NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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LETTER OPINION

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Re: *Will Nesbitt Realty, LLC v. Jeremiah Jones*, Case No: CL-2016-14234

Dear Counsel:

Before the Court are the multiple issues involved in Plaintiff's Complaint for claims of breach of contract and five counts of defamation per se, as well as Defendant's Counterclaim for four breach of contract claims. Based upon the three-day hearing and post-trial briefing, and for the reasons stated herein, all counts of the Complaint and Count IV of the Counterclaim will be dismissed with prejudice, and Counts I, II, and III of the Counterclaim will be granted.

This opinion also addresses a matter of first impression in the Commonwealth, i.e., *whether the 2016 and 2017 amendments to the anti-SLAPP statute, Va. Code § 8.01-223.2, are retroactive.* The 2016 amendment provided for recovery of reasonable attorney fees to a defendant who obtained a dismissal pursuant to the statute. The 2017 amendment expanded the scope of the statute to include claims of defamation. Together, therefore, the amended statute provides for recovery of attorney fees to a defendant who obtains a dismissal of a defamation

action pursuant to the immunity provisions of the statute. For the reasons stated below, the Court finds that this provision is not retroactive.

FACTUAL BACKGROUND

Plaintiff Will Nesbitt Realty, LLC (hereinafter referred to as "Nesbitt") is a limited liability company organized and doing business in the Commonwealth of Virginia. The business relationship at issue in this suit occurred in Fairfax County. At all relevant times, Nesbitt was engaged in the business of property management by representing landlords leasing residential property to tenants.

Defendant Jeremiah Jones (hereinafter referred to as "Jones") is a resident of the Commonwealth of Virginia. Defendant Jeremiah Jones retained Plaintiff to assist him in renting a residential property at 15505 John Diskin Circle in Woodbridge, Virginia. On May 1, 2014, Jones and Nesbitt signed both a "Property Management Agreement" and an "Exclusive Right to Lease Listing Agreement." See Def.'s Ex.'s 1 & 2. With Nesbitt's help, Jones leased the property at 15505 John Diskin Circle to tenants on July 3, 2014. Jones and tenants signed a Lease and Lease Addendum provided by Nesbitt on July 3, 2014. See Pl.'s Ex.'s 1 & 2; Def.'s Ex.'s 4 & 5. The Lease was for a one-year term beginning on July 31, 2014 and ending on July 31, 2015. Id.

Jones called Nesbitt in May of 2015 to check on the status of his house and whether or not the tenants intended to renew the Lease. Hr'g Tr. From 01/23/18, pp. 65-66. Nesbitt sent an email within 24-48 hours stating that the tenants loved the place and were asking about whether or not he wanted to sell the house. Id. at 66. Based upon Nesbitt's assurance that the tenants were interested in staying in the house, Jones signed a lease to rent another apartment in the area for himself. See id. at 66. On or about June 1, 2015, Nesbitt Realty was informed by the tenants that the tenants intended to renew the Lease. See Def.'s Ex. 10. That information was shared with Jones. See id. ("On June 1, 2015 the tenant indicated in writing that he intended to renew his lease for another year. The landlord made financial and living arrangement decisions based upon that notice."). However, on June 2, 2015, the tenants sent an email to Nesbitt Realty's agent, Ron Ginyard, correcting the statement that they intended to renew the lease. The tenants stated that they did not intent to renew the lease. See Def.'s Ex. 10. That information, however, was not shared with Jones until June 25, 2015, when Stuart Nesbitt sent an email to Jones that read in part: "The tenant dropped in and informed me they will not be renewing." Def.'s Ex. 8. On June 29, 2015, Will Nesbitt wrote an attorney regarding the matter. See Def.'s Ex. 10. His email read in part: "Either Ron didn't forward [the tenants' email declining renewal], or we didn't receive that notice and we didn't tell the landlord about this change. Furthermore, we should have listed the property immediately but did not. We're now jumping into action to get the property rented." Def.'s Ex. 10.

After working with Nesbitt for a few months to try to relist the property, Jones told Nesbit that he was unsatisfied with Nesbitt's property management and brokerage services and, therefore, Jones was terminating their relationship. See Pl.'s Ex. 9. On or about December 3, 2015, Jones wrote and posted his first review regarding Nesbitt on the website Yelp. See Pl.'s

Ex. 3 & 14. Nesbitt's attorney sent Jones a cease and desist letter on December 8, 2015. See Pl.'s Ex. 14. Soon thereafter, Jones changed his original post based upon the letter. See Pl.'s Ex. 3. The statements from the original post are the subject of the current claims of defamation per se.

ISSUES IN DISPUTE

1. The Complaint

Nesbitt filed the Complaint at issue on October 14, 2016. The Complaint contained six counts as follows:

Count I—Breach of Contract. Compl. 6. Nesbitt alleges that Jones expressly agreed not to publicly comment upon nor disparage any real estate broker involved in a dispute "in any forum, including internet websites" in Paragraph 4, subsection (h) of the attached Lease Addendum. Jones is alleged to have breached his agreement by publicly commenting upon and disparaging his real estate broker Plaintiff on Yelp on December 3, 2015, and again on or before December 31, 2015. Nesbitt states that paragraph 4 of the Lease Addendum has the operative language:

> [a]t no time will any party publicly comment upon nor disparage one another nor any real estate agents are [sic] brokers involved in a dispute including internet websites and any violation of this provision will be deemed to be deliberate and result in liquidated damages in the amount equal to one months [sic] rent per violation plus $100 per day until any written comment is removed.

Hr'g Tr. Of 10/04/17, p. 6-7.

Count II—Defamation Per Se: (paid to do nothing). Compl. 7. Count II marks the beginning of Nesbitt's five counts regarding defamation per se. The statement at issue in this count is: "I paid Nesbitt Realty a year's worth of property management fees ($2,000+) to do absolutely nothing." Id.

Count III—Defamation Per Se: (wrote a lease). Compl. 8. The statement at issue in this count is: "Next, Nesbitt wrote a lease that was advantageous to the tenant." Id.

Count IV—Defamation Per Se: (failed to enforce a lease). Compl. 9. The statement at issue in this count is: "Nesbitt didn't enforce the lease as I was promised." Id.

Count V—Defamation Per Se: (not compensated by Plaintiff). Compl. 10. The statement at issue in this count is: "I was promised by Nesbitt Realty that I would be compensated for my troubles - that the fees would be refunded to me; however, I've yet to receive any compensation from Nesbit." Id.

Count VI—Defamation Per Se: (caused problems and then would not assist). Compl. 11-12. The statement at issue in this count is: "Instead, when I requested Nesbitt's assistance to

closing out the issues, e.g. withholding the security deposit for violation of the lease and damages, Nesbitt told me that they 'would not be caught between the tenant and me' despite the problems being borne from Nesbitt's management." Id.

2. The Counterclaim

Jones filed his Answer and Counterclaim on December 21, 2016. The Counterclaim contained four counts as follows:

Count 1: Breach of Contract (Attorneys' Fees). Def.'s Countercl. 9-10. Jones states that Paragraph 14 of the Property Management Agreement (hereinafter PMA) states:

> In the event of any dispute, litigation or arbitration arising out of or relating to this Agreement, including non-payment of fees or amounts owed to Agent by Landlord, the prevailing party shall be entitled to recover all costs, including reasonable attorneys' fees, incurred by the prevailing party.

Id. at 9. Jones further highlights Paragraph 21 of the Exclusive Right to Lease Listing Agreement (hereinafter Listing Agreement), which states:

> If any Party breaches this Agreement and a non-breaching Party retains legal counsel to enforce its rights hereunder, the non-breaching Party shall be entitled to recover against the breaching Party, in addition to any other damages recoverable against any breaching Party, all of its reasonable Legal Expenses incurred in enforcing its right under this Agreement, whether or not suit is filed and in obtained, enforcing and/or defending any judgment related thereto.

Id. at 9-10. Jones asserts that based upon these provisions, Jones is entitled to reasonable attorneys' fees if he prevails in the litigation.

Count 2: Breach of Contract (Failure to List Property). Def.'s Countercl. 11-13. On June 2, 2015, Nesbitt Realty learned that the existing tenants were not going to re-rent Jones' house. Nesbitt did not inform Jones about this until June 25, 2015. The Listing Agreement states that Nesbitt "shall enter the listing information into the MLS database within 48 hours (excluding weekends and holidays) of commencement of Listing Period...." Id. at 12. The property was not listed on the MLS for a new tenant until July 17, 2015. Jones alleges that Nesbitt Realty's failure to immediately list the property upon discovery of the tenants' intent to vacate breached the Listing Agreement.

Count 3: Breach of Contract (Early Termination of Agreement). Def.'s Countercl. 13-14. Paragraph 11, Section (a) of the PMA states: "This Agreement may be terminated by either Party with 30 days [sic] Notice." Id. at 14. On August 31, 2015, Jones provided Nesbitt with a 30 day termination notice which should have ended the relationship between the parties on September 30, 2015. Nesbitt, however, removed the listing from the MLS on the same day, August 31, 2015, although Jones did not request that the listing be removed. On September 3, 2015, Nesbitt emailed Jones and stated, "That said, we are finished working on this account. We will not be

creating reports, notices, etc. We are cutting our losses. That means, if there is a notice sent to the tenant, you will send that notice." Id. Jones claims that Nesbitt's actions breached the PMA as Jones was to continue providing services for 30 days after notice of termination, meaning until September 30, 2015.

Count 4: Breach of Contract (Non-Disparagement). Def.'s Countercl. 14. Jones argues that if the Court determines that the Lease Addendum has not expired, Nesbitt has also violated the non-disparagement provision. In support of that assertion, Jones states that on December 9, 2015, Nesbitt posted the following comment on Yelp: "We manage hundreds of properties for many highly satisfied landlords. This review contains numerous false, misleading and libelous statements." Id. Jones states that Nesbitt's comment would fall under the same non-disparagement provision Nesbitt is suing under, so Jones would be entitled to compensation as well.

3. Counts Dismissed During Trial

The trial for this matter occurred on: October 4, 2017, January 11, 2018, and January 23, 2018. During the trial, the court dismissed Complaint counts: I[1], III[2], and VI[3] (leaving counts II, IV, and V). See Hr'g Tr. From 01/11/18, p. 274. The Court also dismissed Counterclaim count 4, for the same reason the Court dismissed Complaint count I.[4]

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[1] See Ct. Order: Intra-Trial Ruling from 10/26/2017 (The Court dismissed the claim as it appeared to the Court "that the Plaintiff's claim for Breach of Contract should be dismissed as having expired where the term set out for the non-disparagement provision is 'at no time' is different from the lease term of one year such that there is ambiguity construed against the drafter….").

[2] See Hr'g Tr. From 01/11/18, p. 274-79 (The Court found that "[w]ith respect to Count 3, it appears to me that that's a statement of opinion. Nesbitt wrote a lease that was advantageous to the tenant. I don't see that as a statement of fact. I see it as a statement of opinion.").

[3] See Hr'g Tr. From 01/11/18, pp. 67-71 (Nesbitt chose not to pursue claim VI. The Court asked if "count 6 is the one you're moving to dismiss?" and Nesbitt's counsel replied "Correct.").

[4] See Ct. Order: Intra-Trial Ruling from 10/26/2017 (The Court stated "it is further ORDERED that the Counterclaim Plaintiff's sole count for Breach of Contract regarding non-disparagement is hereby DISMISSED on the same grounds that Plaintiff's claim for Breach of Contract is dismissed…."); Hr'g Tr. From 10/04/17, p. 54.

ANALYSIS

1. Remaining Counts in the Complaint

The three counts remaining in the Complaint, namely counts II, IV, and V, concern defamation per se.[5] The law regarding the tort of defamation per se comes from the common law. Virginia case law deems the following types of statements to be defamation per se:

> (1) Those which impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Those which impute that a person is infected with some contagious disease, where if the charge is true, it would exclude the party from society. (3) Those which impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment. (4) Those which prejudice such person in his or her profession or trade. All other defamatory words which, though not in themselves actionable, occasion a person special damages are actionable.

Shupe v. Rose's Stores, Inc., 213 Va. 374, 376, 192 S.E. 2d 766, 767 (1972) (citing Carwile v. Richmond Newspapers, Inc., 196 Va. at 7, 82 S.E.2d at 591.).

When deciding whether or not a statement constitutes defamation per se, the Court must first consider whether the statement meets the requisite elements of the tort. The Virginia Supreme Court has held that there is a difference in bringing an action of defamation per se as a private individual versus as a public figure. The action in this case was brought by a private individual. The elements of defamation per se when a private individual is involved have been established by the Virginia Supreme Court:

> In Gazette [v. Harris, 229 Va. 1 (1985)], considering the balance struck by the Supreme Court between the First Amendment's guarantees of freedom of speech and of the press and the state's legitimate interest in protecting private individuals from wrongful injury to reputation, we adopted a negligence standard as a predicate upon which a private individual might recover compensatory damages for a defamatory publication. We held that such a plaintiff might recover compensatory damages upon proof, by a preponderance of the evidence, "that the publication was false, and that the defendant either knew it to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based." Id. at 15, 325 S.E.2d at 725. This standard was made applicable to actions against media and non-

[5] Each of the three remaining counts survived the motion to strike, meaning that the Court found that they constituted factual assertions (rather than opinions) and that the Plaintiff presented a prima facie case of defamation per se.

> media defendants alike, where the plaintiff was neither a public official nor a public figure.

Great Coastal Express v. Ellington, 230 Va. 142, 151 (1985).

In order to decide whether or not a statement constitutes defamation per se, the Court must read the statements in their entirety:

> In determining whether a statement is one of fact or opinion, a court may not isolate one portion of the statement at issue from another portion of the statement. Rather, a court must consider the statement as a whole.
>
> The requirement that an allegedly defamatory statement be considered as a whole also is vital to a determination of the truth or falsity of a defamation claim, because defamatory statements may be made by implication, inference, or insinuation. Thus, the factual portions of an allegedly defamatory statement may not be evaluated for truth or falsity in isolation, but must be considered in view of any accompanying opinion and other stated facts.

Hyland v. Raytheon Tech. Servs. Co., 277 Va. 40, 47-48 (2009) (internal citations omitted).

a. Count II: "I paid Nesbitt Realty a year's worth of property management fees ($2,000+) to do absolutely nothing."

Count II of the Complaint concerns the statement: "I paid Nesbitt Realty a year's worth of property management fees ($2,000+) to do absolutely nothing." Compl. 7. When read in light of the entirety of the Yelp post, it is clear that Jones acknowledged various activities and duties that Nesbitt did perform for him, such as corresponding with Jones about requests from the tenants regarding the need for new appliances, sending out repairmen to attempt to diagnose issues with the appliances, and eventually listing Jones' house once the previous tenants vacated the property. See Def.'s Ex. 14. When reading the statement in relation to the rest of the post, the Court finds that Jones' statement does not constitute defamation per se. In other words, the Court finds that the phrase "to do absolutely nothing" was not, *in context*, an assertion that Nesbitt Realty *literally* did nothing. Rather, it's an assertion that Jones got minimal value for his money. To the extent that this assertion is an assertion of fact, rather than opinion, the Plaintiff has not carried his burden of proving the statement was false, let alone that the Defendant knew it to be false or lacked reasonable grounds for believing it to be true or acted negligently.

b. Count IV: "Nesbitt didn't enforce the lease as I was promised."

Count IV of the Complaint concerns the statement: "Nesbitt didn't enforce the lease as I was promised." Compl. 9. The Court holds that Plaintiff has failed to carry his burden of proof that this statement constitutes defamation per se.

Initially, the Court finds that Plaintiff has not proved the statement was false. In particular, Jones asserted that Nesbitt did not ensure that the home was maintained by the tenants

as required by the Lease. See, e.g., Def.'s Ex. 4 ¶ 19 ("Tenant is responsible for: A. Maintaining the Premises in a clean and sanitary condition and disposing of all trash, garbage, and wasted in sealed containers.... D. Clearing of all drains and toilets and maintaining calking around tubs and showers, maintenance of all carpeting and flooring in a clean and good condition. . . . E. Maintaining the Premises in such a manner as to prevent the accumulation of moisture and the growth of mold. Tenant shall promptly Notify Landlord in writing of any moisture accumulation or visible evidence of mold."). See also Def.'s Ex. 1, ¶ ¶ 2C, 2E, and 2G. In the Yelp review, Jones referred to the fact that the home was not in listing condition following the tenants' departure and that the tenants failed to change the air filter as required. See Hr'g Tr. From 01/11/18, pp. 149, 153; See Pl.'s Ex. 1 ¶ 19; Def.'s Ex. 2 ¶ 2. Jones asserted that when the home was finally relisted, it was "in terrible condition."[6]

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[6] The full original Yelp review reads as follows: "Rarely if ever do I write reviews recommending customers choose (or not choose) a company. Check out previous reviews. I generally try to keep my comments focused on my experience with hopes that you'll make your own decision. However, there are exceptions. The worst decision that I made was hiring Nesbitt Realty. The best decision I made was firing. I paid Nesbitt Realty a year's worth of property management fees ($2,000+) to do absolutely nothing. Nesbitt didn't enforce the lease as I was promised. For example, my tenants were required to change the air filters every 2 months; this didn't happen which was evidenced in the original filters were still in place and Nesbitt charged me $100 to change filters that should have been changed by the tenant. Next, Nesbitt wrote a lease that was advantageous to the tenant. Example, generally a lease requires the tenant informs the landlord 60 days of his/her intent to renew or move out at the end of a lease, which affords the landlord the opportunity to find a replacement tenant. My lease did not require it and thus, my tenant gave less than 45 days [sic] notice of their intent to move out. This left me stranded as the "prime" listing period had passed and my home wasn't in listing condition following their tenancy. This was my fault. Although I was a first time landlord, I should have read the lease closer. I leaned too heavily on Nesbitt's advice on signing the contract. Next, less than 6 months after my tenant moved into my home, I received a "sky is falling email," stating that I needed to replace major appliances. After some probing from me, I discovered that Nesbitt sent (and thus relied on the advice of) an electrician to diagnose problems with appliances. Not only did Nesbitt need to send an actual appliance specialist to my property but also it turned out, none of the appliances needed replacing. When my tenant provided the short notice, Nesbitt denied that the tenant sent prior notice. Two months before the lease ended, I reached out to Nesbitt asking if the tenant desired to remain in the home or intended to move out. After further probing, it was discovered that the tenant did in fact provide notice of their intent to vacate the property at the end of the lease. Thus, Nesbitt failed to take prompt action to have my home listed for rent. Finally, I asked Nesbitt to have the home listed as quickly as possible (and once cleaning had been performed), Nesbitt placed my home on the market in terrible conditions. I was promised by Nesbitt Realty that I would be compensated for my troubles – that the fees would be refunded to me; however, I've yet to receive any compensation from Nesbit [sic]. Instead, when I requested Nesbitt's assistance to closing out the issues, e.g. withholding the security deposit for violation of the lease and damages, despite the problems being borne from Nesbitt's

Nesbitt acknowledged at trial the poor condition of the house when the tenants left, describing it as a "messy property." Hr'g Tr. From 01/11/18, p. 153. In fact, one of his employees refused to list the house once the tenants had vacated due to the condition of the house. See id. Nesbitt ordered his son to list the property. See id.[7]

Therefore, the Court finds that the Plaintiff has not proved his statement to be false. Further, even if the Court were to conclude that the statement was false, there is no evidence that the Defendant knew it to be false, or lacked reasonable grounds for his belief in its truth or acted negligently.

Therefore, the Court does not find the statement to be defamation per se.

c. Count V: "I was promised by Nesbitt Realty that I would be compensated for my troubles - that the fees would be refunded to me; however, I've yet to receive any compensation from Nesbit [sic]."

Count V of the Complaint concerns the statement: "I was promised by Nesbitt Realty that I would be compensated for my troubles - that the fees would be refunded to me; however, I've yet to receive any compensation from Nesbit [sic]." Compl. 10. Although Nesbitt argues that the statement was demonstrably false, the issue is more complicated than that. Based upon the evidence produced during trial:

1) Nesbitt had put about a month's worth of rent into Jones' account on August 5, 2015. See Pl.'s Ex. 8.
2) Jones believed the deposit to be a late payment from the tenants as it was the amount of rent minus the property management fees, which Jones stated he was not supposed to pay if the house was not being leased. See Hr'g Tr. From 01/23/18, p. 58-61.
3) When asked about how Nesbitt was planning on compensating Jones, Nesbitt first said he would "cover the cost of our services", but then, later on the same day, Nesbitt stated that he could "only help cover the cost of the lost month." Def.'s Ex. 11.
4) After Jones terminated his contract with Nesbitt, Nesbitt sent an email on September 3, 2015 stating that Jones had given Nesbitt "a very valuable lesson. In the future, if I decide to make a gesture like paying rent for to [sic] a landlord, I will make sure that I have in writing that acceptance of those funds means that the landlord agrees to go forward with us so that we may recoup the loss." Pl.'s Ex. 9; Def.'s Ex. 13. Jones sent a reply to Nesbitt

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management. If Yelp didn't restrict the length of reviews, I'd tell you about the poor communications." Pl.'s Ex. 14.

[7] Nesbitt also stated that :"[T]his particular tenant I would describe as a C minus compared to other tenants that I've seen…and when he left, he left something that needed to be cleaned up…but it wasn't anything that would rise to the level of unsanitary or where you would call the health department. I certainly appreciate that Mr. Jones may not want to stand in that shower…but…some people like their showers like that. And I don't think—as far as I know, Mr. [] never got any disease, no foot problems." Hr'g Tr. From 01/11/18, p. 153.Id. at 149.

on the same day, September 3, 2015, in which Jones stated that "[w]hile agreeing to recoup the losses was a nice gesture, this alone would not have been enough to keep me as your customer." Pl.'s Ex. 9; Def.'s Ex. 13. Nesbitt argues that this exchange of emails proves that Jones knew the deposited money came from Nesbitt. The Court disagrees. Jones reply email acknowledges the *offer* of compensation, not the *actuality* of it.

5) Jones testified that he only discovered right before trial in April of 2016 that the payment was meant to be the compensation by Nesbitt for his troubles. See Hr'g Tr. From 01/23/18, p. 59. Rather, Jones believed it was a late rent payment. See id. at pp. 60-64.

It is true that the payment was from Nesbitt, not from the tenant. Thus, the Defendant's assertion that he had "yet to receive any compensation" from Nesbitt was not true. But Plaintiff has certainly not proved that Jones knew the statement was false, or lacked a reasonable basis for his belief, or acted negligently. Jones believed the payment was a late rent payment. See, for example, the testimony of Jeremiah Jones:

> [T]he amount that I received, learning after the fact, minus property management fees. The house was vacant in August so I shouldn't have had to pay property management fees just like I didn't do in June of '14. Because if there's no tenant in there, you don't pay property management fees.
>
> So when we were preparing for court, we had -- through counsel we had done a counterclaim to recoup fees and it was only then did he produce some accounting sheet that says, "Oh, we provided this to you."
>
> Again, it's not annotated on the owner's statement that comes every month, right, that I received throughout the tenancy, wasn't on there. Didn't say, "Missed payment, August payment."
>
> So I assumed two things because I wasn't checking the account as often as I did. Because I was delayed in receiving payments in 2014, I assumed that payment was somehow catching up from the month and a half that I didn't receive, right? And I certainly didn't have any communications with Mr. Nesbitt that said, "Hey, this is what this payment is for," so I honestly did not realize that there was any sort of compensation from his perspective.
>
> Q Did you receive rent for the month of June –
>
> A June of –
>
> Q -- from the tenant.
>
> A -- which year?
>
> Q The tenants –

A June of '15? Yes.

Q From the tenant?

A Yes.

Q Did you –

A Well, from him on behalf of the tenant because the tenant would pay him and he would direct deposit the payment.

Q Okay. And then July of 2014, did you receive any rent from the tenant?

A I didn't, no, but the tenant charged -- I'm sorry. That's not true. The tenant -- so originally we were planning for the tenant to take possession of the property I think on August 1st of 2014.

After the tenant had visited the home and talked to me about a few other things, the tenant said, "Hey, would it be okay if I gave you money to move in sooner?" I said I would want my property manager to do it.

They adjusted the lease to show that the tenant was moving in in July versus August and that's -- but it was 60 or 70 or it was certainly under $100 what the tenant ended up paying.

Q So what I'm trying to get at, though, is the amount of rent that you received or didn't receive at the end of the tenancy.

A Uhm-hm.

Q So the tenant gave -- you testified the tenant gave notice in early June.

A Yes.

Q Right?
A Yes.

Q And you testified just a minute ago that Nesbitt didn't hear about -- didn't inform you about that until –

A The end of June.

Q -- the end of June.

A Correct.

Q Did you receive any rent for that June month?

A I believe I did.

Q Did it come from the tenant or did it come from Nesbitt? And I'm sorry, I don't mean was it filtered through Nesbitt's management system.

Did the tenant pay or did Nesbitt pay the rent for the tenant because there was no one there?

A I believe the -- well, someone was there, so the house was occupied until the end of July. So the tenant paid in June and in July.

I don't know if there were some -- any sort of disruption in that time because after they had turned over documents, I realized that the tenant actually didn't pay I think until a few weeks later in the month of June that may have tossed some of the scheduling off.

Q The payment that Nesbitt made to you that you later found out at the beginning of the GDC trial was compensation, was that the same amount of money that you would receive in rent from the tenant?

A It was, because it was minus the property management fees.

Q So –

A Which again -- and when the house is vacant, I should not have paid property management fees.

Q And so because the amount was the same is that the reason why you didn't know that it was from Nesbitt or from –

A Correct.

Q -- the tenant?

A Correct.

Hr'g Tr. From 01/23/18, pp. 60-64.

Therefore, the Court does not find the statement to be defamatory per se.

d. Conclusion as to the Remaining Counts of the Complaint

As the Court holds that none of the statements from the Complaint constitute defamation per se, Counts II, IV, and V will be dismissed with prejudice. Furthermore, as the Court found no defamation per se, the Court does not reach the issue of damages.

2. Remaining Counts in the Counterclaim

The Court will now examine the three remaining counts in the Counterclaim. Before examining the merits of each count, the Court must first decide whether or not a Counterclaim is able to reference and incorporate contracts that the Complaint does not mention or include. During the first day of trial, on October 4, 2017, Nesbitt raised the argument that because he had not sued under the PMA or Listing Agreement, the fee-shifting provisions in the agreements should not apply to this case even though Jones incorporated the two contracts into his Counterclaim. See Hr'g Tr. From 10/04/18, p. 20. The Court disagrees.

Nesbitt argues that *both* parties are confined by the four corners of the Complaint. Certainly it is true that the four corners of a complaint do constrain a *plaintiff's* right to recover:

> Under well-settled Virginia law, "'[a] litigant's pleadings are as essential as his proof, and a court may not award particular relief unless it is substantially in accord with the case asserted in those pleadings. Thus, a court is not permitted to enter a decree or judgment order based on facts not alleged or on a right not pleaded and claimed.'" Dabney v. Augusta Mut. Ins. Co., 282 Va. 78, 86, 710 S.E.2d 726, 731 (2011) (quoting Jenkins v. Bay House Assocs., 266 Va. 39, 43, 581 S.E.2d 510, 512 (2003)).

Allison v. Brown, 293 Va. 617, 625-26 (2017). However, when deciding how to analyze a question regarding a counterclaim, the Court looks to Virginia Supreme Court Rule 3:9, which lays out the rules regarding counterclaims:

> (a) Scope. --A defendant may, at that defendant's option, plead as a counterclaim any cause of action that the defendant has against the plaintiff or all plaintiffs jointly, whether or not it grows out of any transaction mentioned in the complaint, whether or not it is for liquidated damages, whether it is in tort or contract, and whether or not the amount demanded in the counterclaim is greater than the amount demanded in the complaint.
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> * * *
>
> (d) Separate trials. --The court in its discretion may order a separate trial of any cause of action asserted in a counterclaim.

Va. Supp. Ct. R. 3:9(a), (d). Furthermore, Virginia Code Annotated § 8.01-281 states in relevant part:

> A party asserting either a claim, counterclaim, cross-claim, or third-party claim or a defense may plead alternative facts and theories of recovery against alternative parties, provided that such claims, defenses, or demands for relief so joined arise out of the same transaction or occurrence. Such claim, counterclaim, cross-claim, or third-party claim may be for contribution, indemnity, subrogation, or contract, express or implied; it may be based on future potential liability, and it shall be no defense thereto that the party asserting such claim, counterclaim, cross-claim, or third-party claim has made no payment or otherwise discharged any claim as to him arising out of the transaction or occurrence.

Va. Code Ann. § 8.01-281(A).

Thus, the Counterclaim, including the Listing Agreement and the PMA, is properly before the Court. The Court will now analyze Defendant's three remaining claims, beginning with Counts II and III, reserving Count I for the end.

a. Count 2: Breach of Contract (Failure to List Property)

Count 2 of the Counterclaim alleges that Nesbitt had a duty under the Listing Agreement to list Jones' house, but failed to do so. Nesbitt argues that the Listing Agreement only applied to the first listing of the property and terminated upon a successful lease to a tenant, so any subsequent listing would require a new agreement. See Hr'g Tr. From 01/23/18, pp. 179-180. Nesbitt stated that any time a new listing was required he required a new listing agreement. See id. Furthermore, Nesbitt argued that although the PMA incorporated the Listing Agreement, the Listing Agreement did not in turn incorporate the PMA. Jones asserts that the Listing Agreement did require a subsequent listing as the parties had also entered into a property management agreement.[8]

When interpreting the meaning of contracts, the Virginia Supreme Court has held that:

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[8] See Hr'g Tr. From 01/23/18, pp. 135-37 ("MR. KRIEGER: Defense 1 . . . Paragraph 1, Page 1. There's a box towards the bottom of Paragraph 1 that says, 'If this box is checked, agent is to lease premises and the NVAR Exclusive Right to Lease form is attached and is made part of this agreement.' The NVAR Exclusive Right to Lease form is Exhibit 2 . . . [and] the terms of Paragraph 4 in Exhibit 2 should be read in some way that's different than what they are read as . . . [W]hat I'm trying to say is that . . . Paragraph 4 [states] . . . 'unless landlord has entered into a property management agreement with broker'. And that makes sense because if you enter into a property management agreement with the broker and you have one tenant -- as Mr. Nesbitt has already testified to, he has these tenants or these landlord clients for multiple years, so it makes sense that he wouldn't have to get a new Exclusive Right to Lease Listing Agreement if the tenant leaves and the landlord client and Mr. Nesbitt wants to get a new tenant. So naturally, the thing to do is to continue on with these same terms." As the box in paragraph 1 of the PMA was checked, the Court found that the PMA incorporated the Listing Agreement.); Id. at 151, 157. See also Def.'s Ex. 1.

> Contracts between parties are subject to basic rules of interpretation. Contracts are construed as written, without adding terms that were not included by the parties. Where the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning. A contract is not ambiguous merely because the parties disagree as to the meaning of the terms used. Furthermore, contracts must be considered as a whole "without giving emphasis to isolated terms." Finally, no word or clause in a contract will be treated as meaningless if a reasonable meaning can be given to it, and parties are presumed not to have included needless words in the contract.

Tm Delmarva Power v. Ncp of Va., 263 Va. 116, 119 (2002) (internal citations omitted).

This Court held during trial that not only does the PMA incorporate the Listing Agreement, but a reasonable interpretation of the contracts includes the Listing Agreement incorporating the PMA. See Hr'g Tr. From 01/23/18, pp. 150-57. The Court found that not only did the PMA mention the Listing Agreement, but the Listing Agreement incorporated the PMA under Paragraph 4, which reads in part:

> Upon ratification of a lease for Premises, Landlord releases Broker from any further responsibility regarding Premises and the lease, including but not limited to performance by the tenant, unless Landlord has entered into a property management agreement with Broker.

Def.'s Ex. 2.

The evidence before the Court supports Jones' claim that the Listing Agreement was breached. See Def.'s Ex. 2 ¶¶ 4, 9, 10; Def.'s Ex. 1 ¶¶ 2, 11; Hr'g Tr. From 01/23/18, pp. 151, 157. Nesbitt sent an email on June 29, 2015 in which he stated: "we should have listed the property immediately, but did not. We're now jumping into action to get the property rented." Def.'s Ex. 10. Based upon that email, it is clear that Nesbitt acknowledged he had a responsibility to re-list the property as soon as he learned that the first tenant did not intend to renew the Lease. Furthermore, at no point did Nesbitt ask Jones to sign a new Listing Agreement, nor did he ever indicate he would need one in the future or that he was waiving his usual policy in this case. Given that Nesbitt made no indication to Jones that a new Listing Agreement was necessary or customary, given that Nesbitt acknowledged that he had a duty to list the property immediately, given that the Listing Agreement left blank an expiration date, see Def.'s Ex. 2, and given that Nesbitt actually did list the property without asking for a new Listing Agreement, this Court finds that Nesbitt breached the Listing Agreement which states in relevant part: "Broker shall enter the listing information into the MLS database: Within 48 hours (excluding weekends and holidays) of commencement of Listing Period." Def.'s Ex. 2.

Now that the Court has determined that Jones' is entitled to relief under this claim, the Court must determine how much relief is appropriate in this case. Jones asks for $3,800 in his Counterclaim, an amount equal to two months' rent under his previous Lease. Jones argues that the amount is reasonable as: (a) the rental rate would have likely remained about the same based

upon the information Nesbitt had provided to him regarding the market for his kind of home; and (b) Nesbitt removed the listing of Jones' house before their relationship was officially terminated. See Hr'g Tr. From 01/23/18, pp. 84, 104. The Court finds that based upon the foregoing assertions, and the delayed re-listing of the dwelling, Jones is entitled to $3,800.

b. Count 3: Breach of Contract (Early Termination of Agreement)

Count 3 of the Counterclaim references "Early Termination of Agreement." The Agreement referred to in this Count is the PMA. Paragraph 11, Section (a) of the PMA states in relevant: "This Agreement may be terminated by either Party with 30 days [sic] Notice." Def.'s Countercl. 14. On August 31, 2015, Jones provided Nesbitt with a termination notice, per the PMA. Based upon the unambiguous language of the PMA, the notice of termination should not have ended the relationship between the parties until 30 days had passed, meaning on September 30, 2015. Nesbitt, however, removed the listing from the MLS soon after he received the notification, although Jones did not request that the listing be removed. On September 3, 2015, Nesbitt also emailed Jones and stated, "That said, we are finished working on this account. We will not be creating reports, notices, etc. We are cutting our losses. That means, if there is a notice sent to the tenant, you will send that notice." Id. Although Nesbitt did perform certain actions for Jones after his September 3rd email, Nesbitt's actions in immediately removing the listing and sending Jones an email stating that Nesbitt was "finished working on this account" displayed a clear message of Nesbitt's full termination of the relationship as of September 3rd rather than September 30th, which constituted a breach of contract.

Based on the same reasoning the Court discussed for Count 2, the Court finds that Jones is entitled to a damage amount of $3,800.

However, given that the $3,800 awarded in Count 2 and the $3,800 awarded in Count 3 are based on the same damage analysis and circumstances, there will be a total award of $3,800, not $7,600.

c. Count 1: Breach of Contract (Attorneys' Fees)

Finally, the Court will address Count 1 of the Counterclaim. Count 1 requests attorney's fees under paragraph 14 of the PMA, and Paragraph 21 of the Listing Agreement. Before addressing which, if any, of the attorneys' fees Defendant may be entitled to, the Court must decide what constitutes a "prevailing party," and if Defendant qualifies.

Black's Law dictionary defines "prevailing party" as: "A party in whose favor a judgment is rendered, regardless of the amount of damages awarded." *Prevailing Party* (See PARTY (2)) Black's Law Dictionary (Deluxe 10th ed. 2014). In this case, Jones has prevailed on all five counts of the Complaint, as well as prevailed on two counts of the Counterclaim. Although Count IV of Defendant's Counterclaim was dismissed, that claim was pled in the alternative to the other counts as a backup in case the Plaintiff prevailed on its argument that the Lease and Lease Addendum were still enforceable in this matter. It is clear from the record, and this Court's previous holdings in this case, that Jones is the prevailing party.

The Virginia Supreme Court provided an explanation for what constitutes a "prevailing party," specifically with relation to an issue regarding recovery of attorneys' fees and the need to delineate different expenses:

> "Under the so-called 'American rule,' a prevailing party generally cannot recover attorneys' fees from the losing party." This rule, however, does not prevent parties to a contract from adopting provisions that shift the responsibility of attorneys' fees to the losing party in disputes involving the contract. Here, the "Costs and Attorneys' Fees" clause at issue was such a contractual provision. It provided that, in the event of litigation arising out of the lease, the "non-prevailing party" would have to pay all expenses, costs, and reasonable attorneys' fees incurred by the "prevailing party." Since West Square was the prevailing party on the lease dispute, see Sheets v. Castle, 263 Va. 407, 413, 559 S.E.2d 616, 620 (2002) (a "prevailing party" is the "party in whose favor a judgment is rendered, regardless of the amount of damages"), the circuit court correctly awarded attorneys' fees to West Square. The question before us, however, is whether the court abused its discretion in determining the amount of reasonable attorneys' fees.
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> * * *
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> As we have already stated, West Square was the "prevailing party" at trial. Therefore, ComTek, as the "non-prevailing party," was required under the "Costs and Attorney's Fees" clause of the lease to pay West Square "all expenses and court costs" in connection with "any litigation between the parties arising out of" the lease.
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> ComTek, however, contends West Square failed to segregate its costs and expenses associated with the lease dispute from those incurred with regard to the non-suited claims. Our holding in Ulloa regarding the burden to specify attorneys' fees associated with a particular claim for which an award of attorneys' fees is allowed applies with equal force to a request for an award of costs and expenses. Even though claims may be intertwined and have a common factual basis, West Square, as the party seeking an award of costs and expenses, had "the burden to establish to a reasonable degree of specificity" those costs and expenses associated with the lease dispute. It did not do so with respect to certain requested costs and expenses.
>
> * * *
>
> With regard to the requested expenses for depositions and miscellaneous items, West Square did not "establish to a reasonable degree of specificity" what portion of those expenses were incurred with regard to the lease dispute, as opposed to the

> non-suited claims. West Square "is not entitled to recover [expenses] for . . . unsuccessful claims."

West Square, L.L.C. v. Commun. Techs., 274 Va. 425, 434-36 (2007) (internal citations omitted).

Although the Court has decided Defendant is entitled to attorneys' fees as the "prevailing party" in the case, the Court notes that Defendant is not entitled to all of the requested fees. In particular, Defendant is not entitled to his fees associated with the General District Court's case or his Circuit Court-associated fees up to and including the nonsuit. See e.g., Temple v. Mary Washington Hosp., Inc.:

> Prior to trial, Temple took a voluntary nonsuit pursuant to Code § 8.01-380. The trial court entered an order nonsuiting the action on January 19, 2012. Temple then filed a new complaint in the same court and against the same defendants, alleging the same cause of action, on February 8, 2012 (the "2012 action"). On September 24, 2012, the trial court entered an agreed order to incorporate the discovery conducted and taken in the 2010 action. The order stated, "All discovery conducted and taken in the previous action that the Plaintiff brought against the Defendants, bearing Case No.: CL10-47, is hereby incorporated into the instant action."
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> * * *
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> Code § 8.01-380 governs nonsuits, and allows a plaintiff to take one nonsuit as a matter of right if done "before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision." Code § 8.01-380(A). We have always characterized a refiled action after a nonsuit as a "new" action. Laws v. McIlroy, 283 Va. 594, 600, 724 S.E.2d 699, 702 (2012). A "new action stands independently of any prior nonsuited action." Id. (quoting Antisdel v. Ashby, 279 Va. 42, 47, 688 S.E.2d 163, 166 (2010)). The "action" that remains subject to a plaintiff's nonsuit request is comprised only of the claims and parties remaining in the case after any other claims and parties have been dismissed with prejudice or otherwise eliminated from the case. Dalloul v. Agbey, 255 Va. 511, 513-14, 499 S.E.2d 279, 281 (1998).

Temple v. Mary Washington Hosp., Inc., 288 Va. 134, 138-140 (2014).

Furthermore, Jones' attorney has the burden of proving that he adequately segregated his costs and expenses to those that are subject to the attorneys' fees provisions, and those that are

not. Both the PMA[9] and the Listing Agreement[10] contain fee recovery provisions; thus, attorneys' fees associated with the PMA and/or the Listing Agreement may be recoverable under their respective attorneys' fees provisions. On the other hand, the claims involving defamation per se are not subject to attorneys' fees as these tort claims are completely separate and distinct from any contract claim. The determination becomes more complicated, however, when determining whether or not either fee provision may incorporate issues relating to the Lease and Lease Addendum. Paragraph 14 of the PMA states that:

> In the event of any dispute, litigation or arbitration arising out of or relating to this Agreement, including non-payment of fees or amounts owed to Agent by Landlord, the prevailing party shall be entitled to recover all costs, including reasonable attorney's fees, incurred by the prevailing party.

PMA ¶ 14. The PMA also includes the provision under paragraph 2(F) for the Agent (Nesbitt):

> To negotiate, prepare and sign all leases, and to cancel or modify existing leases, The Agent shall sign all leases as Agent for the Landlord. No Lease shall be in excess of 1 year(s) without approval of the Landlord.

PMA ¶ 2(F). The PMA has further references to the "Lease" and the Agent's authority to enforce the Lease throughout the document.

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[9] "In the event of any dispute, litigation or arbitration arising out of or relating to this Agreement, including non-payment of fees or amounts owed to Agent by Landlord, the prevailing party shall be entitled to recover all costs, including reasonable attorney's fees, incurred by the prevailing party." PMA ¶ 14.

[10] "If any Party breaches this Agreement and a non-breaching Party retains legal counsel to enforce its rights hereunder, the non-breaching Party shall be entitled to recover against the breaching Party, in addition to any other damages recoverable against any breaching Party, all of its reasonable Legal Expenses incurred in enforcing its right under this Agreement, whether or not suit is filed, and in obtaining, enforcing and/or defending any judgment related thereto. Should any tribunal of competent jurisdiction determine that more than one Party to the dispute has breached this Agreement, then all such breaching Parties shall bear their own costs, unless the tribunal determines that one or more of the Parties is a "Substantially Prevailing Party" , [sic] in which case any such Substantially Prevailing Party shall be entitled to recover from any of the breaching Parties, in addition to any other damages recoverable against any breaching Party, all of its reasonable Legal Expenses incurred in enforcing its rights under this Agreement, whether or not suit is filed, and in obtaining, enforcing and/or defending any judgment related thereto. "Party" as used in this paragraph includes any third party beneficiary identified herein. "Legal Expenses" as used in this paragraph includes attorney fees, court costs, and litigation expenses, if any, including, but not limited to, expert witness fees and court reporter fees." Listing Agreement ¶ 21.

In the case at bar, the PMA is so entwined with the Listing Agreement, the Lease, and the Lease Addendum, that the phrase in the PMA— "arising out of or relating to this Agreement"— clearly includes the Lease and Lease Addendum. The Virginia Supreme Court has analyzed documents in which the terms "arising out of" and "relating to" have been used, such as in arbitration clauses, and have held that the language is broad enough to cover disputes outside the four corners of the agreement itself:

> We begin by considering the language of the agreement to arbitrate contained in paragraph 19. We observe that it not only covers disputes "arising out" of the partnership agreement, but also those disputes "relating to this agreement or a breach hereof." Except for the substitution of the word "hereof" for the word "thereof," it is the standard arbitration clause recommended by the American Arbitration Association, Commercial Arbitration Rules 5 (1991). The standard arbitration clause has been described by the Supreme Court as "a broad arbitration clause."
>
> In a dispute between joint venturers as to the scope of the recommended standard arbitration clause, another court has said, "[t]his broad language encompasses venture-generated or venture-related disputes between the parties, however labeled. It is immaterial whether the basis for the claim is in the language of the joint-venture agreement or the relationship itself." Such a clause "is not limited to disputes over the terms of the contract or to disputes arising during the performance of the contract." Rather, "[b]road language of this nature covers contract-generated or contract-related disputes between the parties however labeled." Indeed, "[a]n arbitration clause covering claims 'relating to' a contract is broader than a clause covering claims 'arising out of' a contract."

McMullin v. Union Land & Management Co., 242 Va. 337, 341 (1991) (internal citations omitted). The Lease and Lease Addendum would not have occurred but-for the PMA. Therefore, the Court holds that Jones is entitled to an award of attorney fees related to the contract claim under the Lease and Lease Addendum under the PMA attorneys' fees provision.

i. Application of Virginia's Anti-SLAPP Statute (Va Code § 8.01-223.2)

The Plaintiff asserts that he is entitled to a recovery of attorney fees in connection with prevailing on the defamation counts. He relies on the attorney fee provision of Virginia's Anti-SLAPP statute, Va Code § 8.01-223.2. For the reasons stated below, the Court finds that the Anti-SLAPP statute is inapplicable to this case.

In resolving this issue, the Court must address three questions: (1) when did the cause of action accrue; (2) what version of the Anti-SLAPP statute was in effect at the time the cause of action accrued, and would that version cover the instant case; (3) would a later version of the statute provide coverage for the instant case; and (4) if a later version of the statute would provide coverage for the instant case, would it be retroactive?

a. When Did the Cause of Action Accrue?

The Virginia Code states that a cause of action generally accrues on the date the injury is sustained:

> In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute.

Va. Code Ann. § 8.01-230. Virginia case law states that for a cause of action involving a claim for defamation, the cause of action accrues when the defamatory act occurred:

> Any cause of action that a plaintiff has for defamation accrues on the date that the defamatory acts occurred. Collins' defamation action accrued as a matter of law when Askew made the per se defamatory statement to The Daily Press reporters on January 8th. Accordingly, Collins' emotional and reputational injury resulting from Askew's statement was suffered upon Askew's publication of the statement to the reporters on that date.

Askew v. Collins, 283 Va. 482, 487 (2012) (internal citations omitted). Based upon both the Virginia Code and Virginia Supreme Court case law, the date the action accrued in the case at bar was the date on which Defendant published his original review of Plaintiff on Yelp, i.e., on December 3, 2015. See Pl.'s Ex. 3 & 14.

b. What version of the Anti-SLAPP statute was in effect at the time the cause of action accrued, and would that version cover the instant case?

The statute in effect on December 3, 2015 stated:

> A person shall be immune from civil liability for a violation of § 18.2-499 or a claim of tortious interference with an existing contract or a business or contractual expectancy based solely on statements made by that person at a public hearing before the governing body of any locality or other political subdivision, or the boards, commissions, agencies and authorities thereof, and other governing bodies of any local governmental entity concerning matters properly before such body. The immunity provided by this section shall not apply to any statements made with knowledge that they are false, or reckless disregard for whether they are false.

Va. Code Ann. § 8.01-223.2.

This version of the statue neither covers claims of defamation nor provides for recovery of attorney fees. Thus, the statute in effect at the time the cause of action accrued would not be applicable to the instant case.

c. Would a later version of the statute provide coverage for the instant case?

In 2016, the statute was amended to provide for an award of attorney fees to an individual whose case was dismissed pursuant to the statute. The statute did not expand the type of cases subject to immunity. The 2016 statute read as follows:

> A person shall be immune from civil liability for a violation of § 18.2-499 or a claim of tortious interference with an existing contract or a business or contractual expectancy based solely on statements made by that person at a public hearing before the governing body of any locality or other political subdivision, or the boards, commissions, agencies and authorities thereof, and other governing bodies of any local governmental entity concerning matters properly before such body. The immunity provided by this section shall not apply to any statements made with knowledge that they are false, or reckless disregard for whether they are false.
>
> Any person who has a suit against him dismissed pursuant to the immunity provided by this section may be awarded reasonable attorney fees and costs.

Va. Code Ann. § 8.01-223.2 (emphasis added).

In 2017, the statute was amended again, this time to expand the type of cases subject to the immunity protection provided by the statute. Specifically, the statute was expanded to cover claims of defamation. It now read as follows:

> A. A person shall be immune from civil liability for a violation of § 18.2-499, a claim of tortious interference with an existing contract or a business or contractual expectancy, or a claim of defamation based solely on statements (i) regarding matters of public concern that would be protected under the First Amendment to the United States Constitution made by that person that are communicated to a third party or (ii) made at a public hearing before the governing body of any locality or other political subdivision, or the boards, commissions, agencies and authorities thereof, and other governing bodies of any local governmental entity concerning matters properly before such body. The immunity provided by this section shall not apply to any statements made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false.
>
> B. Any person who has a suit against him dismissed pursuant to the immunity provided by this section may be awarded reasonable attorney fees and costs.

Va. Code Ann. § 8.01-223.2 (emphasis added).

Thus, the version of the statute that went into effect in 2017 does provide for recovery of attorneys' fees by a defendant who obtains dismissal of claims of defamation pursuant to the statute. Therefore, the Court will now turn to the issue of retroactivity.

d. Is the Anti-SLAPP statute retroactive?

The question of retroactivity ultimately turns on whether the change in the law is procedural or substantive. Virginia Code § 8.01-1 addresses this issue:

> Except as may be otherwise provided in § 8.01-256 of Chapter 4 (§ 8.01-228 et seq.) (Limitations of Actions), all provisions of this title shall apply to causes of action which arose prior to the effective date of any such provisions; provided, however, that the applicable law in effect on the day before the effective date of the particular provisions shall apply if in the opinion of the court any particular provision (i) may materially change the substantive rights of a party (as distinguished from the procedural aspects of the remedy) or (ii) may cause the miscarriage of justice.

Va. Code Ann. § 8.01-1. The question, therefore, is whether the revised statute "materially change[d] the substantive rights of a party (as distinguished from the procedural aspects of the remedy)." Id. As the Supreme Court stated in 1984:

> The concept of protection of substantive rights was incorporated by the General Assembly into Virginia civil procedure with the enactment of Title 8.01, effective October 1, 1977. Specifically, § 8.01-1 provides for retroactive application of all provisions of the Title, unless a particular provision "may materially change the substantive rights of a party (as distinguished from the procedural aspects of the remedy) . . . ." Substantive rights, which are not necessarily synonymous with vested rights, are included within that part of the law dealing with creation of duties, rights, and obligations, as opposed to procedural or remedial law, which prescribes methods of obtaining redress or enforcement of rights.

Shiflet v. Eller, 228 Va. 115, 120 (1984) (internal citations omitted).

In determining retroactivity, the Court looks first to the language of the statute itself to determine if it provides direction as to retroactivity, see, e.g., Ferguson v. Ferguson, 169 Va. 77, 85-87 (1937). In this case, the statute does not provide such direction. Second, the Court determines whether the revised statute makes procedural or substantive changes:

> The general rule is that changes to statutes affecting substantive rights apply prospectively and that the proceedings under those statutes will conform to the laws in effect on the date they are conducted. Section 8.01-1, the exception, deals only with changes in the procedural provisions of Title 8.01 and also sets forth certain

> circumstances when such procedural changes may not apply to existing causes of action.

Riddett v. Virginia Elec. & Power Co., 255 Va. 23, 29 (1998).

In the instant case, the section of the revised statute at issue – providing for a recovery of attorneys' fees for an individual who successfully obtains dismissal of a defamation claim pursuant to the immunity provisions of the statute – is substantive, not procedural. It creates a new statutory right to attorney fees in a defamation case where the defendant would otherwise not be entitled to attorney fees. As the Supreme Court of Virginia has stated: "[W]e have consistently adhered to the 'American rule': ordinarily, attorneys' fees are not recoverable by a prevailing litigant in the absence of a specific contractual or statutory provision to the contrary." Lannon v. Lee Conner Realty Corp., 238 Va. 590, 594 (1989) (citation omitted). In other words, the revised statute created a right of recovery in a defamation case that did not exist prior to the revision. Thus, the change is substantive and, therefore, not retroactive.[11]

ii. Fee Award

Based on the foregoing discussion, the Court cannot award attorney fees and costs to Jones for the following: (1) fees associated with the General District Court litigation; (2) fees associated with the Circuit Court litigation up to and including the non-suit taken on September 2, 2016; (3) fees associated with the potential appeal of the non-suit[12] ; and (4) fees solely associated with defending against the defamation claims. The Court's review of Jones' attorney fees leaves two categories of potentially recoverable fees: First, there are those fees solely associated with the contract claims. This amounts to $9,941. Second, there are those fees which are a mixture of contract claims and defamation claims. This amounts to $19,303.82. With respect to the first category, the Court awards 100% of the requested fees and costs, finding them to be reasonable. With respect to the second category, the Court awards 50% of the fees and costs, which the Court also finds to be reasonable. The reason the Court has selected 50% as the correct manner in which to divide the fees is based on the Court's presiding over the trial and in consideration of the evidence introduced and the arguments made at trial, as well as reviewing the pleadings filed in this case. The Court finds that 50% is an appropriate division between recoverable contract fees and costs and non-recoverable defamation fees and costs.

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[11] Given the resolution of this issue, the Court need not and, therefore, does not reach the issue of whether the statements in the December 3, 2015 posting constitute "matters of public concern that would be protected under the First Amendment to the United States Constitution," as that phrase is used in the Anti-SLAPP statute.

[12] The defendant is not seeking recovery of these fees. See Hr'g Tr. from 01/23/18, p. 90.

Therefore, the Court awards Jones total fees and costs of $19,592.91, which was arrived at by adding $9941 (contract related fees) + $9651.91, which is 50% of $19,303.82 (50% of mixed fees).

d. Conclusion for the Remaining Counts of the Counterclaim

The Court holds that Jones is entitled to recovery for counts 1, 2, and 3 of the Counterclaim based on the analyses above. As such, Jones will recover a total of $23,392.91, which sum includes: $3,800 for Count 2 and Count 3, and $19,592.91 for Count 1.

CONCLUSION

The case at bar began with a total of ten counts: six counts in the Complaint and four counts in the Counterclaim. During trial the Court dismissed four counts total: three from the Complaint and one from the Counterclaim. With respect to the remaining counts, the Court holds that Counts II, IV, and V of the Complaint do not constitute defamation per se, and counts 1-3 of the Counterclaim have been sufficiently proven.

THEREFORE, the Court finds that all counts of the Complaint as well as Count 4 of the Counterclaim must be dismissed with prejudice. The Court further finds that counts 1-3 of the Counterclaim should be granted. As such, the Court finds that Jones is entitled to $3,800 for counts 2 and 3 of the Counterclaim and, as the prevailing party, $19,592.91 in attorney fees under count 1 of the Counterclaim.

Defense counsel shall prepare an order in accordance with this opinion, provide it to Plaintiff's counsel for review and to note his objections, and submit it to the Court within fourteen (14) calendar days.

Sincerely,

[redacted]

Randy I. Bellows
Circuit Court Judge

OPINION LETTER