

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 27th day of August, 2019.*

Present: All the Justices

James Brayboy, Appellant,

against Record No. 180426  
Circuit Court No. 087CL17000883-00

Amber Durette, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Henrico County.

James Brayboy appeals from the judgment of the circuit court dismissing his defamation action against Amber Durette.<sup>1</sup> We granted two assignments of error: 1. The circuit court erred in sustaining Durette's demurrer to the claim of defamation; and 2. The circuit court erred in sustaining Durette's plea in bar of sovereign immunity to the claim of defamation.

Upon consideration of the record, briefs, and argument of counsel, we conclude that Brayboy failed to preserve the arguments he makes in support of his first assignment of error, which renders moot our consideration of the second assignment of error. Therefore, the Court is of opinion that the judgment of the circuit court should be affirmed.

I.

Brayboy filed an amended complaint asserting that Durette, a school resource officer employed by Henrico County, made defamatory statements against him regarding events

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<sup>1</sup> Although Brayboy's petition for appeal included assignments of error to rulings by the circuit court on claims made against other defendants named in Brayboy's amended complaint, the Court granted the appeal only as to assignments of error to rulings on the claim of defamation against Durette. Therefore, our discussion is limited to the claim of defamation against Durette.

that took place at his child's elementary school. In response to the amended complaint, Durette filed a demurrer and plea in bar.<sup>2</sup> She asserted in her demurrer that count I of the amended complaint, alleging defamation, failed to state a claim upon which relief could be granted because, among other grounds, it failed to "delineate the most basic elements of a defamation claim, or what statements or actions allegedly taken by the individual defendants satisfy those elements." She further asserted that the amended complaint "makes no allegation sufficient to permit the Court to discern what statements are complained of, who specifically made them, or how they were defamatory." Durette asserted in her plea in bar that she shared her employer's sovereign immunity and was immune from liability for statements made in court, statements made in administrative proceedings, and for statements in which she had an interest. Durette also asserted statutory immunity under Code § 8.01-47 and the statute of limitations.

Brayboy filed no written response to the demurrer and plea in bar. In lieu of a response, Brayboy filed a motion for leave to file a second amended complaint.<sup>3</sup> At the hearing noticed for the plea in bar, demurrer, and Brayboy's motion for leave to file a second amended complaint, Brayboy explained that while his motion for leave to amend "was filed as a responsive pleading," he was prepared to argue against the plea in bar and demurrer if necessary. After hearing arguments, the circuit court denied Brayboy's motion for leave to amend.

With regard to the demurrer to the defamation claim, Durette argued that the amended complaint "fails to identify the elements of that claim or to specify what conduct meets

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<sup>2</sup> The demurrer and plea in bar were filed on behalf of all three individual defendants named in the amended complaint.

<sup>3</sup> Although Brayboy filed his amended complaint pro se, he subsequently obtained counsel and was represented by counsel on October 17, the date he filed his motion for leave to amend, and thereafter, including on the date of the hearing, December 15.

those elements” and that “[m]erely using the word[s] ‘defamation’ or ‘actual malice’ is not sufficient to allege a cause of action.”<sup>4</sup> Durette further argued that “a case for defamation can only advance upon statements which may actually defame a plaintiff” and “[t]here’s no allegation to state which specific statements are complained of, who made them, or how they meet the elements required to articulate the minimum elements of a defamation claim.”<sup>5</sup>

In response to Durette’s arguments, Brayboy only presented argument in opposition to the grounds asserted in Durette’s plea in bar. Specifically, Brayboy argued that sovereign immunity only applies to acts within the scope of employment that are not done with actual malice or intent to do harm and that “[t]aken on its face, and with the broadest interpretation and all reasonable inferences to be drawn therefrom, the second amendment . . . clearly alleges intentional acts taken outside the scope of employment with actual malice.” Brayboy further argued that if those actions were taken with actual malice, “the employees would not be entitled to the [Code §] 8.01-47 statutory protection.”<sup>6</sup>

Brayboy also asserted that even if the circuit court “does sustain a plea in bar

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<sup>4</sup> Durette expressly adopted the arguments made by the Henrico County School Board, which was also named as a defendant in the amended complaint. Durette’s counsel, who represented the Henrico County School Board and the other individual defendants, first presented argument in support of the School Board’s demurrer and plea in bar. When counsel next presented argument in support of the individual defendants’ demurrer and plea in bar, counsel noted that Brayboy’s claims against the individual defendants were the same as those against the School Board and that “the individual Defendants’ demurrer tracks the same argument that I’ve already made with regard to the School Board, so I won’t restate it now, except to reiterate that the amended complaint fails to allege any facts or state any claims upon which relief may be granted, and it must be dismissed as a matter of law.”

<sup>5</sup> Durette also presented argument in support of her plea in bar. In light of our ruling, it is unnecessary to recite that argument.

<sup>6</sup> In the context of Brayboy’s argument that sovereign immunity did not apply to intentional acts taken outside the scope of employment with actual malice, his counsel referred to the “demurrer” instead of the “plea in bar.”

against the School Board which there is some case law to support, it should not sustain those same pleas against the individual Defendants.” In addition to arguing that sovereign immunity does not apply to intentional torts or to acts done with actual malice, Brayboy argued that his case was not time-barred and that the elements of forgery and unlawful discriminatory practices were alleged “[f]or the purpose of moving beyond the sovereign immunity plea” and “qualified immunity.” Although Brayboy asked the circuit court to “overrule the demurrers,” he argued the circuit court should do so because “sovereign immunity does not stand against employees who act outside the scope of their employment with intention or actual malice to commit harm.” Brayboy did not, however, address the grounds of the demurrer or the arguments made by Durette to support her demurrer.

At the conclusion of the hearing, the circuit court ruled that it would sustain the demurrer and the plea in bar, and dismiss Brayboy’s action without leave to amend. On the final order subsequently entered, Brayboy noted his objection stating that the “rulings were made without evidence and without inferences required and as otherwise stated at the hearing.”

## II.

On appeal, Brayboy contends the circuit court erred in sustaining the demurrer to his defamation claim against Durette because his amended complaint adequately identified defamatory statements concerning Brayboy made by Durette. According to Brayboy, his amended complaint alleged that “Durette falsely asserted to others that Brayboy called her a ‘bitch’” and that Durette was involved in the circulation of an e-mail accusing Brayboy of engaging in “disorderly conduct.” Because Brayboy’s arguments were not raised in the circuit court, however, they are not preserved for appeal.

In the circuit court, Brayboy filed no written response to Durette's demurrer except for his motion for leave to file a second amended complaint. At the hearing in the circuit court, Durette presented legal arguments to support her demurrer, specifically including her assertion that the amended complaint contained no allegations "to state which specific statements are complained of, who made them, or how they meet the elements required to articulate the minimum elements of a defamation claim." Brayboy did not respond to Durette's argument or present any legal argument in opposition to the demurrer.<sup>7</sup>

In this Court, Brayboy argues that his amended complaint contains sufficient allegations to state a claim of defamation against Durette because it identifies two defamatory statements concerning Brayboy made by Durette. In particular, Brayboy contends his amended complaint asserts that Durette falsely accused him of calling her a "bitch" and that Durette took part in the circulation of an e-mail falsely accusing him of disorderly conduct. Brayboy did not make these arguments – or any legal argument in opposition to the demurrer – to the circuit court. Accordingly, Brayboy failed to preserve these arguments for appeal. *See* Rule 5:25; *cf.* *Luckett v. Jennings*, 246 Va. 303, 306 (1993) (concluding plaintiff adequately preserved his argument in support of his assertion that the circuit court erred in sustaining demurrers because he "presented to the trial court a memorandum of points and authorities that discussed, among other things, the reasons why his motion for judgment sufficiently alleged injury to his

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<sup>7</sup> As noted previously, while Brayboy used the word "demurrer" during his argument in the circuit court, in each instance he was referring to the plea in bar in the context of his argument in opposition to the plea in bar. Furthermore, on the final order, Brayboy did not state a specific ground for his objection to the court's ruling sustaining the demurrer, noting only that all "rulings were made without evidence and without inferences required and as otherwise stated at the hearing."

business”).<sup>8</sup>

Brayboy’s failure to preserve the arguments he makes to support his assertion that the circuit court erred in sustaining Durette’s demurrer to the defamation claim against her renders moot our consideration of his assertion that the circuit court erred in sustaining Durette’s plea in bar of sovereign immunity to the defamation claim against her.

III.

For the foregoing reasons, we affirm the judgment of the circuit court.

This order shall be certified to the said circuit court.

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Teste:



Clerk

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<sup>8</sup> Although Rule 5:25 permits the Court to exercise the discretion to consider arguments raised for the first time on appeal “to enable [it] to attain the ends of justice,” we see no reason to apply the ends of justice exception in this case.