M.L.C.," a daughter who was thirteen years old at the time of the events at issue. JA12, JA16.

On December 18, 2019, Nicholas, Sheila, and M.L.C., along with Sheila's parents, Edgar and Kathy Miller, were customers of Appellee Delta Air Lines on a trip from Memphis, Tennessee, to Newport News, Virginia, to attend Nicholas and Sheila's adult son's graduation from the United States Coast Guard training facility's "A School." All members of the family possessed valid government-issued photo identification and checked in for the flight together. JA14–15. Delta, Endeavor, and its employees were aware that the Cupp family was related and possessed valid identification. JA15.

The Cupp family flew on a connecting flight from Memphis to Atlanta without incident, then boarded a Delta Air Lines flight bound for Newport News-Williamsburg International Airport. JA15. The plane encountered turbulence which frightened M.L.C., who was seated next to Mr. Cupp. JA15–16.

Flight Attendant Cheryl Thomas (referred to herein as "FA Thomas"), an employee of Delta Air Lines and Endeavor Air, JA13, came to the false conclusion that Mr. Cupp was human trafficking M.L.C. JA16. FA Thomas notified the flight's captain of her conclusion, and the captain passed this information along to Derek Palazzone, Appellee Delta's station manager, who phoned the police. JA16. FA Thomas then supplemented her initial, false report of human trafficking to also include an allegation that Mr. Cupp had been "inappropriately" touching M.L.C. and

was sexually abusing her. JA16. FA Thomas reached this conclusion despite the other family members sitting around Mr. Cupp and M.L.C. JA22.

FA Thomas' reports of human trafficking and sexual abuse were entirely false and without probable cause. JA16. Her reports violated her training and education, and they flew in the face of the fact that no other airline or transportation security officials reached a similar conclusion that day. JA22. The subsequent modification of her initial complaint of human trafficking to include the new complaint of sexual abuse suggests that she intended to ensure that the Cupp family was singled out. JA22.

As a result of FA Thomas' actions, law enforcement officers met flight DL5002 when it landed. Armed officers boarded the plane, where FA Thomas repeated her false claims of abuse and human trafficking directly to them. JA16–17. After FA Thomas pointed Mr. Cupp out to the law enforcement officers, the officers physically separated M.L.C. from her parents, took Mr. Cupp into investigative detention and read him a *Miranda* warning, and physically prevented Sheila Cupp from coming to the assistance of either her husband or her daughter. JA17.

After separating the family members, the armed law enforcement officers interrogated M.L.C. about the false reports made by FA Thomas. The interrogation process scared her to tears. JA17–18. Meanwhile, other armed law enforcement

officers interrogated Mr. Cupp about the false allegations made by FA Thomas in a public portion of the airport in the vicinity of members of the public. The officers threatened to handcuff him. Ultimately, the officers determined that there was no probable cause to charge or arrest Mr. Cupp. JA18. Thereafter, FA Thomas simply walked past M.L.C. without even looking at her. JA23. This suggests that she was not motivated by any real concern for M.L.C.'s safety and well-being.

The actions of FA Thomas, Delta Air Lines, and Endeavor Air caused severe and permanent harm to Mr. Cupp. JA18. He has suffered fragmented sleep, nightmares, headaches, and other symptoms of severe emotional trauma. His doctor concluded that his pre-existing, military service-related Post Traumatic Stress Disorder was significantly aggravated by the ordeal, causing his condition to revert to how it was when he first came home from Iraq. He is now afraid to express affection to M.L.C., out of fear that someone else might try to take her away from him again, and the emotional distress has taken a toll on his marriage. JA20.

Count One of the Complaint asserted claims against Appellees Delta and Endeavor for negligently, willfully, wantonly, recklessly, and with gross negligence violating their duties to Appellant, both as corporate entities and by virtue of being the employers of FA Thomas. JA18–20. Count Two asserted a claim against FA Thomas for negligently, willfully, wantonly, recklessly, and with gross negligence violating her duties to Appellant. JA20–22. Count Three asserted a claim against

FA Thomas for intentional infliction of emotional distress. JA22–24. Count Four asserted a claim against FA Thomas for tortious interference with parental rights. JA24–25. Count Five asserted a claim against all Appellees for false imprisonment. JA25–26.

SUMMARY OF ARGUMENT

Flight Attendant Thomas (referred to herein as "FA Thomas") observed an adult male passenger comfort his crying thirteen-year-old daughter seated next to him while the plane was encountering turbulence. Rather than take any action to determine the details of the situation, and despite having at hand passenger manifest information that showed that the adult passenger was the father of the teenaged female and that the mother of the teenaged female was seated just across the aisle, and that all three possessed government-issued identification, FA Thomas made a report of human trafficking and, later, sexual abuse against the male passenger. FA Thomas reported this false accusation directly to law enforcement, which responded when the plane landed at Newport News-Williamsburg International Airport and detained the adult passenger, separating him from his daughter. The adult passenger was Appellant Nicholas Cupp, an Iraqi war veteran who had spent years attempting to overcome disabling service-related post-traumatic stress disorder. Appellees' malicious actions triggered a relapse in Mr. Cupp's most severe PTSD symptoms from which he has not yet recovered, and severely impaired his relationship with his

daughter. Mr. Cupp's claims against FA Thomas arise out of her false report to her supervisor and to law enforcement that Mr. Cupp had committed sexual abuse and human trafficking of his own daughter. His claims against Delta and Endeavor are based on not only *respondeat superior,* but also direct claims of negligence and false imprisonment.

The Appellees collectively moved to dismiss, claiming immunity pursuant to Virginia Code § 63.2-1512, which relevantly states as follows:

> Any person making a . . . complaint pursuant to § 63.2-1510, . . . shall be immune from any civil or criminal liability in connection therewith, unless it is proven that such person acted in bad faith or with malicious intent.

Mr. Cupp pointed out below that this statute, read in conjunction with Code § 63.2-1510 to which it refers, only immunizes *good faith, non-malicious* complaints made *to the Department of Social Services*, and that the reports in this case were made in bad faith, maliciously, to law enforcement; however, the district court dismissed Mr. Cupp's claims against all defendants with prejudice.

The district court's Order was premised upon three erroneous conclusions. First, the district court concluded that the report of suspected child abuse to law enforcement does not bar the application of Virginia Code § 63.2-1512. JA86. This was error because the plain language of the statute should have been applied, and even if statutory construction had been necessary, the statute should have beeen narrowly construed because it is in derogation of common law. Second, the district

court concluded that Mr. Cupp's Complaint did not adequately allege that the defendants acted in bad faith or with malicious intent. JA87. This was error because the Complaint made sufficient allegations of both bad faith and malicious intent, particularly as it alleges a lack of probable cause, from which malice can be inferred. Third, the district court concluded that because all of Mr. Cupp's claims derived from the child abuse report, all claims against all defendants should be dismissed with prejudice, without any provision for leave to amend. JA90. This was error because the Virginia derivative liability bar does not allow dismissal of a principal when its agent is dismissed purely based upon immunity.

ARGUMENT

1. Standard of Review

The district court granted a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). This Court reviews such matters *de novo*. *Sucampo Pharm., Inc. v. Astellas Pharma, Inc*., 471 F.3d 544, 550 (4th Cir. 2006).

To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint must contain sufficient facts to state a claim that is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A claim is plausible if it contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and if there is "more than a sheer possibility that a defendant has acted unlawfully."

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). This is not a high burden. A complaint "need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Coleman v. Md. Ct. of Apps*., 626 F.3d 187, 190 (4th Cir. 2010) (internal quotation marks omitted).

Importantly for purposes of the issues at hand, a motion to dismiss tests the sufficiency of a complaint without resolving factual disputes, and a district court "'must accept as true all of the factual allegations contained in the complaint' and 'draw all reasonable inferences in favor of the plaintiff.'" *Kensington Volunteer Fire Dep't v. Montgomery County*, 684 F.3d 462, 467 (4th Cir. 2012) (citation omitted).

2. The district court erred when it concluded that FA Thomas' false report to law enforcement entitled her to the immunity that is statutorily reserved to a person who makes a complaint to DSS.

Virginia law only grants immunity for complaints of child abuse made to the Virginia Department of Social Services; therefore, the district court committed error when it concluded that Flight Attendant Thomas was entitled to immunity for making a false report of child abuse to law enforcement. On this point, the district court's ruling violated the plain language of the statute and well-established canons of statutory instruction, and instead relied upon a selective reading of prior opinions and a disregard for the distinct tactics and goals utilized by social services as compared to law enforcement.

a. The district court failed to apply the plain language of the immunity statute.

The statutory immunity granted to a reporter of suspected child abuse is limited. Only a person who makes a report pursuant to 63.2-1509 or a complaint pursuant to § 63.2-1510 is entitled to immunity under the statute. Va. Code § 63.2-1512. The Appellees did not assert below that § -1509, providing for immunity to mandatory reporters, applies to FA Thomas, leaving § -1510 as her only possible source of immunity.

According to the plain language of § 63.2-1510, the only type of complaint for which immunity attaches is one made to the Virginia Department of Social Services. That code section specifically defines a "complaint" as one made "to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred or to the Department's toll-free child abuse and neglect hotline." Removing all doubt about the statute's limited reach, the Virginia General Assembly has statutorily defined "local department" to mean the "local department of social services of any county or city in this Commonwealth," and has defined "Department" to mean the "State Department of Social Services." Va. Code § 63.2-100. The Virginia legislature therefore carefully and expressly defined that immunity which attaches only to complaints made to DSS.

Applying this plain, statutorily-defined language to the case at hand, neither FA Thomas nor any other employee of Appellees Delta and Endeavor ever made a

complaint to the Virginia Department of Social Services. As such, FA Thomas did not make a complaint pursuant to § -1510 and thus is not entitled to the immunity granted by § -1512.

Rather than apply the plain language of the statute, the district court found a reference to cooperation between law enforcement and the child protective services coordinator of a local department in Virginia Code §63.2-1507. From this single specific code section, the district court extrapolated that a report to law enforcement is no different from a report to social services. JA86.

The district court's conclusion violates a clear canon of statutory construction. "[W]hen the General Assembly includes specific language in one section of a statute, but omits that language from another section of the statute, we must presume that the exclusion of the language was intentional." *Halifax Corp. v. First Union Nat. Bank,* 546 S.E.2d 696, 702 (2001); *Stoots v. Marion Life Saving Crew, Inc*., 867 S.E.2d 40, 46 (Va. 2021).[1] Thus, because the General Assembly specifically referred to "law enforcement" in § 63.2-1507, the Court must presume that it

[1] "[A] federal court sitting in diversity is obliged to apply state law principles to resolve [a question of statutory construction], utilizing such principles as enunciated and applied by the state's highest court." *Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.*, 510 F.3d 474, 482–83 (4th Cir. 2007).

intentionally excluded that phrase in § 63.2-1510's definition of "complaint."[2] As in *Stoots,* 867 S.E.2d at 47, the statute presents a "simple dichotomy": either a person complains to social services and is immune, or a person complains to a different entity and may be held liable. The statute does not look at whether social services might ultimately be brought into an investigation; rather, it looks at whether the complaint was made to social services. The statute does not apply, and the district court should not have dismissed the claims against FA Thomas.

b. The district court broadly construed a statute that should have been narrowly applied, leading it to erroneously conclude that a report to law enforcement is the same as a complaint to social services for immunity purposes.

To reach its conclusion that a report to law enforcement is impliedly included in the ambit of § 63.2-1512 immunity, the district court erroneously focused heavily on the supposed "purpose" of the statute. Here again, the district court contravened well-established canons of statutory construction. The "interpretive principle that precedes all others is that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Appalachian Power Co. v. State Corp. Comm'n*, 876 S.E.2d 349, 358 (Va. 2022), citing *Arlington Cent.*

[2] Importantly, the Virginia Code never uses the term "local department"—which is already a defined term in Title 63.2 as cited above—in reference to *law enforcement*. In fact, when the Legislature refers to "law-enforcement" in Title 63.2, it does so explicitly—s*ee, e.g.,* §§ 63.2-103, -104.1, -105, -1502, -1505, -1507, -1517, -1605, -1606, -1609, and -1737.

School District Bd. of Ed. v. Murphy, 548 U.S. 291, 296 (2006). To this end, "[d]ivinations of 'the spirit or reason of the law,' . . . and 'vague invocations of statutory purpose,' . . . cannot take precedence over a clearly worded statutory text." *Id*. (citations omitted). Both §1512 and §1510 are "clearly worded statutory texts," which need not be divined for their purpose. Further, strict construction of an immunity statute precludes the Court from implying terms not found in the statute's text, *Shoemaker v. Funkhouser,* 856 S.E.2d 174, 182 (2021), yet this was exactly what the district court erroneously did.

The district court's primary source for discerning the purpose of the statute was its erroneous reliance upon *Wolf v. Fauquier Co. Board of Supervisors,* 555 F.3d 311 (4th Cir. 2009). But the *Wolf* court was not called upon to determine whether a report to law enforcement was the same thing as a report to social services; its analysis was instead focused on the applicability of the statute's "bad faith or malicious intent" exception. Moreover, to the extent that *Wolf*'s analysis of the statutory purpose is pertinent to the issue at hand, it must be recognized that the Court focused on fulfillment of the statutory purpose *through the workings of the social services process*, and not through the immunization of every complaint of suspected abuse made to any person. As the Court noted, "Virginia's reporting statute and its social services apparatus are both based on the assumption that false positives – mistaken reports of child abuse followed by DSS investigations- are less

harmful than false negatives[.]" *Id.* at 323. The Court did not lump law enforcement into that analysis, further showing that the district court exceeded the statutory language in an attempt to achieve a goal it mistakenly inferred from *Wolf.*

While the district court referred to the "trade-offs" that the Virginia's legislature struck when it enacted § 63.2-1512, JA90, it somehow failed to recognize that the legislative result of the trade-offs was a statute that only immunizes complaints made to social services.

Furthermore, even if construction of § 63.2-1512 is necessary, the Court should read it narrowly, not broadly. Because the statute grants immunity to certain categories of persons for specifically defined activities, it is in derogation of the common law principle that a person is generally responsible for the consequences of her negligent actions. This concept is critical, because the Virginia Supreme Court has made clear that, "'[s]tatutes in derogation of the common law are [themselves] to be strictly construed and not to be enlarged in their operation by construction beyond their express terms.'" *Shoemaker v. Funkhouser,* 856 S.E.2d 174, 181 (Va. 2021), citing *Wetlands Am. Tr., Inc. v. White Cloud Nine Ventures, L.P.,* 782 S.E.2d 131 (Va. 2016).

In *Shoemaker,* the Virginia Supreme Court applied this rule of construction to Virginia's Recreational Immunity statute and refused to extend its protection to unenumerated recreational activities, concluding that strict construction of the

immunity statute "precludes us from implying terms not found in the text of the statute." *Id.* at 182. The district court violated this principle when it interpreted § 63.2-1510 and § 63.2-1512 expansively to include reports made to agencies not enumerated in § -1510's statutory definition of "Department. The district court should have simply applied the plain language of the statute, which limits immunity to complaints made to the Department of Social Services.

The cases upon which the district court relied do not support the proposition that complaints to social services and complaints to law enforcement are equivalent for immunity purposes. The district court primarily relied upon a precarious reading of the facts of *Wolf,* 555 F.3d 311. While the district court is correct that the long factual recitation of the defendants' conduct in *Wolf* included a call to law enforcement, the crux of the *Wolf* case was a complaint of suspected abuse *made to the Department of Social Services* by the plaintiff's counselor at Chrysalis Counseling Center, which set off a social services investigation that embroiled the plaintiff's family. The incidental call to law enforcement was immaterial; indeed, this Court's introduction to the opinion specifically recited that the "claims arise out of a complaint of suspected child abuse **made to DSS**," *Wolf,* 555 F.3d at 314 (emphasis added), and later stated that the claims against the reporting counselor "**arise directly out of [her] report to DSS**." *Id.* at 317 (emphasis added). The phone call to law enforcement did not form the basis for either the plaintiffs' claims or the

Court's conclusions and was therefore simply an ancillary or collateral fact. Thus the *Wolf* court simply did not confront the issue in the present case: whether a person falsely reporting to law enforcement, rather than to the Department of Social Services, is immune from liability pursuant to Va. Code § 63.2-1512. For this reason, the district court's heavy reliance upon *Wolf* was misplaced.

For the same reason, the district court should not have relied upon the unpublished opinion of *Bellotte v. Edwards,* 2009 WL 10674480 (N.D.W.Va. Apr. 30, 2009). JA87. That case recites the *Wolf* facts in the same mistakenly selective manner by emphasizing the single immaterial call to law enforcement. The district court also cited *In re Trammel*, 388 B.R. 182, 188-89 (E.D.Va. 2008), as supporting its conclusion, JA87; however, that case in no way scrutinizes the issue at hand. In fact, beyond a reference to Va. Code § 63.2-1512 in a footnote, the *Trammel* opinion does not discuss immunity at all, much less analyze whether the statutory immunization of complaints to social services extends to reports to law enforcement.

In fact, and contrary to the district court's conclusion, an investigation by the Department of Social Services is entirely different from that conducted by law enforcement. This is shown by the statutory and regulatory framework upon which social workers base their investigations. Social services workers are specially educated, trained, and certified in investigating child abuse situations to determine the validity of the allegation without causing undue upset to families, based on a

regulatory regime specific to the Department of Social Services,[3] and the Virginia Code contains an entire Article entitled "Procedures" that enumerates mandatory laws which the Department of Social Services must follow upon receipt of a complaint.

While it is true that some portions of Virginia's regulatory scheme provide for cooperation between social workers and law enforcement, this cooperation does not constitute a "distinction without a difference," as the district court concluded. This Court has recognized the difference: the actions taken by a child protective services worker "are by nature different than and are granted more latitude than criminal arrests." *Parker v. Henry & William Evans Home for Children, Inc.,* 762 F. App'x. 147 n.1 (4th Cir. 2019), *citing Jordan v. Jackson*, 15 F.3d 333, 350 (4th Cir.1994). Meanwhile, "[i]t is an undoubtedly natural consequence of reporting a person to the police that the person will be arrested." *Tobey v. Jones*, 706 F.3d 379, 386 (4th Cir. 2013) (an airport arrest case). And in fact, FA Thomas' report to law enforcement—rather than to the Department of Social Services—led to a meaningful

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[3] See Virginia Code § 63.2-208; §§ 63.2-215 through §§-221; and §§ 63.2-1502 (6) and (7) (among others…) establishing "…standards of training and provide educational programs to qualify workers in the field of child-protective services. Such standards of training shall include provisions regarding the legal duties of the workers *in order to protect the constitutional and statutory rights and safety of children and families from the initial time of contact during investigation through treatment*." (Emphasis added).

difference in this case, where armed police officers physically separated Mr. Cupp, an Iraq War veteran with PTSD, from his family and interrogated him in view of the public after disembarking from a commercial flight in a public airport, an outcome that was entirely different from what would have happened had a complaint been made to DSS.

In light of the above, the district court should not have proceeded beyond the plain language of Virginia Code §§ 63.2-1512 and 63.2-1510. The Virginia legislature clearly defined the type of complaint for which a reporter is entitled to immunity. By inferring a scope of immunity that exceeded the statutory language, the district court impermissibly and erroneously broadened immunity in contravention of the common law, the clear and express statutory language, and in violation of Virginia principles of statutory construction. Its determination that the statute's silence about immunity for reports made to law enforcement came from a broad, rather than narrow, construction, and constituted error. This Court should reverse the district court's dismissal of the case.

3. The district court erred when it concluded that the exceptions to the immunity statute were not sufficiently pled, because the Complaint plausibly sets forth FA Thomas' bad faith or malicious intent.

Even assuming, *arguendo*, that a report to law enforcement is the same as a report to DSS, § -1512 does not grant immunity if the reporter acts "in bad faith or with malicious intent." Either of these will cause a reporter to lose immunity, and

the Complaint in this case sufficiently alleged both. Thus, the district court erred when it determined that the Complaint failed to sufficiently allege that FA Thomas acted in bad faith or with malicious intent.

a. The Complaint sufficiently alleged that FA Thomas acted in bad faith.

Although "bad faith" is not defined in the statute, the Virginia Supreme Court recently suggested that it is the same thing as an absence of good faith. *Stoots,* 867 S.E.2d at 47. There, the court noted that "in certain contexts, the term 'good faith' looks at the intent of the actor." *Id.*, at 46. Put another way, "[a] person acts in good faith when he or she acts with honest motives." *Rafalko v. Georgiadis*, 777 S.E.2d 870, 877 (Va. 2015). Thus, the *Stoots* court held, "a finding of good faith is 'based on the court's determination of the mindset of a party.'" *Stoots,* 867 S.E.2d at 46.

Making a determination of FA Thomas' mindset requires inferences which must be made in favor of Mr. Cupp at the 12(b)(6) stage, before discovery or depositions occur. The allegations of the reports' falsehood demonstrate the dishonest mindset which characterizes bad faith. The Complaint alleges that she "apparently changed her initial report of human trafficking to a report of sexual abuse," which is proof that she "was driven by a motivation to ensure that this particular family was singled out and treated in the way that it was." JA22. Further, the allegation that her employers incentivized her reports, JA19, allows the inference that she was motivated to make the false report in an effort to gain some workplace

advantage; this type of inference must be made in favor of the Appellant. The allegation that FA Thomas walked past the armed law enforcement intervention without even looking at M.L.C. allows the inference that she was not acting out of concern for M.L.C.'s safety. The Complaint thus makes very specific allegations that Defendant Thomas did not act with honest motives, which are sufficient at the 12(b)(6) stage to set forth a claim that FA Thomas acted in bad faith.

Indeed, the Complaint alleges that FA Thomas' conduct was "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." JA22–23. As Judge Moon of the Western District of Virginia concluded from a survey of opinions:

> [i]n Virginia, allegations that a defendant deceptively or falsely accused a plaintiff of sexually-tinged impropriety or abuse have described sufficiently outrageous and intolerable conduct to survive a motion to dismiss.

Nelson v. Green, No. 3:06cv70, 2014 WL 131055, at *26 (W.D.Va. Jan. 14, 2014). If FA Thomas' conduct was outrageous and intolerable, then the Complaint plausibly alleges bad faith.

Although the district court relied heavily on *Wolf* to define and determine the existence of sufficient *allegations* of bad faith, it is important to note that *Wolf* was decided at the *summary judgment* stage, after the plaintiffs had an opportunity to conduct discovery, as opposed to the case at hand, which was dismissed based only

upon the allegations of the Complaint. To the extent that *Wolf* defines bad faith conduct, and when viewed through the definitions more recently provided in *Stoots*, Mr. Cupp's Complaint sufficiently alleged bad faith to provide a plausible basis for a claim upon which relief can be granted. The district court should not have dismissed the Complaint.

b. The Complaint sufficiently alleged that FA Thomas acted with malicious intent.

The Complaint adequately alleges that FA Thomas acted with malicious intent for purposes of Rule 12(b)(6). Indeed, the Complaint specifically alleges that her conduct demonstrated "malice." JA22–23. This allegation must be taken as true and is alone sufficient to state a claim.

Further, for the analogous claim of malicious prosecution, "a jury may infer malice from a lack of probable cause, thus evidence showing lack of probable cause is always admissible to prove malice." *Dill v. Kroger Ltd. Partnership I,* 860 S.E.2d 372, 379 (Va. 2021) (citations omitted). The Complaint alleged that FA Thomas lacked probable cause for her reports, JA16, JA25, and that the "law enforcement officers ultimately determined that there was no probable cause to charge or arrest" Appellant. JA18. From these allegations, malice can be inferred. And indeed, as the district court was reviewing this matter pursuant to a Rule 12(b)(6) motion, the court was required to make all inferences in favor of the Appellant. Drawing inferences in favor of Mr. Cupp should have led the district court to infer malice

from the lack of probable cause pleaded in the Complaint. This would be in keeping with the Virginia Supreme Court's instruction that "the inference of malice from a lack of probable cause is usually a question reserved for the jury's determination." *Id.*, citing *Clinchfield Coal Corp. v. Redd*, 96 S.E. 836, 843 (Va. 1918).

Lastly, while Virginia Code § 63.2-1512 does not define "malicious intent," the Virginia Supreme Court has considered the term with respect to malicious prosecution. In a malicious prosecution case, malice is "any controlling motive other than a good faith desire to further the ends of justice, enforce obedience to the criminal laws, suppress crime, or see that the guilty are punished." *Id.,* citing *Hudson v. Lanier*, 497 S.E.2d 471 (Va. 1998). But "[i]t is not necessary to prove actual spite, hatred, ill will, or grudge against or desire to injure the person charged with the crime." *Id.*, citing *Freezer v. Miller*, 176 S.E. 159 (Va. 1934). A person acts maliciously if she initiates a criminal prosecution "upon no or such slight grounds of suspicion as to indicate a general disregard of [others]." *Id.* Put differently, "an individual pursues a criminal prosecution maliciously if her basis for suspecting a defendant is so tenuous that the prosecution can be said to have been 'directed by chance' against the defendant." *Id.*

These definitions match the allegations of the Complaint. FA Thomas' false report "was based upon insufficient cause," lacked "any type of common sense analysis," "was outlandish in light of the other family members seated" nearby, was

made even though the family had already encountered multiple other Delta, Endeavor, and Transportation Security Administration employees that day (none of whom reached a similar conclusion), and violated her training and education on the subject. JA22. The Court may—and indeed, must, at the 12(b)(6) stage—infer that FA Thomas' false report, in violation of her training, lacking common sense, and based upon insufficient cause, reflected a basis "so tenuous" and resting upon "such slight grounds" that it could be said to have been "directed by chance" against Mr. Cupp. This plausibly defines malicious conduct under Virginia law.

Thus, allegations of recklessness, malice, willfulness, wantonness, outrageousness, indecency, atrocity, and intolerance allege a mindset that sufficiently alleges "bad faith" and "malicious intent" when drawing all inferences in the light most favorable to Plaintiff. Consequently, the Complaint sufficiently alleged an exception to § 63.2-1512 immunity, and the district court's order should be reversed.

4. The district court erred in concluding that Appellant's claims against Delta and Endeavor should also be dismissed, because the derivative liability bar does not apply when the employee has been dismissed for procedural reasons.

No matter what the Court concludes about FA Thomas' immunity, the Court should reverse the district court for summarily concluding that "[b]ecause all five counts derive from Defendants' child abuse report," Delta and Endeavor were also

entitled to dismissal. JA90. As a result of this single sentence applying the concept of the derivative liability bar, Appellees Delta and Endeavor were dismissed from the case despite claims against them for not only *respondeat superior* liability, but also their own negligence and false imprisonment.

The district court's conclusion violated the Virginia legal principle that the dismissal on procedural grounds of a plaintiff's claim against an employee does not automatically lead to dismissal of the *respondeat superior* claim against the employer. *Hughes v. Doe*, 639 S.E.2d 302 (Va. 2007).

The Virginia Supreme Court recently applied this principle to an immunity case in *Stoots v. Marion Life Saving Crew, Inc.,* 867 S.E.2d 40 (Va. 2021). In *Stoots*, a wrongful death case which applied Virginia's "Good Samaritan" immunity statute, the trial court found that several paramedics were immune from liability, and further concluded that the liability of the rescue unit itself, MLSC, was coterminous with that of the paramedics. As a result, the trial court ruled that MLSC, as the principal, should also be dismissed. *Id.* In a ruling that is determinative of the case at hand, the Virginia Supreme Court reversed the dismissal of MLSC, pointedly emphasizing that "the liability of a principal is only coterminous with the liability of its agent 'when a verdict or other finding that the [agent] *was not negligent* is the basis for the exoneration of the [principal].'" *Id.* at 47 – 48, (emphasis in original), citing *Hughes,* 639 S.E.2d at 303. The state court went on to conclude that "[a]s there was no

verdict in favor of the Paramedics, or finding that they were not negligent, their immunity from civil liability is not dispositive of whether [the Good Samaritan statute] applies to MLSC." *Id.*at 48.[4]

The district court's dismissal of Delta and Endeavor for failure to state a claim upon which relief may be granted based on an immunity statute is exactly the type of procedural dismissal the *Hughes* and *Stoots* courts condemned. The district court determined that FA Thomas is entitled to immunity from liability without making any finding concerning whether FA Thomas acted negligently or wrongfully, yet made the same mistake as the *Stoots* trial court by also dismissing Delta and Endeavor. Pursuant to Virginia law, in the absence of a verdict or finding that FA Thomas was not negligent, Delta and Endeavor, her principals, are not entitled to derivative immunity. Thus, no matter the Court's conclusions about Appellee FA Thomas' claim of immunity, the district court's conclusory sentence also dismissing Appellant's claims against Delta and Endeavor was erroneous, and this Court should reverse the dismissals of Delta and Endeavor.

[4] The Virginia court's holding in *Stoots* post-dates this honorable Court's ruling in *Wolf v. Fauquier County Bd. Of Supervisors,* 555 F.3d 311 (4th Cir. 2009), limiting that case's utility as a source of Virginia law on the subject of a principal's responsibility for its immune agent's misconduct.

CONCLUSION

In conclusion, the district court's dismissal of all claims against all parties was premised upon a *wholly inapplicable* statute: Virginia Code § 63.2-1512, which only immunizes reports and complaints made to the Department of Social Services in good faith and without malicious intent. In the case at hand, the Complaint alleges that Flight Attendant Thomas recklessly and maliciously made a false report of human trafficking to law enforcement. Her conduct, for which Defendants Delta and Endeavor are vicariously responsible, does not satisfy the statutory standard for immunity. Based upon the foregoing reasons, Appellant respectfully asks this Court to reverse the district court's erroneous dismissal of all claims with prejudice and remand this case to the district court.

STATEMENT REGARDING ORAL ARGUMENT

The primary question presented herein is a matter of first impression that has not been determined by either this Court or the Virginia Supreme Court. Appellant respectfully requests oral argument.

Respectfully submitted,

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