SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

January 27, 2006

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RE: James Gilliland v. St. Joseph's at Providence Creek, et al.
Kent County C.A. No. 04C-09-042

DATE SUBMITTED: October 17, 2005

Dear Counsel:

This is the Court's decision as to Defendants' motions to dismiss or alternatively motions for a more definite statement. For the reasons stated herein Plaintiff's Count I is dismissed as to Defendant Taylor, and Count II is dismissed. Plaintiff is required to file a more definite statement for the remaining claims.

STATEMENT OF FACTS[1]

Plaintiff James Gilliland incorporated and founded Friends in Christian Fellowship in 1997, a Delaware non-profit, non-stock corporation. In 1998, its name was changed to St. Joseph Project Foundation and in 2002 its name was again changed to St. Joseph's at Providence Creek ("St. Joseph's"). From its founding until July, 2004 Plaintiff acted as Executive Director for Defendant St. Joseph's.

Following the acquisition of the Clayton property, Defendant St. Joseph's, with Plaintiff as its agent, negotiated with potential users of the property. These various negotiations continued until approximately October, 2001 when Defendant St. Joseph's entered into a lease agreement with Defendant Providence Creek Academy Charter School ("Academy").

Then Plaintiff, on behalf of Defendant St. Joseph's, pursued and negotiated for financing, in addition to the non-profit contributions already received. The borrowed and contributed funds were used for the necessary renovations to the properties of Defendant St. Joseph's for the establishment of the Defendant Academy. The renovations were completed in August, 2002 and the School opened in September, 2002.

Beacon Education Management Companies ("Beacon"), a professional education management company, contracted with Defendant Academy to run the facility. In August, 2002 Beacon informed Plaintiff that the school may not be able to open because food services and bus transportation had not been arranged by the principles of Defendant Academy. Plaintiff formed Defendant Providence Creek Services, LLC ("LLC") to provide these above services for Defendant Academy. The principles of Defendant LLC were McKay Associates, LLC, owned

[1] Facts are taken from Plaintiff's pleadings, motions, briefs, and correspondence. All factual inferences are drawn in Plaintiff's favor.

and operated by Defendant Charles Taylor's wife, Claudia Taylor; Kokomo Associates, LLC, owned and operated by Plaintiff's wife, Jody Gilliland; and Defendant St. Joseph's. Defendant LLC's purpose was to protect assets of Defendant St. Joseph's from potential liabilities and assure the viability of Defendant Academy.

Plaintiff served solely as Executive Director of Defendant St. Joseph's without compensation, except certain reimbursements for out-of-pocket expenses, from 1997 until January, 2003. At that point, Plaintiff became an employee of Defendant LLC, but continued serving as Executive Director for Defendant St. Joseph's.

In March, 2003 seven vehicles were purchased by Defendant LLC. A vehicle was provided to Plaintiff. A vehicle was provided to Plaintiff's wife, who was the accounting manager, and a member of Defendant LLC, respectively. Plaintiff contributed capital to Defendant LLC to make the purchase by trading in his own car as part of the purchase of the seven cars. One of the five other vehicles that were purchased was provided to Taylor, who was the managing director.

In February, 2004, at the suggestion of the professional advisors of Defendants St. Joseph's and LLC, Defendant LLC was converted to a single member LLC for profit, with Defendant St. Joseph's being the single member. Also, in February, 2004, Plaintiff purchased from Defendant LLC the two vehicles he and his wife were using.

Defendants Barry Meekins and Taylor issued a series of communications directed toward the Board of Defendant St. Joseph's alleging or inferring numerous instances of mismanagement by Plaintiff.

In June, 2004 Plaintiff was requested by several members of Defendant St. Joseph's Board, specifically Mr. Evans, Mr. Kaercher, and Ms. Webber, to temporarily undertake the duties of Director of Development. Marc Ostroff was to assume the duties of interim Executive Director for six months. Plaintiff was allegedly assured by the Evans, Kaercher, and Webber that in the future he would return to the position of Executive Director. Allegedly, the changing of position was because Barry Meekins had created an atmosphere of dissension on the Board, making it unable to function.

On approximately July 9, 2004 Plaintiff was given verbal notice by Marc Ostroff that Plaintiff's services were no longer needed. Further, Ostroff told Plaintiff unless he voluntarily resigned all his posts with St. Joseph's and LLC that he would be terminated by 6:00 p.m. that day. Plaintiff refused to resign and on July 21, 2004 was told that effective July 13, 2004 he had been terminated.

Plaintiff, who was at all times a member of the Board of Defendant St. Joseph's, never received notice of any meeting in which his status was to be an agenda item. Plaintiff also did not attend any meeting at which his termination was discussed.

On March 4, 2005 Plaintiff filed his complaint against multiple Defendants for various claims as will be discussed below.

On March 10, 2005 multiple motions to dismiss were filed with the Court. On April 8, 2005 another group of motions to dismiss were submitted to the Court. All Defendants sought more definite statements for all claims that the Court does not dismiss. Subsequently, the parties unsuccessfully attempted to resolve their differences through mediation.

STANDARD OF REVIEW

The Court must assume all well-pleaded facts or allegations in the complaint as true when evaluating a Motion to Dismiss under Rule 12 (b) (6).[2] The Court will not dismiss a claim unless the Plaintiff would not be entitled to recover under any circumstances that are susceptible to proof.[3] The complaint must be without merit as a matter of fact or law to be dismissed.[4] The Plaintiff or complainant will have every reasonable factual inference drawn in his favor.[5] "Dismissal is warranted where the plaintiff has failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted."[6] "Where allegations are merely conclusory, however (*i.e.,* without specific allegations of fact to support them), they may be deemed insufficient to withstand a motion to dismiss."[7]

Alternatively, Rule 12 (e) states that:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired.

"If the complaint is found to be vague or ambiguous, the Plaintiff will be required to correct any defects with a more definite statement."[8]

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[2] *RSS Acquisition, Inc. v. Dart Group Corp.,* 1999 WL 1442009, *2 (Del. Super.).
[3] *Id.*
[4] *Id.*
[5] *Ramunno v. Cawley,* 705 A.2d 1029, 1036 (Del.1998).
[6] *Hedenberg v. Raber,* 2004 WL 2191164, *1 (Del. Super.) *citing Evans v. Perillo,* 2000 Del. Super. Lexis 243, at *5-6.
[7] *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000) *citing In re Tri-Star Pictures, Inc Litig.,* 634 a.2d 319, 326 (Del. 1993).
[8] *Crowhorn v. Nationwide Mut. Ins. Co.*, 2001 WL 695542, *2 (Del. Super.).

ANALYSIS

I. Count I

Count I of Plaintiff's complaint stated:[9]

46. Plaintiff restates and incorporates paragraphs 1-45 above.

47. In contravention of its bylaws Defendant St. Joseph purportedly conducted a meeting of its Board of Directors without proper notice at some point during the month of July.

48. At this improperly constituted meeting of the Board of Directors actions were apparently taken by the board in violation of its charter and bylaws to wit, the termination of Plaintiff James G. Gilliland.

49. The improper actions of the purported Board of Directors are void.

WHEREFORE Plaintiff prays judgment against Defendant St. Joseph's and each and every of its alleged Directors declaring his employment with that entity not to have been terminated, together with a monetary judgment sufficient to compensate him for lost wages, fringe benefits together with the cost of this action, attorney's fees, punitive damages and liquidated damages in the amount of 10% of his unpaid wages for each day, which the failure to compensate him continues (19 **Del. C**. §1103).

In a nutshell, Plaintiff alleges he was a Board member of St. Joseph's. The Board fired him from his positions at St. Joseph's and the LLC, and Plaintiff alleges that as a Board member

[9] Below taken verbatim from Plaintiff's Amended Complaint.

he should have received notice of the meeting, but did not; and therefore, the Board action was a nullity.

Taylor

Defendant Charles Taylor was alleged to be on the Board of Directors. He is the only member of the Board of Directors who has not been dismissed out of the original complaint.

Taylor raised various arguments as to why Count I should be dismissed against him. First, he claimed to be immune from suit as set out by 10 Del. C. § 8133. Second, he stated that he is not personally liable for the allegedly wrongful acts of the non-profit corporation on whose Board he serves. Third, Taylor argued that Plaintiff has failed to plead a cognizable claim against him because he cannot provide the relief that Plaintiff seeks. Finally, along with Defendant St. Joseph's, Defendant Taylor claimed that Plaintiff is not entitled to money or economic damages because Plaintiff admitted that he served as Executive Director of Defendant St. Joseph's without compensation.

10 Del. C. § 8133 provides "[n]o volunteer of an organization shall be subject to suit directly, derivately or by way of contribution for any civil damages under the laws of Delaware resulting from any negligent act or omission performed during or in connection with an activity of such organization."[10] However, "[t]he immunity granted in subsection (b) of this section shall not extend to any act or omission constituting willful and wanton or grossly negligent conduct."[11] A "volunteer" is defined as "any trustee, ex officio trustee, director, officer, agent or worker who is engaged in activity without compensation."[12] An "organization" includes "[a]ny

[10] 10 Del. C. § 8133 (b).
[11] 10 Del. C. § 8133 (d).
[12] 10 Del. C. § 8133 (a) (1).

not-for-profit organization exempt from federal income tax under § 501 (c) of the Internal Revenue Code[.]"[13]

Plaintiff did not allege that Taylor is anything more than a "volunteer" of a not-for-profit organization as statutorily defined. Further, the exception for acts or omissions constituting willful and wanton or grossly negligent conduct is not applicable here because there have been no allegations against Defendant Taylor of such conduct.

Plaintiff argued Taylor cannot raise this immunity statute as a defense because the not-for-profit entity, Defendant St. Joseph's, is the single member of the for-profit entity, Defendant LLC. However, Plaintiff did not provide any law, rule, or precedent that states that a "volunteer" waives his immunity because the not-for-profit entity is associated with a for-profit entity. Further, as to Count I, Plaintiff named Defendant St. Joseph's, along with its Board, not the for-profit Defendant LLC, I find the statute provides Taylor immunity as to Count I.

Taylor also raised the defense that a director or officer is not personally liable for the acts of the corporation cited by *G & G Restaurant, Inc. v. New G & G Corp.*[14] and *Irwin & Leighton, Inc. v. W.M. Anderson Co.*[15]

Defendant Taylor argued further that Plaintiff cannot use the Personal Participation Doctrine to avoid dismissal. "The Personal Participation Doctrine stands for the idea that an officer of a corporation can be held liable for his own wrongful acts."[16] A corporate officer must have more than mere knowledge to be found liable under this doctrine.[17] To successfully use the

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[13] 10 Del. C. § 8133 (a) (5).
[14] 1991 WL 35703, *4 (Del. Super.)
[15] 532 A.2d 983, 987 (Del. Ch. 1987).
[16] *Brandt v. Rokeby Realty Co.,* 2004 WL 2050519, *9 (Del. Super.).
[17] [17] *Id. citing T.V. Spano Building Corp. v. Dept. of Natural Resources and Environmental Control*, 628 A.2d 53, 61(Del. 1993).

doctrine, it must be shown "that the officer 'directed, ordered, ratified, approved, or consented to' the tortious act."[18] However, no Delaware court has extended this doctrine to officers of non-profit corporations because doing so would eliminate the immunity created by 10 Del. C. § 8133 for such officers. Nor is the allegation in Count I a tortious act. Thus, the personal participation doctrine here does not impose liability on Defendant Taylor.

Further, Defendant Taylor stated that Plaintiff cannot raise the claim as one for a breach of a fiduciary duty. Fiduciary duties are to the corporation itself and its shareholders[19], not employees, as Plaintiff was. Thus, Plaintiff cannot bring suit for breach of a fiduciary duty for individual injuries to himself.

Defendant Taylor stated that Plaintiff did not allege facts that would allow the Court to infer that Defendant Taylor had an individual duty to provide proper notice of the Board meeting to Plaintiff. Therefore, Defendant Taylor cannot be held individually liable for failing to send notice to Plaintiff about the Board meeting.

Finally, Defendant Taylor raised the defense that he cannot provide Plaintiff with the relief that he seeks. The relief sought by Plaintiff is a return to his former position of Executive Director. Defendant Taylor cannot return Plaintiff to his former position. Only the Defendant St. Joseph's can return Plaintiff to his former position.

For all of the above reasons I find that the personal claim against Taylor in Count I should be dismissed.

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[18] *Id. quoting T.V. Spano Building Corp.*, 628 A.2d at 61.
[19] *Agostino v. Hicks,* 2004 WL 443987 (Del. Ch.).

St. Joseph's

St. Joseph's raised a defense that Plaintiff's claims in Count I for money and other economic damages must be dismissed because Plaintiff admits that he served as Executive Director without compensation. Plaintiff submitted pay stubs to establish what he was owed. However, these pay stubs are from checks paid by Defendant LLC and Plaintiff claims to be a paid employee of Defendant LLC, not Defendant St. Joseph's.

Plaintiff appears to be seeking lost wages against the wrong party. His employer was the LLC, and regardless of St. Joseph's interest in the LLC, he has alleged nothing in Count I as to why economic damages should be assessed against St. Joseph's. He has alleged nothing as to how the corporate governance requirements of St. Joseph's control the corporate governance of the LLC, a separate entity. I remind counsel that the Court earlier directed that an amended complaint be filed, where Plaintiff could "sharpen his pencil" as to the claims and parties involved.

Further, Defendant St. Joseph's argued that Plaintiff cannot maintain a claim for past-due wages, benefits or liquidated damages because the termination of his employment, even if taken at an improperly noticed meeting or by an improperly constituted board of directors, is merely voidable, not void *ab initio*.

The essential distinction between voidable and void acts is that the former are those which may be found to have been performed in the interest of the corporation but beyond the authority of management, as distinguished from acts which are ultra vires, fraudulent or gifts or waste of corporate assets."[20] "The practical distinction, for our purposes, is that voidable acts are

[20] *Michelson v. Duncan,* 407 A.2d 211, 218-219 (Del. 1979) *citing* 19 Am.Jur.2d, Corporations, § 1247.

susceptible to cure…while void acts are not."[21] Thus, even if the Board lacked authority to hold an annual meeting without proper notice unless fraud is shown, its actions are voidable, not void and subject to ratification; but, there is no indication that the Board has called a properly noticed meeting and ratified its prior voidable action.

Because the Court is directing that Plaintiff file a more definite statement as to exactly what it is he is trying to plead in Count I, he needs to spell out what he seeks against St. Joseph's, and why. This is to be done within twenty (20) days, with an Answer to be filed within twenty (20) days thereafter.

II. Count II

Count II of Plaintiff's complaint stated:[22]

Plaintiff restates and incorporates paragraphs 1-49 above.

50. Plaintiff, James Gilliland, by reason of his employment relationship with St. Joseph's at Providence Creek and Providence Creek Services, LLC was entitled to the good faith of the employer and the continuation of the employment relationship based in part upon the assurances of Defendants Evans, Webber and Kaercher.

51. Defendants Providence Creek Services, LLC and St. Joseph's at Providence Creek in failing to properly protect Plaintiff Gilliland from the false accusations of Defendant Barry Meekins and Defendant Charles Taylor breached its duty of good faith to Plaintiff, James Gilliland.

52. The actions of Defendant Providence Creek Services, LLC and Defendant St. Joseph's and certain of its officers and Board of directors in terminating Plaintiff

[21] *Id.* at 219.
[22] Below taken verbatim from Plaintiff's Amended Complaint.

were a failure of those entities to exercise and exhibit good faith in their relationships with Plaintiff.

WHEREFORE Plaintiff James Gilliland prays judgment against Defendants Providence Creek Services LLC and St. Joseph's at Providence Creek for lost past and future wages, fringe benefits, damage to reputation, loss of business opportunity, the intentional infliction of emotional and mental distress, punitive damages attorney's fees, costs and such other relief as a duly constituted Court deems just.

David Evans, Joyce Webber, and Paul Kaercher are no longer defendants because they have been dismissed from this action.

Defendants St. Joseph's and LLC argued that Count II should be dismissed because there is no supporting legal authority that they are aware of requiring a corporation to protect its employees or Board members from false accusations made by others. Further, Defendants claimed that Plaintiff was an at-will employee. Defendants also stated that Count II is insufficiently pled because Plaintiff did not allege that Defendants were aware of false accusations in that he did not identify what accusations were false, nor did he identify what actions Defendants were obligated to take if they did learn of such accusations.

An at-will employee can be terminated "with or without just cause".[23] An implied covenant of good faith and fair dealing is included in every employment contract made under the laws of Delaware.[24] However, "[t]o constitute [a] breach of the implied covenant of good faith, the conduct of the employer must constitute 'an aspect of fraud, deceit or misrepresentation.'"[25]

[23] *Shockley v. General Foods Corp.*, 1988 WL 102983 (Del. Super.) aff'd, 560 A.2d 491 (Del. 1988).
[24] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 101 (Del. 1992).
[25] *Id. quoting Magnan v. Anaconda Industries, Inc.*, 429 A.2d 492, 494 (Conn. Super. 1979).

"The lodestar…is candor."[26] "An employer acts in bad faith when it induces another to enter into an employment contract through actions, words, or the withholding of information, which is intentionally deceptive in some material way to the contract."[27] Such conduct constitutes 'an aspect of fraud, deceit, or misrepresentation.'"[28] "[A]n employer's freedom to terminate an at-will employment contract for its own legitimate business reasons, or even highly subjective, reasons"[29] was not limited by *Merrill v. Crothall.*

Plaintiff stated that the Court must look to *E.I. DuPont de Nemours and Co. v. Pressman*[30] when looking at the implied covenant of good faith in employment contracts. *Pressman* does not alter the implied covenant of good faith and fair dealing in relation to at-willemployment contracts; it merely explained a specific situation where misrepresentation took place violating the covenant.

The situation in *Pressman* involved a manager/supervisor falsifying performance reports to cause a subordinate employee to be fired.[31] Although, the employer in *Pressman* "was made aware after the fact of this course of events"[32], the Court stated that if the jury believed that the manager intentionally misrepresented the employee's performance to get her fired then the covenant was breached.[33]

The Court in *Pressman* reviewed four categories of actionable claims based on the implied covenant of good faith and fair dealing.[34] The four categories are: "(i) where

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 103.
[30] 679 A.2d 436 (Del. 1996).
[31] *Id.* at 439.
[32] *Id.* at 444.
[33] *Id.*
[34] *Lord v. Souder,* 748 A.2d 393, 400 (Del. 2000).

termination violated public policy; (ii) where the employer misrepresented an important fact and the employee relied 'thereon either to accept a new position or remain in a present one'; (iii) where the employer used its superior bargaining power to deprive an employee of clearly identifiable compensation related to the employee's past service; and (iv) where the employer falsified or manipulated employment records to create fictitious grounds for termination."[35] Finally, the Delaware Supreme Court has held that *Pressman's* categories are "narrowly defined" and exclusive.[36]

Plaintiff's allegations as to Count II boil down to the following: I was told I would get my old job back but did not because my employer did not protect me from false accusations made by Board member Taylor and employee Meekins.

As to his *Pressman* category (ii) claims, Plaintiff has not alleged that Evans, Webber, and Kaercher were being dishonest, fraudulent, or deceitful when they asked Plaintiff to temporarily take a subordinate position. Nor does he allege any dishonesty, fraud, or deceit as to their representation he would get his old job back as Executive Director (the boss).
Nor is this a case where Plaintiff has claimed that he relied on his employer's assurances of continued employment to his detriment. For example, there are no allegations that Plaintiff turned down another job offer based on any promise of continued employment. There are no allegations of promissory estoppel.[37]

Having pled no fraud and having no detrimental reliance or promissory estoppel, his claim based on getting his old job back must fail.

Plaintiff was an employee at will when he was Executive Director. When the quarrels and disputes began about governance and money issues he was fully aware of same. He could

[35] *Id.* at 401 *citing Pressman,* 679 A.2d at 442-444.
[36] *Id.*
[37] See *Lord,* 748 A.2d 393.

have been discharged, but was basically moved to a subordinate position. A very short time later he was terminated from his position with Defendant employers. Plaintiff alleged nothing to defeat employer's right to terminate him at will based on assurances.

The major point of Count II is the allegation that his employers did not protect him. These allegations seem to place Plaintiff's claim under *Pressman's* category (iv). However, there are facts that distinguish Plaintiff's claim from *Pressman*.

First, Plaintiff has not identified the false accusations that were made about him. Regardless of the failure to identify the falsehoods, as quarrels began about Plaintiff's job performance, the Board became aware of these allegations not only from alleged communications by Taylor and Meekins, but also from Plaintiff himself.[38] In other words, the internal disputes and politics of St. Joseph's and the LLC were not a secret campaign to attack Plaintiff. It was a full blown fight over his job performance and the issues were known by everyone. Plaintiff was the boss, the Executive Director. He was the top dog and was involved in the discussions about his job performance and thus in a position to defend himself from accusations coming from within the organization. *Pressman* involved deceit and falsehoods which were used to create fictitious grounds for termination.

Plaintiff's case is different because he was discharged with the Board being aware of the row and Plaintiff's position. An employer has wide latitude in its decisions regarding employment.[39]

Plaintiff argued the employer has a duty under *Pressman* to protect an employee when there are false allegations of improper conduct. Plaintiff wishes to push the envelope as to

[38] Plaintiff was directly involved in communicating to Board members and others.
[39] See *Merrill,* 606 A.2d 96.

Pressman's holding to require an employer to determine the truth as to the dispute, to determine who was right and who was wrong before discharge becomes an option.

Pressman is a narrow holding. In *Lord*, the Supreme Court noted its concern that if the four *Pressman* categories were not limited then the future erosion of the employment at will would leave the accepted concept of at will employment meaningless.[40]

Since the present case involves accusations of improper corporate governance, which Plaintiff was aware of and in a position to defend himself, the Board was not required to determine who was right and who was wrong before it made decisions concerning termination. When employers are faced with accusations among its employees of "he said, she said", the employer should be given the right to resolve the disputes in the employer's best interest by exercising its right to end the employment relationship.

The employer should have the latitude to discharge without having a jury "second guess" the "correctness" of the employer's decision. To hold otherwise would substantially erode the concept of employment at will.

Plaintiff's claims against St. Joseph's and the LLC for failure to protect are dismissed.

III. Applicable Law for Counts III, IV, and V (Defamation Claims)

"A plaintiff must plead five elements in a defamation action: 1) the defamatory character of the communication; 2) publication; 3) that the communication refers to the plaintiff; 4) the third party's understanding of the communication's defamatory character; and 5) injury."[41] Special damages are required for slander (oral defamation) to be actionable.[42] However, slander

[40] *Lord,* 748 A.2d at 401.
[41] *Read v. Carpenter,* 1995 WL 945544, *2 (Del. Super.).
[42] *Id.*

per se is actionable without proving special damages.[43] Slander per se is made up of four general categories of statements.[44] The four types of statements are ones that: 1) malign one in a trade, business, or profession; 2) impute a crime; 3)imply one has a loathsome disease; or 4) impute unchastity to a woman.[45] Libel (written defamation) does not require special damages.[46]

"A mere insinuation is as actionable as a positive assertion, if the meaning is plain, and it has been held repeatedly that the putting of words in the form of a question will in no [way] reduce the liability of the defendant."[47] Thus, raising a question can still satisfy the requirement that the communication be of a defamatory character.

Self-publication is when a plaintiff publishes the allegedly defamatory communication to a third party instead of the defendant publishing it to a third-party. **"**[T]he concept of self-publication has been accepted in a minority of other jurisdictions", but Delaware is not one of them.[48] Therefore, self publication does not satisfy the publication requirement for a defamation action in Delaware.[49]

Conditional/qualified privilege can be raised as an affirmative defense to a defamation action.[50] "A qualified privilege extends to communications made between people who have a 'common interest for the protection of which the allegedly defamatory statements that are made' or which are 'disclosed to any person who has a legitimate expectation in the subject matter.'"[51] "The question of whether or not a privilege attaches to a given communication is a question for

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[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Spence v. Funk,* 396 A.2d 967, 971 (Del. 1978).
[47] *Schoedler v. Mo tometer Gauge & Equip. Co rp.,* 15 N.E.2d 958, 961 (Ohio 1938).
[48] *Lynch v. Mellon Bank of Delaware,* 1992 WL 51880, *3 (Del. Super.).
[49] *Id.*
[50] *Edwards v. Lutheran So cial Services of Dover, Inc.,* 1987 WL 10271, *4 (Del. Super.).
[51] *Davis v. West Center City Neighborhood Planning Advisory Committee, Inc.,* 2003 WL 908885 (Del. Super.) *quoting Henry v. Delaware Law School of Widener University, Inc.,* 1998 WL 15897 (Del. Ch.).

the court to determine as a matter of law."[52] Conditional privilege has been held as a matter of law to include the publication of letters to the board of directors of a not-for-profit Delaware corporation when it pertained to the conduct of a board member.[53]

"Once a conditional privilege has been established, it 'must be exercised with good faith, without malice and absent any knowledge of falsity or desire to cause harm.'"[54] The burden of showing that the privilege was abused must be carried by the Plaintiff by producing evidence showing actual malice on behalf of the defendants.[55] Malice can be shown through excessive or improper publication or publishing statements that are known to be false.[56]
"Delaware courts have recognized that the conditional privilege is particularly relevant to communications made in employer/employee relationships."[57] The privilege for employers allows them "to make communications regarding the character, qualifications, or job performance of an employee or former employee to those who have a legitimate interest in such information."[58]

However, the affirmative defense of conditional privilege cannot "be considered in the context of a motion to dismiss pursuant to Rule 12(b) (6)."[59] Conditional privilege should be raised in the Defendant's Answer and should not be raised in a motion to dismiss.[60]

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[52] *Lipson v. Anesthesia Services, P.A.,* 790 A.2d 1261, 1282 (Del. Super. 2001) *quoting Bickilng v. Kent General Hosp.,* 872 F.Supp. 1299, 1307-1308 (D.Del. 1994).
[53] *Davis,* 2003 WL 908885 at *3.
[54] *Durig v. Woodbridge Board of Education,* 1992 WL 301983, *7 (Del. Super.) *quoting Burr v. Atlantic Aviation Corp.,* 348 A.2d 179, 181 (Delaware 1975).
[55] *Id. citing Heller v. Dover Warehouse Market, Inc.* 515 A.2d 178 (Del. Super. 1975); *Battista v. Chrysler Corp.,* 454 A.2d 286, 291 (Del. Super. 1982)
[56] *Lipson,* 790 A.2d at 1283 *citing Battista* 454 A.2d at 291.
[57] *Id.* at *6 *citing Battista* 454 A.2d at 291; *Pierce v. Burns,* 185 A.2d 477 (1962).
[58] *Lipson,* 790 A.2d at 1282 *quoting Bloss v. Kershner,* 2000 WL 303342, *6 (Del. Super.).
[59] *Meades v. Wilmington Housing Authority,* 875 A.2d 632,*2 (Del. 2005) *citing Klein v. Sunbeam,* 94 A.2d 385, 392 (Del. 1952).
[60] *Klein,* 94 A.2d at 392.

IV. Count III

Plaintiff's Allegations from Count III of his Complaint

Count III of Plaintiff's complaint stated:[61]

53. Plaintiff restates and incorporates paragraphs 1-52 above.

54. Defendants B.W. Meekins and Taylor at various times made false and defamatory statements and in the case of Taylor[62] communicated false and defamatory writings to third parties (See Exhibit A attached).

55. As a direct and proximate result of these false statements and innuendos Plaintiff James Gilliland was held up to public ridicule.

56. As a direct and proximate result of these and defamatory statements and writings Plaintiff James Gilliland was allegedly terminated from his employment.

57. As a direct and proximate result of these false and defamatory statements and writings Plaintiff James Gilliland suffered fiscal and emotional damages.

WHEREFORE Plaintiff prays judgment against Defendant B. Meekins and Defendant Taylor and under Respondent Superior against Providence Creek Services, LLC and St. Joseph's at Providence Creek for lost past and future wages and fringe benefits, damage to reputation, loss of business opportunity, the intentional infliction of emotional and mental distress, punitive damages, attorney's fees, costs and such other relief as a duly constituted Court deems just.

[61] Below taken verbatim from Count III of Plaintiff's Amended Complaint.
[62] Barry Meekins written communications alleged to be defamatory are included in Exhibit A as well.

Parties' Contentions

Defendants Barry Meekins and Taylor raised similar issues with Plaintiff's complaint in their motions to dismiss. Both claimed that Plaintiff's complaint did not allege even one defamatory statement, nor does it identify to whom such a statement was published. They stated that Plaintiff attached to the complaint as exhibit A, 16 letters, emails, and faxes as examples of the defamatory conduct as set out above. However, some of these documents were written by Plaintiff and others were sent only to Plaintiff.

Further, as to Exhibit A, Defendants claimed that Plaintiff has not alleged that the statements were false and defamatory, nor did Plaintiff explain how the statements were published or how such publication would damage his reputation.

Defendants also claimed that Plaintiff must specifically identify what statements are attributed to which Defendant. Defendants cited *Delaware Express Shuttle v. Older*[63] for the proposition that Plaintiff must identify the defamatory communication, the individual or entities to whom the statement was published, facts sufficient to show that communication actually refers to the Plaintiff, that the publishee understood the communication as defamatory, and that the Plaintiff sustained injury. Defendants claimed that Plaintiff must plead facts to support each element of a defamation claim.

Defendants also stated that claims of slander require proof of special damages unless the statements qualify as slander per se. Defendants claimed that Plaintiff does not allege special damages and cannot claim slander per se because he has not identified the statements in question.

[63] 2002 WL 31458243, *21 (Del Ch.).

Defendant Taylor also argued, as set out above under Count I, that he is immune from suit as set out by 10 Del. C. § 8133. Plaintiff argued Defendant Taylor cannot raise this immunity statute as a defense because the not-for-profit entity, Defendant St. Joseph's, is the single member of a for-profit entity, Defendant LLC.[64]

Plaintiff responded to Defendants' motion to dismiss by stating that the *Delaware Express* case cited by Defendants was a post trial memorandum opinion and that it analyzed the facts as brought forth during discovery and trial.[65] Plaintiff cited various cases for the proposition that pleadings are to be simple, direct, and concise to provide notice to the defendants of the claim with the development of the claim left to the discovery process.

A Review of "Exhibit A"

Plaintiff attempted to set out the campaign of defamation that was levied against him by Defendants Taylor and Meekins in Exhibit A of his complaint. Exhibit A contains copies of emails and letters from Defendants, Plaintiff, and Plaintiff's wife.

Defendant Meekins' Communications

Letter from Defendant Barry Meekins to Plaintiff on February 5, 2004

In the letter, Defendant Barry Meekins questioned Plaintiff about a set of unsigned checks drawn on an account for Providence Creek Summer Camp, Inc. The checks were sent by Plaintiff to Defendant with a note attached directing that Meekins approve and return these checks to Plaintiff. Meekins stated that nine of the checks are indicated to be "LEAP Winter 04 Refunds" and the last is a check for reimbursement to Lori Bailey for "summer camp supplies".

[64] It is not clear whether Defendant LLC is consisted 1 or 3 entities from pleadings. Because this is not a motion for summary judgment, no affidavits have been filed.

[65] Plaintiff is correct that this case is inappropriate to state what is required to plead a defamation action. The Court relied on *Read v. Carpenter,* 1995 WL 945544 (Del. Super.).

Meekins explained that he has never seen this account before, nor was any explanation about the program included. Meekins stated that he returned the checks without his approval and that he was unaware of who actually had signature authority on this account.

Meekins next addressed the fact that he has asked Plaintiff for access to the Wilmington Trust account records for the various companies at the St. Joseph's site. Meekins stated that he has not received the requested access from Plaintiff. Meekins acknowledged that Plaintiff has given him printouts of several "Quik Books" records for some of the companies which Defendant has stated that he does not want. Meekins explained that Plaintiff has offered to allow him to review bank records locked in file cabinets in Jody's office (Plaintiff's wife) when she is present. Meekins stated that this was unacceptable. Meekins informed Plaintiff in the letter that Wilmington Trust informed him that records could be reproduced in 48 hours with a letter of authorization signed by the person having signature authority on the account. Meekins stated that he is confused why Plaintiff has not met his request for access.

In the letter Meekins told Plaintiff that this letter represents his formal request for access before he takes more drastic action.

Defendant then went on to state his opinions based on the minimal amount of information he has been provided. He found that "the account records are replete with co-mingling of funds and circuitous transactions that lead [him] to conclude that their intent is to conceal and confuse", and that the "accounting methods and the lack of basic 'cross checking' practices" are "wholly unacceptable."[66]

Plaintiff faxed this letter to Chuck Durante on February 5, 2004.

[66] Quotes from 2/5/2004 letter from Defendant Meekins to Plaintiff.

June 14, 2004 Letter from Defendant Barry Meekins to the Board of Directors of Defendant St. Joseph's at Providence Creek

In this letter, Defendant Barry Meekins raised issues concerning the financial and leadership structure of the Defendant St. Joseph's. Meekins also told of actions taken by Plaintiff that have poorly affected Defendant St. Joseph's financial structure.

The first issue presented was Defendant St. Joseph's unusual concentration in all financial and fiscal decision-making. The next issue was that the account reconciliation lacked an independent set of checks and balances. Meekins mentioned his concern about accountability because of the lack of checks and balances. Meekins next addressed that there appeared to be no well-defined system for revenue and expenditures accountability and/or resource management. Meekins stated that this applied equally to all aspects of every business unit on site. Finally, Meekins went on to write that there seems to be an almost universal commingling and/or intermingling of assets and revenues among the various businesses. Meekins stated that heraised financial issues to Plaintiff. However, Plaintiff refused to address and/or correct these problems according to Meekins.

In the letter, Meekins explained that he disclosed to the Executive Board areas of serious financial mismanagement. These included long histories of non-payment of bills, failures to collect and deposit revenues in a timely manner, delinquencies in taxes, commingling and intermingling of funds, no inventory controls, using corporate funds for personal purposes, self-dealing with corporate assets, and generally shoddy financial practices.

Meekins specifically stated that he discussed in the presence of members of the Executive Board that Plaintiff, without authorization other than his own, and apparently without any other person in the corporation knowing, used corporate funds to purchase vehicles for both

him and his wife and insured those vehicles at Defendant St. Joseph's expense. Plaintiff eventually acknowledged these purchases when Defendant confronted him about them. Plaintiff also agreed to remove those expenses from the corporate accounts and make the vehicle payments going forward with personal funds. However, Plaintiff would never discuss the total amount of corporate funds used on those items or other questionable personal expenditures.

Meekins then discussed the appropriateness of paying Plaintiff's wife a salary of over $55,000 for a bookkeeping position. Meekins explained that this type of salary was inappropriate considering the poor financial condition that Defendant St. Joseph's was in. Meekins added that this salary was not warranted, especially because Defendant St. Joseph's was already paying for a Chrysler 300 for Plaintiff's wife, along with other perks.

Next, Meekins discussed that Plaintiff gave the Director of the Pre-K program a $10,000 raise. Further, Plaintiff granted this raise without consulting or disclosing to any other administrative person. At the time that the raise was given, the Pre-K program was losing tens of thousands of dollars.

Meekins then stated that Plaintiff knowingly and wrongfully placed the Pre-K program, a separate non-profit business, on the insurance policy of Defendant Providence Creek Academy, which is a non-profit public Charter School. Meekins acknowledged that it does not seem that any state funds were expended for insurance that would not have otherwise been spent. These actions were being reviewed by the State Auditor. However, the insurance company now likelyhas a claim for approximately $11,000 for insurance premiums that should have been paid for the Pre-K Program.

June 18, 2004 Letter from Defendant Barry Meekins to the Board of Directors of Defendant St. Joseph's at Providence Creek

In this letter, Defendant Barry Meekins discussed in more detail Plaintiff placing the Pre-K and Aftercare Programs' insurance on Defendant Academy's policy improperly. The insurance company sent Plaintiff a letter in February, 2004 in response to his request. This letter informed Plaintiff that there was an additional charge of $4 per student for insuring these programs. The letter explained to Plaintiff that the rate was based on the affiliation with Defendant Academy, or the rate would have been significantly higher and some parts of the coverage would not be available at all. Meekins stated that this information was intentionally withheld from Defendant Academy and its representatives by Plaintiff.

Meekins stated that he informed Paul Kaercher, another Board member, that Plaintiff's continued failure to provide payroll detail with paychecks was a violation of state law. Meekins further stated that despite his urgings and Plaintiff's repeated assurances, no corrective action was taken. Further, Meekins explained to Kaercher that some employees would likely report the problem to the Department of Labor.

MOTION TO DISMISS ANALYSIS FOR DEFENDANT BARRY MEEKINS

After reviewing the communications attributable to Defendant Barry Meekins from Exhibit A, in conjunction with Count III of the complaint, Plaintiff's defamation claim cannot be dismissed against Defendant Barry Meekins.

The February 5, 2004 letter from Defendant Meekins to Plaintiff, even if it contained defamatory statements, cannot support a defamation action because it was not published to a third party. The letter was sent directly to the Plaintiff. Further, as set out above, Delaware does not recognize self-publication so when Plaintiff faxed the letter to a third-party, Charles Durante,

the publication requirement still was not satisfied. Therefore, Plaintiff cannot sustain a defamation action against Defendant Meekins based on this letter.

In respect to the above communications, except the February 5, 2004 letter, Plaintiff provided who made the defamatory statements (Defendant Meekins), the date of the communication, who the communication was published to (Board), and his injury (public ridicule). However, Plaintiff did not specifically allege what part of the statement was defamatory in character or that the third party understood the defamatory character of the communication.

Count III cannot be dismissed against Defendant Meekins based on this communication because the Court will not dismiss a claim unless the Plaintiff would not be entitled to recover under any circumstances that are susceptible to proof.[67] Here, there may be a circumstance that can be proved so dismissal is unwarranted. However, Plaintiff must provide a more definite statement as required by Rule 12 (e). Plaintiff's complaint "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading"[68], so a more definite statement is required.

Even if all elements to plead defamation were satisfied, the communication took place between those who had a legitimate interest in the above information; therefore, I anticipate having to resolve whether a conditional privilege existed.[69] Plaintiff is directed to file a more definite statement within twenty (20) days specifically setting forth what was false. Defendant Barry Meekins is to then file his answer within twenty (20) days.

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[67] *RSS Acquisition, Inc.,* 1999 WL 1442009, *2.
[68] DE R S Ct Rule 12 (e).
[69] *Lipson,* 790 A.2d at 1282 *quoting Bloss,* 2000 WL 303342 at *6.

Defendant Taylor's Communications

Letter from Defendant Taylor to the Executive Committee of Defendant St. Joseph's on April 26, 2004

In this letter, Defendant Taylor stated that the actions of the Executive Committee have placed his agreed assets in jeopardy. Taylor specifically cited that Plaintiff did not receive approval to solicit legal counsel on behalf of the Executive Committee, and if approval was given, the Committee met without Taylor knowing. Taylor explained that he planned to prepare a written list of questions for Plaintiff.

Taylor alleged that the Board or Committee is either unwilling or unable to deal with Plaintiff's apparent unauthorized expenditure of corporate funds for personal use. The personal expenditures included cars for Plaintiff and Plaintiff's wife and insurance for his family. Taylor explained that all these expenditures have been brought to the Committee's attention. Finally, Taylor wanted Plaintiff to provide full disclosure of corporate accounts and return any unauthorized personal expenditures.

Fax from Defendant Taylor to Charles Durante, Attorney for Plaintiff, Board of Defendant St. Joseph's, and at times Defendant LLC on April 28, 2004

The fax was a documentation of an earlier conversation between Defendant Taylor and Durante. Defendant Taylor asked the following six questions to Durante and included Durante's supposed answers:

1. Do you represent St. Joseph's at Providence Creek? You responded that you represented St. Joseph's for years.
2. Are you under a retainer agreement? You responded that you billed for services rendered.

3. Were [you] aware that [Plaintiff] used corporate funds to purchase personal vehicles for himself and his wife and insurance coverage without the knowledge of the Board of Directors? You responded "I need more information."

4. [Did] you advise [Plaintiff] of the propriety of such action either before or after the purchase of vehicles or insurance? You responded by saying that this was a "Board squabble" and did not want to discuss it and I should take it up with the Board.

5. [Did] you advise [Plaintiff] on the transfer of assets between corporations? You made no response.

6. [Defendant Taylor] asked [Durante] to fax any billings that occurred since January of 2003 to the present. You responded that you had not billed us since January 2004 and you made no further response to my request.

Finally, Taylor stated that this fax was a formal request for answers to the above questions in as much detail as possible and if any conflicts exist because of representation of Plaintiff, please advise when conflict occurred and why the Board was not informed.

Email from Defendant Taylor to the Board of Defendant St. Joseph's on May 1, 2004

This email stated that a list of questions that were to be answered was attached for the Board. The questions were:

1. Was [Plaintiff] authorized to purchase by Defendant St. Joseph's or any Corporation of St. Joseph's to purchase a new truck for himself, and/or new car for Mrs. Gilliland?

2. If the above answer is yes, did anyone on the either the executive committee or the board approve the purchase? Was there a formal meeting to approve the purchase? Were any board members aware of such a meeting? Did a board resolution authorize sole discretion on such purchases?

3. If the vehicles were purchased in the name of either St. Joe's, LLC or any Corporation of St. Joe's, has the sale been authorized by the Board?

4. Same as above but in relation to vehicle insurance?

5. During Executive Committee meeting on 4/25/2004, a Summerfest June 2003 Summary was presented and a list of Committee Members was provided. Are there detailed minutes for each meeting was held? If yes, please provide minutes for each meeting including the attendance list of each meeting.

6. Is a detailed list of all credit card and cash sales with the total number of tickets sold available?

7. As stated in the Summerfest June 2003 Summary, the poor performance in sponsorship sales and inclement weather caused serious income shortfall. Is any detailed information available to show why the poor in sponsorship sales is attributed to Lynn Cunningham and/or J.C. Mears? The Summerfest June 2003 Summary reports a loss of $139,011.12, can a detailed payment record be provided to indicate how this stated loss was paid for, to include where the income came from and also if all vendors were paid?

8. Insurance for Early Childhood Development Inc. and Summer Camp Program were paid for by the Providence Creek Academy Charter School. At any time

was the Board of the Charter School made aware of or asked to vote on allowing such insurance to be added to their policy? If yes, could authorization from Charter School be provided by either Early Childhood Development or Summer Camp Program?

9. Defendant Taylor requested termination of the additional coverage on 1/21/2004. He requested that termination occur as soon as other insurance was obtained. Joseph Gaynor of Pratt Insurance requested information from St. Joe's. The requested info was to be to quote new insurance for the Early Childhood Development and Summer Camp Program. As of this date, no info has been brought to the attention of Charter School. Can an explanation be provided? Charter School continues to provide such insurance as a good will gesture.

10. Ongard Security Inc. invoice 4676 has 2 charges for excess monitoring fees that total 433.06 (134.75 and 299.31). What was this for? If a malfunction occurred why were the necessary corrections not made? Additionally an excess activity fee was charged on invoice 4886 dated 7/1/03, this invoice was for maintenance and monitoring in July, August, and September. What did the excess activity fee cover and is there a detailed in voice? Invoice 5037 dated October 1, 2003 shows a charge of 226.07 for an excess activity fee. Can a detailed invoice be provided? Was the alarm system malfunctioning? If yes, why was the system not repaired?

11. During the 4/25/04 meeting of executive committee, a draft business plan was presented by Plaintiff. Included was a resolution to dissolve the Summer Camp Program and merge its assets with Early Childhood Development. A number of

questions were raised by Defendant Taylor. A sample of the questions follows: Do we have a list of all the assets? What would happen to the assets? Would they go to any of the churches mentioned? I request a list of all the assets.

12. I have requested a full Board meeting, is one planned and what is the date?

13. Was Lori Bailey authorized to sign company checks and make adjustments to preprinted checks?

June 26, 2004 Email from Defendant Taylor to Defendant Meekins,, Joyce Webber, Paul Kaercher, an employee of Wilmington Trust, and whoever controls email address admin@sjpf.org

This email discussed a meeting between Defendant Taylor, Defendant Barry Meekins, and Plaintiff. Taylor stated that Barry Meekins wanted Plaintiff to resign for what Plaintiff has done. Taylor explained that he wanted Plaintiff and Barry Meekins to work together on selling the land.

After the meeting Taylor stated that Plaintiff wanted to talk to him. Plaintiff called Taylor and left a message that he wanted to have a chance to rebut what Barry Meekins has said about him. Taylor told Plaintiff that Barry Meekins was ready to make a compromise on Plaintiff's resignation. Defendant Taylor declared that he informed Plaintiff that they needed to meet at 2:00 p.m. or he would call for Plaintiff's resignation. Plaintiff had not responded to this request as the writing of this email according to Taylor.

The email concluded with Taylor requesting a full Board meeting on June 29, 2004. He stated that he planned to discuss all events and items that have brought them to this point. He stated that he will ask Webber as secretary to call everyone because we need to bring this to an end or we will all fail.

June 26, 2004 Email from Defendant Taylor to Defendant Barry Meekins,, Joyce Webber, Paul Kaercher, and whoever controls email address admin@sjpf.org

This Email is directed towards Webber. It requested that Webber call everyone because Taylor has requested a full Board meeting after the meeting with Barry Meekins and Plaintiff.

MOTION TO DISMISS ANALYSIS FOR DEFENDANT TAYLOR

After reviewing the communications attributable to Defendant Taylor from Exhibit A in conjunction with Count III of the complaint, Plaintiff's defamation claim cannot be dismissed against Defendant Taylor.

Plaintiff provided who made the defamatory statements (Defendant Taylor), the dates of the communications, who the communications were published to, and his injury (public ridicule). Even though some of the allegedly defamatory communications were set out in the forms of questions, they can still be considered defamatory. However, Plaintiff did not specifically allege what parts of the statements were defamatory in character or that the third parties understood the defamatory character of the communication.

The Court will not dismiss a claim unless the Plaintiff would not be entitled to recover under any circumstances that are susceptible to proof.[70] Here, there may be a circumstance that can be proved so dismissal is unwarranted. However, Plaintiff must provide a more definite statement as required by Rule 12 (e). Plaintiff's complaint "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading"[71] so a more definite statement is required.

[70] *RSS Acquisition, Inc.,* 1999 WL 1442009, *2.
[71] DE R S Ct Rule 12 (e).

As with Meekins, I expect the question of conditional privilege will need to be addressed. Therefore, Plaintiff shall file a more definite statement within twenty (20) days setting what communications were false. Taylor is to file his answer within twenty (20) days of receiving the more definite statement setting forth.

Whether Defendant Taylor may be able to have Count III dismissed against him based on the immunity granted volunteers of not-for-profit corporations as established by10 Del. C. § 8133 as set out above[72]should not be ruled upon until the pleadings and discovery better develop the allegations and issues.

Plaintiff's Communications

Email from Jody Gilliland, Plaintiff's Wife, to Dave Evans, Joyce Webber, Paul Kaercher (Members of Board of Directors of Defendant St. Joseph's at Providence Creek) on April 9, 2004.

This email was sent to members of Defendant St. Joseph's Board from Jody Gilliland's email account. It documented a discussion on April 8, 2004 that Plaintiff had with Defendants Barry Meekins and Taylor in Defendant Meekins' office. It is Plaintiff's personal description of the discussion, but sent from his wife's email address.

Defendant Barry Meekins allegedly stated during the discussion described in the email that he intends to meet with the State Auditors Office, the Board of Defendant Providence Creek Academy Charter School, and the State Department of Education. Further, Meekins told how he had copied the information on St. Joseph's server and was going to turn it over to the state auditor. Meekins also allegedly implied that Plaintiff, Defendants St. Joseph's and its Board had engaged in questionable and illegal activities.

[72] See Analysis of Count I for full explanation of 10 Del. C. § 8133.

A summary of Meekins assertions were included in the email. These alleged assertions were that:

1. There are a major inconsistencies and illegal actions contained in accounting records.
2. The Board should move to accept the offer from the developer identified and contacted by Defendant Meekins and not involve Mark Dunkle in any potential transactions regarding the regarding the disposition of portions of Defendant St. Joseph's real estate holdings.
3. Defendant St. Joseph's Executive Committee should not have allowed a board member to adopt the Pre K Program for review and decision.
4. Defendant Meekins intends to take whatever steps are required to block the sale of the transportation business by Defendant St. Joseph's.
5. The Executive Committee of Defendant St. Joe's is extremely ineffective and unable to reach decisions.

Meekins left the meeting with Plaintiff and Defendant Taylor. Plaintiff then discussed with Taylor what Barry Meekins said. Defendant Taylor seemed surprised by Meekins' actions and statements. Plaintiff told Defendant Taylor that he took Defendant Meekins very seriously and had to consider what position and/or action to take.

This email seems to be self-published because Plaintiff is summarizing what Defendant Meekins said while in a discussion with Defendant Taylor and himself. Even though the email comes from his wife's email address, Plaintiff would not be able to meet the publication requirement for a defamation action because he published it himself or provided it to a third-

party, his wife, who published it. Therefore, Plaintiff cannot sustain an action for Defamation based on this email.

June 22, 2004 Email from Plaintiff to Dave Evans, Joyce Webber, and Paul Kaercher

The subject of this email was "Last Nights Meeting". Plaintiff stated that Defendant Barry Meekins' behavior at last night's meeting was totally unacceptable. Plaintiff stated that he was embarrassed and upset that we have all allowed this behavior to continue since January. Plaintiff stated further that Meekins' influence disrupted the entire meeting. Plaintiff explained that Meekins' behavior has set Plaintiff and Taylor at odds with each other and overall it is affecting the ability of the entire organization to function properly.

This email cannot be used to sustain an action for defamation against either Defendant Taylor or Defendant Barry Meekins. Nothing appears to be defamatory. Further, Plaintiff self-publishes this email so it cannot be considered defamatory because it does not satisfy the publication requirement for a defamation action. Therefore, Plaintiff cannot sustain an action for defamation based on this document.

Others' Communications

Three Emails on May 3, 2004, May 4, 2004, and June 10, 2004

Included in Exhibit A were three emails that were not written by either Defendant Meekins or Defendant Taylor. Thus, they are not pertinent to the defamation claims against these Defendants. Therefore, the details of such emails will not be discussed.

D. Respondeat Superior

Defendants St. Joseph's and LLC argued that Count III of Plaintiff's complaint should be dismissed against them as well because Plaintiff did not allege that Defendants Taylor and Barry

Meekins were employees of Defendants St. Joseph's or LLC. Defendants cited *TIG Ins. Co. v. Royal Ins. Co. of America*[73] to show that the doctrine of respondeat superior only imposes liability on an employer for the wrongful acts of its employees while they are in their scope of employment. St. Joseph's and LLC claimed that Plaintiff does not allege that Defendants Taylor and Meekins were employees or that they made the defamatory statements while in the scope of their employment. Further, these Defendants also raise the arguments of Defendants Taylor and B.W. Meekins that Plaintiff has not sufficiently pled his defamation claims citing *Delaware Express*.

Plaintiff responded that Defendants Taylor and Barry Meekins were actually employees of Defendant LLC and were agents of Defendant St. Joseph's because it owned Defendant LLC. Plaintiff stated that Defendants St. Joseph's and LLC should be held responsible for Defendant Taylor and B.W. Meekins actions because of this alleged employment and agency relationships.

However, Plaintiff did not allege what the defamatory statements were and if the defamatory statements were made, that they were made while in the scope of their employment. Therefore, Plaintiff shall file a more definite statement within twenty (20) days setting forth what is false about the above communications and an answer shall be filed within twenty (20) days after receiving the more definite statement.

COUNT III CONCLUSION

Count III is not ripe for decision at this point. Thus, Plaintiff is required to file a more definite statement within twenty (20) days and answers shall be filed within twenty (20) days of receiving the more definite statement.

[73] 2004 WL 728858 (Del. Super.).

V. Count IV

Count IV of Plaintiff's complaint stated:[74]

58. Plaintiff restates and incorporates paragraphs 1-57 above.

59. Defendant Providence Creek Academy Charter School, Inc. by and through its Board of Directors, having received false, defamatory and misleading information, knowing or having reason to know that same was false and misleading (See Taylor email and attachment of May 21, 2004 in Exhibit A)[75], disseminated this information to various members of the public including school parents Andrea Gott, Lori Bailey and Crystal Gavidia who indicated they received information from Board member Drake, and Defendant Cunningham and Defendant Eichler. In making this dissemination of false and misleading information Providence Creek Academy Charter School, Inc. and its Board of Directors knowingly engaged in slander and libel aimed at destroying the reputation and professional position of Plaintiff James Gilliland.

60. In a series of casual meetings in May and June of 2004 Defendants Jennifer Meekins, Messick and Drake and on information and belief Horan and Slapcinsky met with Defendants Webber, Kaercher, David Evans. At these meetings the named members of the Board of Providence Creek demanded action against Plaintiff Gilliland including his termination and other financial compensation for alleged financial improprieties.

WHEREFORE James Gilliland prays judgment against Providence Creek Academy Charter School Inc. and each of named members of the Board of Directors individually for past and future wages, fringe benefits, damage to reputation, loss of

[74] Below taken verbatim from Count III of Plaintiff's Amended Complaint.
[75] There is no email included in Exhibit A dated May 21, 2004.

business opportunity, intentional infliction of emotional and mental distress, punitive damages attorney's fees, costs and such other relief as a duly constituted Court deems just.

David Evans, Paul Kaercher, Joyce Webber, Mark Slapcinsky, Thomas Eichler, and Diane Cunningham have been dismissed from this action and are no longer defendants. Thus, members of Defendant Academy's Board who are still subject to this action as defendants are Jennifer Meekins, Harold Horan, Michelle Drake, Joan Messick, and Charles Taylor.[76]

Defendants raised issues with Plaintiff's complaint in their motions to dismiss. All claimed that Plaintiff's complaint did not allege even one defamatory statement, nor did it identify to whom such a statement was published. They stated that Plaintiff attached to the complaint as Exhibit A, 16 letters, emails, and faxes as examples of the defamatory conduct. However, some of these documents were written by Plaintiff and others were sent only to Plaintiff. Defendants raised that Plaintiff specifically cites a May 21, 2004 email, but no such email exists.

Further, as to Exhibit A, Defendants claimed that Plaintiff has not alleged that the statements were false and defamatory, nor did Plaintiff explain how the statements were published or how such publication would damage his reputation.

This Count fails if the above defamation counts fail but for now Count IV cannot be dismissed because the Court will not dismiss a claim unless the Plaintiff would not be entitled to recover under any circumstances that are susceptible to proof.[77] Here, there may be a circumstance that can be proved so dismissal is unwarranted. However, Plaintiff must provide a

[76] Information found in Amended Complaint.
[77] *RSS Acquisition, Inc.,* 1999 WL 1442009, *2.

more definite statement as required by Rule 12 (e). Plaintiff's complaint "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading"[78] so a more definite statement is required. Therefore, Plaintiff shall file a more definite statement setting forth what communications were false, and which Defendants published to which third party(s), within twenty (20) days. Defendants are to file their answers within twenty (20) days of receiving the more definite statement.

VI. Count V

Count V of Plaintiff's complaint states:[79]

61. Plaintiff restates and incorporates paragraphs 1-60 above.

62. Defendants Evans, Webber, Taylor, Kaercher, and Plaintiff Gilliland are corporate officers and members of Providence Creek Center for Autistic Research and Education.

63. On January 30, 2004 Defendant B.W. Meekins and Defendant Meekins advised the Board of Directors of St. Joseph's that Plaintiff James Gilliland and his spouse, Jody Gilliland had misappropriated $5,000 from CARE while Defendant Meekins knew or had reason to know that $5,000 was in possession of Defendant Meekins, daughter of Defendant B.W. Meekins.

64. St. Joseph's and each of its named Directors having knowledge or having reason to have knowledge of the true facts and circumstances surrounding these allegations failed to take steps to protect the Plaintiff James Gilliland from public ridicule and suspicion of theft thereby advancing the slanderous statements including removing

[78] DE R S Ct Rule 12 (e).
[79] Below taken verbatim from Count III of Plaintiff's Amended Complaint.

> Plaintiff as Executive Director requiring a three member management team which included Taylor and Meekins and terminating Plaintiff's spouse causing Plaintiff James Gilliland severe and substantial emotional distress, loss of reputation, and contributing to the atmosphere in which the Plaintiff was eventually terminated by his employers.
>
> **WHEREFORE** Plaintiff prays judgment against the Defendants B.W. Meekins and Meekins for damages of past and future wages, fringe benefits, damage to reputation, loss of business opportunity, intentional infliction of emotional and mental distress, punitive damages, attorney's fees, costs and such other relief as duly constituted Court deems just.

David Evans, Joyce Webber, and Paul Kaercher are no longer defendants in this action because they have been dismissed.

Defendant Barry Meekins claimed that the bare allegations in Count V cannot serve as the basis for any kind of claim against him because it is unclear what type of legal claim Plaintiff is seeking to make in Count V. Defendant Barry Meekins stated that Plaintiff did not allege that he advised the Board of Defendant St. Joseph's that Plaintiff misappropriated $5,000 from CARE while knowing himself that the money was allegedly in possession of Defendant Jennifer Meekins. Thus, Plaintiff has not alleged any wrongdoing on the part of Defendant Barry Meekins. Further, Defendant Barry Meekins argued that the thrust of Count V appears to be against Defendant St. Joseph's and certain unknown directors.

Further, Defendant Barry Meekins raised the same arguments to dismiss Count V that were argued against Count III; specifically that Plaintiff has not satisfied all the elements for a

defamation claim and that Plaintiff did not plead special damages as required for a slander action. Defendant Jennifer Meekins raised this same reasoning as why Count V should also be dismissed in relation to her. However, these communications discussed Plaintiff's trade, profession, or business and/or imputed a crime to him; both are categories under slander per se so there is no need to plead special damages.[80]

Plaintiff responded that he provided the date, place, the false allegation, who the communication was published to, and how the statements damaged the Plaintiff. Thus, Plaintiff claimed that a case against Defendants Barry and Jennifer Meekins is made with all specificity.

Here, Count V is set out as required by law with all elements provided by Plaintiff so Count V survives. However, the communication took place between members of the Board. Thus, the parties all had a legitimate interest in such information so the conditional privilege defense may exist.[81] Nevertheless, this defense cannot be raised in a motion to dismiss.[82] Therefore, Plaintiff may go forward with this count. Defendants are required to file their answers. This may be done after Plaintiff files his new pleading as to the other counts.

VII. Count VI

Count VI was dismissed by Plaintiff so it is not addressed.

VIII. Count VII

Count VII of Plaintiff's complaint stated:[83]

69. Plaintiff restates and incorporates paragraphs 1-68 above.

70. As a sign of good faith Plaintiff James Gilliland from time to time utilized his

[80] *Spence,* 396 A.2d at 971.
[81] *Lipson,* 790 A.2d at 1282 *quoting Bloss,* 2000 WL 303342 at *6.
[82] *Klein,* 94 A.2d at 392.
[83] Below taken verbatim from Count VII of Plaintiff's Amended Complaint.

personal credit for purposes of advancing the interests of Defendant's St. Joseph's, at Providence Creek

71. Plaintiff, at time of his alleged termination had advanced and not been reimbursed $15,000 for certain fund raising activities conducted by Defendants St. Joseph, at Providence Creek

72. Despite repeated demands, no reimbursement of said sum has been forthcoming.

WHEREFORE Plaintiff prays judgment against Defendants St. Joseph's, Providence Creek in sum of $15,000 plus interest at legal rate from the date hereof and compensation for damage to Plaintiff's personal credit.

Defendants stated that Plaintiff did not identify the legal theory which he is seeking to recover some $15,000 in expenses he incurred and therefore the claim must be dismissed on this basis alone. Further, Defendants stated that if Plaintiff is suing for breach of contract he has failed to allege the existence of a contract or plead facts that establish any contractual obligation. Defendants argued that Plaintiff has not alleged that any of the expenditures were authorized by Defendants or that Defendants promised to repay Plaintiff. Defendants stated that Plaintiff did not allege any facts that prove that Plaintiff did not voluntarily spend this money.

Defendant LLC stated that the allegations are that the Plaintiff spent the money to advance the interests of Defendant St. Joseph's and Defendant Academy, not LLC. Therefore, Defendant LLC found it a mystery why it was included in Count VII.

Count VII cannot be dismissed because the Court will not dismiss a claim unless the Plaintiff would not be entitled to recover under any circumstances that are susceptible to proof.[84]

[84] *RSS Acquisition, Inc.,* 1999 WL 1442009, *2.

Here, there may be a circumstance that can be proved so dismissal is unwarranted. However, Plaintiff must provide a more definite statement as required by Rule 12 (e). Plaintiff's sloppy pleading of Count VII requires that a more definite statement be filed. Plaintiff's complaint "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading".[85] Plaintiff does not make it clear why or if Defendant LLC is even named in this count. Plaintiff used the term "Defendants" in paragraph 71 of his complaint so it seems to include LLC as a party which Count VII is brought against. Plaintiff's alleged fundraising activities were not conducted on behalf of Defendant LLC so it is unclear why LLC would be named. Therefore, Plaintiff shall file a more definite statement within twenty (20) days setting forth who Count VII is actually being brought against and based on what legal theories. Defendants are to file their answers within twenty (20) days of receiving the more definite statement.

CONCLUSION

Count I as to Defendant Taylor, and Count II are dismissed. Counts III, IV, V, and VII survive the motions to dismiss. However, Plaintiff shall file a more definite statement as set out by Rule 12 (e) within twenty (20) days for all surviving counts. Answers will be filed within twenty (20) days of receiving the more definite statements.

Each person involved in this case became board members and employees to further the good of the community. Differences between the parties need to be put aside for the good of the

[85] DE R S Ct Rule 12 (e).

community and the school. I urge everyone to reconsider their respective positions to determine if the expense and collateral damage to the community is worth continuing with this lawsuit.

Very truly yours,

T. Henley Graves

oc: Prothonotary