

Virginia and the amount in controversy exceeds \$75,000. *See* 28 U.S.C.A. § 1332 (West 1993 & Supp. 2001).

The plaintiff, Dr. Alvin C. Proffit, at the times specified in the complaint, served as the superintendent of schools in Grayson County, Virginia. According to the complaint, the school system's maintenance department obtained a building permit on August 1, 2000, in order to build an aboveground storage tank at Grayson County High School.

On August 7, 2000, a concrete pad was poured to serve as a foundation for the storage tank. On August 28, 2000, the director of maintenance, William Cox, spoke with one of the defendants, William Dale Ring, the county building inspector, about the project. Ring told Cox that a letter was required from the project architect to show that the concrete pad was adequate to support the storage tank. Cox delivered a letter from the project architect to Ring on September 6, 2000.

On September 8, 2000, Ring appeared before a magistrate in Grayson County and swore out a warrant for the plaintiff's arrest on the charge that he "[f]ailed to obtain a building permit before beginning work on a ten thousand gallon storage tank and concealing work prior to the required inspection by pouring a concrete slab." On October 3, 2000, the date of trial, the charge was nol prossed on the motion by the other defendant, J.D. Bolt, the Commonwealth's attorney of Grayson County.

The plaintiff alleges that the defendants should be liable for malicious prosecution because they acted together to “instigate[] and procure[]” the prosecution of the plaintiff falsely and maliciously, knowing that no probable cause existed.

The plaintiff also alleges that the defendants conspired to willfully and maliciously damage the plaintiff in his reputation, business, trade and profession such that they should be liable under the Virginia conspiracy statute, Va. Code Ann. §§ 18.2-499, 500 (Michie 1996).

In response to the complaint, both defendants filed motions to dismiss, which were briefed and argued and are ripe for decision.

II

The defendants filed separate motions to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6). The defendants assert that the plaintiff’s claims are barred under a number of immunity theories. In addition, the defendants argue that the plaintiff’s statutory cause of action fails to state a claim upon which relief can be granted because (1) the plaintiff does not seek business damages; and (2) because the defendants were both employees of Grayson County and thus legally could not conspire together.

Bolt and Ring first argue that they are entitled to the protection embodied in the Eleventh Amendment, which forbids federal courts from hearing suits by an individual against a state. Bolt contends that a Commonwealth's attorney is a state official and that when a state official is sued in his official capacity, he is entitled to the same immunity as the state. Ring argues that the same rule applies to him as a building inspector.

Bolt notes that the plaintiff did not specify in the complaint whether Bolt was sued in his official or individual capacity, but argues that the complaint should be construed as suing Bolt in his official capacity. Similarly, Ring argues that while the plaintiff did not specify in what capacity the plaintiff sued him, "there is no question" that the plaintiff sued him in his official capacity as Grayson County building inspector. Accordingly, the defendants conclude that the plaintiff's case is barred by the Eleventh Amendment.

Next, Bolt argues that he is also entitled to immunity in his position as a public prosecutor. Bolt contends that under the *Imbler* line of cases, prosecutors are entitled to absolute immunity from suit when acting in performance of the "quasi-judicial" functions of the office. *See Imbler v. Pachtman*, 424 U.S. 409, 424 (1976). According to Bolt, the prosecutor's quasi-judicial functions include deciding whether to proceed

with charges. Bolt contends that because it is alleged that he only prosecuted the plaintiff for a criminal charge, he is absolutely immune from the plaintiff's suit.

Ring utilizes the same rationale and asserts that a building inspector acts like a prosecutor in enforcement of the building code. He argues that the quasi-judicial functions of building inspector include enforcement of the building code through obtaining summons or arrest warrants. Therefore, Ring concludes that he should also be entitled to absolute immunity.

The plaintiff contends that Bolt is not entitled to absolute immunity as a prosecutor. The plaintiff argues that Bolt assisted Ring "in creating a false charge" against the plaintiff and then directed Ring to swear out a warrant. According to the plaintiff, these actions were not "intimately associated with the judicial phase of the criminal process" and would thus remove Bolt's absolute immunity. *See Carter v. Burch*, 34 F.3d 257, 261-62 (4th Cir. 1994) (citing *Burns v. Reed*, 500 U.S. 478, 492-96 (1991), which held that under § 1983, prosecutors are only entitled to qualified immunity for advising the police).

Bolt and Ring also raise challenges to the plaintiff's statutory cause of action. First, they contend that the Virginia conspiracy statute only proscribes conduct that causes injury to business interests. The defendants conclude that the plaintiff's claim

should be dismissed because he claims only damage to his personal reputation, which the statute does not cover.

The plaintiff responds that the statute allows all types of reputation damages by its plain language and thus does not require the plaintiff to show that the defendants' primary purpose was to injure him in his trade or business.

Lastly, the defendants argue that the statutory cause of action should be dismissed under the intra-corporate immunity doctrine. Under that rule, a corporation cannot conspire with itself. The defendants argue that since Ring and Bolt are both officials of Grayson County, they could not conspire together.

III

A

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to the plaintiff, the plaintiff is not entitled to relief. The court may not dismiss a complaint unless the plaintiff can prove no set of facts which would entitle the plaintiff to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). “The issue is not whether a plaintiff will ultimately prevail but whether the

claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

It is not necessary to set forth a particular legal theory, but rather a party is required only to make “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a); *See* Charles Alan Wright, *Law of Federal Courts* § 68 (5th ed. 1994). The court is obligated to construe the complaint as asserting “any and all legal claims that its factual allegations can fairly be thought to support.” *Martin v. Gentile*, 849 F.2d 863, 868 (4th Cir. 1988).

A federal court exercising diversity jurisdiction must apply the law of the state in which it sits, *see Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938), and thus Virginia substantive law applies in this case.

B

The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI.

The Supreme Court has construed the effect of the amendment as depriving federal courts’ jurisdiction over actions by a citizen against a state, when the state has not consented. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-99

(1984). In the absence of consent, an action against a state official sued in his official capacity is also barred by the Eleventh Amendment because the suit is deemed to be against the state. *See Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 462-63 (1945). This bar pertains both to federal and state causes of action. *See Halderman*, 465 U.S. at 121.

On the contrary, when an individual sues a state official in his individual or personal capacity—in other words, when the plaintiff seeks to recover damages from the official, rather than from the state—the Eleventh Amendment is not a bar. *See Alden v. Maine*, 527 U.S. 706, 757 (1999).

The plaintiff in this case has not specified in what capacity he has sued the defendants. Where, as here, the Eleventh Amendment may be involved, this determination is particularly important. If the plaintiff has sued the defendants in their official capacities, he is barred from proceeding with the case, but if he has sued them in their individual capacities, the Eleventh Amendment does not apply.

The Fourth Circuit has directed that in order to make this determination, “the court must examine the nature of the plaintiff’s claims, the relief sought, and the course of proceedings.” *Biggs v. Meadows*, 66 F.3d 56, 61 (4th Cir. 1995). Factors that weigh in favor of finding that the official has been sued in his individual capacity include the plaintiff’s failure to plead that the defendant acted according to official

policy or custom and whether the plaintiff requested compensatory or punitive damages, which would be unavailable in an official capacity suit. *See id.* The focus of the court's determination should be "whether the plaintiff's intention to hold a defendant personally liable can be ascertained fairly." *Id.*

I find under the circumstances in this case that the plaintiff has sued the defendants in their individual capacities. First, the complaint does not allege that the defendants acted in accordance with an official policy or custom. Bolt claims that the plaintiff's statements in the complaint identifying Bolt as Commonwealth's attorney mean that the plaintiff sued him in his official capacity. Similarly, Ring argues that the plaintiff sued him in his official capacity when he alleged that Ring "is and has been at all times relevant to this action the Grayson County Building Inspector acting as an employee and agent for the office of the Grayson County Building Inspectors." However, I find that neither of these statements implicate an official policy, but merely indicate the defendants' employment and that they are officials in Grayson County.

Likewise, the complaint requests compensatory and punitive damages. Under *Biggs*, these demands suggest that the plaintiff sued the defendants in their individual capacities.

Because I find that the defendants are sued in their individual capacities, this suit is not barred by the Eleventh Amendment.

C

Another limitation on jurisdiction exists under the common law doctrine of sovereign immunity, which is separate from the protection of the Eleventh Amendment. *See Medicenters of Am. v. Va.*, 373 F. Supp. 305, 307-08 (E.D. Va. 1974). “The privilege of suing [a state] is a grace, which she extends or withholds as to her may see, just and proper. . .” *Maury v. Commonwealth*, 23 S.E.757 (Va. 1895). State officials acting in the course of their employment are also protected from suit under this doctrine. *See Elder v. Holland*, 155 S.E.2d 369, 372 (Va. 1967). However, this protection does not protect an official who has committed an intentional tort. *See id.* In the present case, the plaintiff has alleged that the defendants committed the torts of malicious prosecution and conspiracy. Because these are intentional torts, sovereign immunity does not apply.

D

Aside from the Eleventh Amendment and common law sovereign immunity, the defendants also argue that they are protected by a third form of immunity—prosecutorial immunity.

Judges have absolute immunity from civil liability even when their actions are malicious. *See Harlow v. Clatterbuck*, 339 S.E.2d 181, 184 (Va. 1986). This common law immunity has been extended to include public prosecutors. The prosecutorial immunity is considered derivative of the judicial immunity and is sometimes referred to as “quasi-judicial” immunity. *See Imbler*, 424 U.S. at 423 n.20.

In *Imbler*, the Supreme Court analyzed the common law history of prosecutorial immunity and concluded that the rule was “well settled” that prosecutors were absolutely immune from acts within the scope of their duties. *Id.* at 422-24. The Court then went on to apply the common law doctrine to actions under 42 U.S.C.A. § 1983.

Subsequent cases used the so-called “functional” approach to determine whether absolute immunity would apply under § 1983. *See id.*; *Buckley v. Fitzsimmons*, 509 U.S. 259, 276-77 (1993) (holding that prosecutors are not entitled to absolute immunity under § 1983 when performing investigatory functions normally performed by a police officer or for making false statements to the press); *Burns v. Reed*, 500 U.S. 478, 491-93 (1991) (holding that prosecutor was entitled to absolute immunity under § 1983 for actions taken at probable cause hearing but not for giving advice to police).

Virginia has recognized judicial immunity, *see Clatterbuck*, 339 S.E.2d at 184, but prosecutorial immunity has not been directly addressed by Virginia’s highest court. As noted in *Imbler*, absolute immunity of a prosecutor at common law is well-settled.

The Supreme Court first recognized the doctrine in *Yaselli v. Goff*, 257 U.S. 503 (1927), when it affirmed a Second Circuit decision that an assistant United States attorney had absolute immunity from a malicious prosecution action. *See Yaselli v. Goff*, 12 F.2d 396, 406 (2d Cir. 1926).

The Restatement of Torts also recognizes absolute immunity. “A public prosecutor in his official capacity is absolutely privileged to initiate, institute, or continue criminal proceedings.” Restatement (Second) of Torts § 656 (1977). “Absolute” in this context means that the prosecutor is immune even if he proceeded knowingly without probable cause and acted with a malicious purpose. *See id.* cmt b.

I find that Virginia law contains prosecutorial immunity and that under the facts alleged Bolt is immune by this doctrine. The plaintiff alleges in his complaint that Bolt “instigated and procured” prosecution of the warrant with Ring. Even assuming this allegation is true, Bolt acted within the office of the Commonwealth’s attorney, which includes initiating criminal proceedings. Furthermore, even if Bolt acted solely out of a malicious purpose in the instigation of the charge against Proffit, he is still absolutely immune from a civil suit.¹ Therefore, this suit is barred as against Bolt.

¹ Of course, prosecuting attorneys may be held accountable for improper actions by criminal laws and professional responsibility discipline. *See Imbler*, 424 U.S. at 429.

Ring argues that absolute immunity should apply to him as well because he acts as a prosecutor by enforcing the criminal laws. I disagree. A building code inspector's duties are more like those of a police officer in enforcing the law, rather than a Commonwealth's attorney, who judicially prosecutes violations of the law. *Compare* Va. Code Ann. § 15.2-1704 (Michie Supp. 2001), *and* 13 Va. Admin. Code 5-61-41 § 107 (West 2001), *with* Va. Code Ann. § 15.2-1627 (Michie 1997). Police officers are not entitled to absolute immunity at common law. Rather, the general rule is that they will be free from liability if they acted in good faith and with probable cause. *See Pierson v. Ray*, 386 U.S. 547, 554 (1967). In malicious prosecution actions in Virginia, “[i]f probable cause exists, it is an absolute protection . . . even when malice is proved.” *Freezer v. Miller*, 176 S.E. 159 (Va. 1934). Malice and lack of probable cause must concur. *See id.* The burden of proving malice and lack of probable cause is upon the plaintiff. *See Wiggs v. Farmer*, 135 S.E.2d 829, 831 (Va. 1964).

E

The defendants next argue that the plaintiff's claims under Va. Code Ann. §§ 18.2-499, 500 should be dismissed. Section 500 provides a civil remedy, including an attorney's fee and treble damages, when “any two or more persons . . . combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully, and maliciously injuring another in his reputation, trade, business or profession by any

means whatever” as proscribed by section 499. *See* Va. Code Ann. §§ 18.2-499, 500. In order to recover, the plaintiff must show that the conspirators acted intentionally, purposefully, and without lawful justification by clear and convincing evidence. *See Simmons v. Miller*, 544 S.E.2d 666, 677 (Va. 2001).

The defendants argue that the plaintiff’s statutory claims are barred by the intra-corporate immunity doctrine. Under this doctrine, agents of a corporation may not form a conspiracy because “acts of the agent are acts of the corporation.” *Buschi v. Kirven*, 775 F.2d 1240,1252 (4th Cir. 1985) (quoting *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911, 914 (5th Cir. 1952)). The immunity remains even if defendants are sued individually. *See id.* However, the doctrine does not apply when a defendant has “an independent personal stake in achieving the corporation’s illegal objective.” *Id.*

The defendants argue that they are employees of the same entity, Grayson County, and thus are immune. This argument is without merit because Bolt is an agent of the state, not the county. *See Newport News Fire Fighters Assoc., Local 794 v. City of Newport News, Va.*, 307 F. Supp. 1113, 1116 (E.D. Va. 1969). Accordingly, the doctrine does not apply.

While the defendants may not avail themselves of this immunity, unless the plaintiff pleads a cognizable claim for damages under the statute, this claim must be dismissed.

The Virginia conspiracy statute has received only limited treatment by the Virginia Supreme Court, but federal courts have construed it to require injury to a “business” rather than merely to employment or employment reputation. *See Buschi*, 775 F.2d at 1259. The word “reputation” in the statute is modified by the terms trade, profession or business, thus eliminating recovery for damage to personal reputation. *See Ward v. Connor*, 495 F. Supp. 434, 439 (E.D. Va. 1980), *rev’d on other grounds*, 657 F.2d 45 (4th Cir. 1981). The court in *Ward* also noted that the remedy for violation of the statute includes lost profits, which also suggests a limitation to business injury. *See id.*

While no legislative history of the statute exists, some suggestion of its purpose can be drawn from the fact that it was once part of the anti-trust statutes. *See Nationwide Mut. Ins. Co. v. Jones*, 577 F. Supp. 968, 970 (W.D. Va. 1984). In *Jones*, Judge Williams of this court suggested the following injuries that are redressable under the statutes: “(1) interfering in business activity such as boycotts and pickets; (2) injuring a company’s tradename and good will; [and] (3) stealing customer lists and trade secrets.” *Id.*

I hold that the plaintiff is not entitled to recovery under this statute. The plaintiff was not in business and any damages arising from the defendants’ alleged conduct would only be to the plaintiff’s personal or employment reputation. The Virginia

conspiracy statute does not provide a remedy for this type of damage. Thus, the plaintiff's statutory claims will be dismissed.

IV

For the reasons stated, it is **ORDERED** as follows:

1. The motion to dismiss by J.D. Bolt [Doc. No. 2] is granted;
2. The motion to dismiss by William Dale Ring [Doc. No. 4] is denied in part and granted in part;
3. J.D. Bolt is dismissed as a defendant; and
4. Count Two of the complaint, asserting a cause of action under Va. Code Ann. §§ 18.2-499, 500, is dismissed.

ENTER: January 28, 2002

United States District Judge