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*In the*  
**Court of Appeals of Virginia**  
*At Richmond*

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**0110-24-4**

WILLIAM JOSEPH PETRAK,

*Appellant,*

– v. –

RYAN SAWYERS,

*Appellee.*

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**OPENING BRIEF OF APPELLANT**

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## STATEMENT OF THE CASE

This is an appeal of a final judgment from the Prince William County Circuit Court in a defamation case brought by a local politician against a citizen who criticized his behavior in a Facebook comment. The trial court erroneously rejected the defendant's anti-SLAPP defense, statute-of-limitations defense, and demurrer, and allowed the case to proceed to a jury. The jury found for the politician and awarded \$1,000,000 in damages.

### Material Proceedings Below

Mr. Petrak (the Defendant below and Appellant here) posted the Facebook comment at issue on December 2, 2017. (Record "R." at 17, 3470-3472). Mr. Sawyers (the Plaintiff below and Appellee here) sued Mr. Petrak for defamation just four days later. (R. 42). On February 5, 2020, after over two years of litigation, Mr. Sawyers took a nonsuit. (R. 50-51). Over a year passed. Then, on March 23, 2021, Mr. Sawyers re-filed his defamation action. (R. 1).

Mr. Petrak responded to the re-filed action with a series of dispositive motions: a Demurrer (R. 26) arguing that the Facebook comment at issue

was a constitutionally-protected, non-actionable expression of opinion (filed on June 22, 2021); a Plea in Bar (R. 38) noting that the one-year statute of limitations had expired (filed August 19, 2021); and a Plea in Bar and Motion to Dismiss (hereinafter the “Anti-SLAPP Motion”)<sup>1</sup> (R. 290) raising the defense of statutory immunity under Va. Code § 8.01-223.2 (filed on February 3, 2022).

The Plea in Bar (raising the statute of limitations defense) was argued first. The trial court overruled the Plea in Bar on November 10, 2021, finding that although the court was “initially troubled by a seemingly inequitable outcome,” Mr. Sawyers’ Complaint was nevertheless timely filed. (R. 79-86). Mr. Petrak asked the court to reconsider its ruling in a motion filed on November 23, 2021 (R. 88), but the court declined to do so (R. 124-27).

On January 14, 2022, the parties proceeded to present oral argument on Mr. Petrak’s Demurrer. (R. 274, 3309-68). The court overruled the

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<sup>1</sup> See *Harless v. Nicely*, Record No. 0702-23-3 (Va. Ct. App. May 7, 2024) (referring to Virginia Code § 8.01-223.2 as “Virginia’s anti-SLAPP (strategic lawsuit against public participation) statute.”).

Demurrer that same day, finding that the Complaint had “sufficiently state[d] a claim” (R. 274) and that the question of whether the statement at issue was non-actionable opinion should be deferred to trial and decided by the jury. (R. 3349) (Hearing Transcript at 40 (describing Mr. Petrak’s Demurrer argument as “a great argument for the jury” and ruling: “that’s where it needs to be decided.”))

Mr. Petrak then proceeded to seek a hearing on his third dispositive defense: the Anti-SLAPP Motion. An evidentiary hearing was initially scheduled for October 12, 2022. However, when Mr. Petrak sought entry of a scheduling order to establish pre-hearing deadlines, Mr. Sawyers objected to proceeding with a pretrial evidentiary hearing, arguing that the issue of anti-SLAPP immunity is not one that could be decided on a plea in bar. (R. 397). The court agreed and denied the Motion for Entry of Scheduling Order on June 2, 2022. (R. 519). The evidentiary hearing that had been set for October 12, 2022, was removed from the docket (R. 615) and consideration of the Anti-SLAPP Motion was postponed for trial.

In light of the trial court's rejection (or postponement) of all three dispositive pretrial motions, Mr. Petrak was required to litigate the entire case (a second time) and incur large sums of attorney fees in the course of preparing and presenting his defenses. The case was tried before a jury October 16-24, 2023. (R. 1531). During the course of the trial, and at the earlier invitation of the court, Mr. Petrak renewed his Demurrer, which the court again overruled, ruling expressly that the statements in the Facebook Post were "statements of fact and not opinion." (R. 1522-24, 2398-2400). Later, at the close of the plaintiff's evidence and again at the close of all the evidence, Mr. Petrak moved to strike the case and moved for a directed verdict<sup>2</sup> for the reasons outlined in the Anti-SLAPP Motion (namely, that Mr. Sawyers had failed to prove any ground for applying an exception to statutory immunity). (R. 2442-47, 2884-87). The court refused to strike the evidence or direct a verdict and denied the motions, allowing the case to go

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<sup>2</sup> The oral motion for a directed verdict was essentially a motion for summary judgment. Mr. Petrak's counsel asked the trial court to decide the immunity issue as a matter of law (R. 2451) in connection with his motion to strike the evidence, but the court opted to treat the argument as a motion for a "directed verdict." (R. 2452).

to the jury. (R. 2469-71, 2891). The jury returned a verdict for Mr. Sawyers, awarding him one million dollars. (R. 1381).

On December 14, 2023, the court entered a written order denying Mr. Petrak's Anti-SLAPP Motion and immunity defense, ruling that "immunity does not apply." (R. 1527-28).

Mr. Petrak appeals.

### **ASSIGNMENTS OF ERROR**

- I. The circuit court erred by overruling Bill Petrak's Demurrer.<sup>3</sup> The court should have sustained the Demurrer because the statements at issue are, as a matter of law, non-actionable opinions that fully disclose their factual predicate and do not imply the existence of undisclosed defamatory facts.**
- II. The circuit court erroneously determined that Ryan Sawyers' Complaint was timely filed and erred by refusing to dismiss the case despite the expiration of the applicable limitations period.<sup>4</sup>**
- III. The circuit court erred by failing to dismiss the case on grounds of statutory immunity and award attorney fees under Va. Code § 8.01-223.2.<sup>5</sup> The court erroneously applied Section 8.01-223.2(B)'s "actual malice" exception to immunity, but that exception does not apply to statements of opinion such as those at issue in this case.**

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<sup>3</sup> Preserved at R. 26, 205-14, 1522-24, 2398-2400, 3316-3329, 3342-3350.

<sup>4</sup> Preserved at R. 30-38, 64-70, 88-95, 3276-83, 3291-96.

<sup>5</sup> Preserved at R. 290-93, 368-70, 521, 1528, 2442-54, 2884-91.

## FACTS RELATING TO ASSIGNMENTS OF ERROR

### **Facts Relating to Assignments 1 and 3:**

Ryan Sawyers is the former Chairman of the Prince William County School Board. (R. 2). While serving in that capacity, he also ran for Congress, launching his campaign at some point in 2017. (R. 1740). Towards the end of 2016, approximately one year into his term as Chairman of the School Board, a group of Prince William County citizens displeased with his performance (a group that included Mr. Petrak) initiated a statutory recall proceeding seeking Mr. Sawyers' removal from office. (R. 1752, 2290). The group collected "just over 7,000" signatures of people supporting his removal. (R. 2292). Mr. Sawyers resigned from the School Board and terminated his congressional bid in early 2018, shortly after the number of signatures was made public. (R. 1742, 1757, 2293).

On December 2, 2017, during the height of public discourse regarding Mr. Sawyers' suitability for public office, Mr. Petrak wrote a post in a Facebook Group called "Prince William County Education Reform" in which he took issue with Mr. Sawyers' personal behavior. (R. 2194-95,

3470-3472). The behavior in question was a public statement made by Mr. Sawyers on social media in which he referred to a local librarian as a “LILF.” (R. 1719, 3461-62, hereinafter the “LILF Comment”). This acronym was both intended by Mr. Sawyers<sup>6</sup> and interpreted by Mr. Petrak to mean “Librarian I’d Like to Fuck.” (R. 2031-32, 2825). Mr. Petrak was horrified that a holder of public office, particularly a married man in charge of the school system, would make such a “repugnant” and “disgusting” remark in a public forum. (R. 2839-40). He felt it was appropriate to inform the public of this behavior, so he wrote a Facebook post (hereinafter the “Facebook Post”) in which he shared a screenshot of Mr. Sawyers’ LILF Comment and added the following personal observations:

Look closely and see the comment by Ryan Sawyers. It says “such a LILF”. I am told this person is a librarian. So basically Ryan Sawyers, a married man, is publicly saying on social media that he would like to have sex with this woman. If that isn’t the

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<sup>6</sup> Mr. Sawyers would later testify that calling the librarian a LILF was also an “inside joke” among the librarian’s husband, Mr. Sawyers, and Mr. Sawyers’ wife that the “F” stood for “fund,” as school funding was one of Mr. Sawyers’ campaign issues. (R. 1719-21).

behavior of a SEXUAL PREDATOR or HARASSER I  
don't know what is.

(R. 3470-3472). Mr. Sawyers did not appreciate being called a “sexual predator or harasser” (a characterization he contends is false) and sued Mr. Petrak for defamation just four days later. (R. 42).

### **Facts Relating to Assignment 2:**

This defamation lawsuit—originally filed on December 6, 2017—is based solely on Mr. Petrak’s Facebook Post of December 2, 2017. (R. 9, 42). On February 5, 2020, after several years of litigation, Mr. Sawyers took a nonsuit. (R. 50-51, hereinafter the “Nonsuit Order”). The trial court ordered that “Plaintiffs motion for nonsuit...is granted and the remaining Defamation Count is nonsuited,” signing the order on February 5, 2020. (R. 51). At the time of the dismissal, two motions for sanctions remained pending and had not yet been argued. To allow additional time for the sanctions motions to be heard, the court suspended Rule 1:1. (R. 51) (“Rule 1:1 is hereby suspended and this Court preserves jurisdiction over this matter beyond 21 days in order to potentially hear Petrak’s two motions for sanctions as previously filed”).

Shortly after the Nonsuit Order was entered, and as the result of a series of judicial emergency orders entered by the Virginia Supreme Court during the height of the COVID-19 pandemic, statutes of limitation were suspended from March 16, 2020, through July 19, 2020. (R. 53-58).

The motions for sanctions were eventually argued on September 24, 2020. (R. 59). The court denied the motions and entered its final order on that date. (R. 59). Mr. Sawyers re-filed the case on March 23, 2021, over a year after the Nonsuit Order was entered and over three years after the Facebook Post at issue. (R. 1).

## ARGUMENT

### **I. The Complaint Fails to State a Claim for Defamation.**

#### **A. Standard of Review (First Assignment of Error)**

The trial court should have sustained Mr. Petrak's Demurrer to the defamation claim, but didn't. The legal question presented by a trial court's failure to sustain a demurrer requires application of a de novo standard of review because it is a pure question of law. *Mark Five Const., Inc. ex rel. Am. Econ. Ins. Co. v. Castle Contractors*, 274 Va. 283, 287 (2007). A demurrer tests the legal sufficiency of a pleading and should be sustained

if the pleading fails to state a valid cause of action. *La Bella Dona Skin Care, Inc. v. Belle Femme Enterps.*, 294 Va. 243, 255 (2017).

## **B. Discussion**

### **1. Expressions of Opinion Are Not Actionable.**

To state a claim for defamation, a plaintiff must allege (1) publication (2) of an actionable statement (3) with the requisite level of intent. *Jordan v. Kollman*, 269 Va. 569, 575 (2005). To be actionable, a statement must be one that asserts actual false and defamatory facts about a person; pure expressions of opinion are never actionable. *Yeagle v. Collegiate Times*, 255 Va. 293, 295 (1998) (holding that “speech which does not contain a provably false factual connotation, or statements which cannot reasonably be interpreted as stating actual facts about a person cannot form the basis of a common law defamation action.”) “It is firmly established that pure expressions of opinion are protected by both the First Amendment to the Federal Constitution and Article I, Section 12 of the Constitution of Virginia and, therefore, cannot form the basis of a defamation action.” *Padula-Wilson v. Landry*, 298 Va. 565, 579 (2020) (quoting *Williams v. Garraghty*, 249 Va. 224, 233 (1995)).

**2. As a Matter of Law, the Facebook Post Is an Expression of Opinion.**

The trial court should have sustained the Demurrer because the question of whether the Facebook Post constitutes a non-actionable opinion is a matter of law, not fact, and the only reasonable interpretation of the Facebook Post is that it merely reflects the personal views of Mr. Petrak. “Whether an alleged defamatory statement is one of fact or opinion is a question of law and is, therefore, properly decided by the court instead of a jury.”<sup>7</sup> *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 714 (2006) (citing *Fuste v. Riverside Healthcare Ass’n*, 265 Va. 127, 132-33 (2003)). A demurrer is therefore an appropriate vehicle by which to challenge a defamation claim based on a non-actionable statement of opinion. See *Yeagle v. Collegiate Times*, 255 Va. 293 (1998) (affirming sustaining of demurrer in defamation action based on statement calling university official “Director of Butt Licking”).

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<sup>7</sup> The trial court declined to apply this principle, overruling the Demurrer to allow the jury to consider the issue. (See Hearing Transcript at 40 (R. 3349) (describing Mr. Petrak’s opinion argument as “a great argument for the jury” and ruling erroneously, “that’s where it needs to be decided.”))

Statements that are relative in nature and depend largely upon the speaker's viewpoint are expressions of opinion. *Tronfeld*, 272 Va. at 714. "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." *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 48 (2009).

Instead, "a court must consider the statement as a whole." *Id.* "[F]actual 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." *Id.*; see also *Schaecher v. Bouffault*, 290 Va. 83, 101 (2015) (holding that "[a]s with all evaluations of defamatory statements, however, context is of the utmost importance").

An expression of opinion that implies the existence of undisclosed facts known only to the writer may be actionable if those undisclosed facts are false and defamatory; on the other hand, an expression of opinion that fully discloses its factual predicate retains its protected status and is not actionable. *Schaecher*, 290 Va. at 105-06. Virginia follows the rule expressed in Section 566 of the Restatement (Second) of Torts, which provides that an

expression of opinion may be actionable “only if it implies the allegation of *undisclosed* defamatory facts as the basis for the opinion.” See Restatement (Second) of Torts § 566 (emphasis added). The Virginia Supreme Court held in *Schaecher v. Bouffault* that opinions fully disclosing their factual bases constitute a subjective view and are not actionable. See *Schaecher*, 290 Va. at 105 (citing *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 185 (4th Cir. 1998)).

In *Schaecher*, the court found the statement “I firmly believe that Gina is lying and manipulating facts to her benefit” to be insufficient to state a claim for defamation because the email containing the statement appeared to fully disclose the basis for making the accusation and there was no reason for the recipients to infer that the author had an “implied factual basis for her accusation that [Gina] was lying of which they were unaware.” *Schaecher*, 290 Va. at 105-06. Rather, the court held that the recipients “would have perceived the accusation as a pure opinion on the part of [the writer] based upon her subjective understanding of the

underlying scenario and not upon an implied factual predicate of which they were unaware.” *Id.*

In the Facebook Post, Mr. Petrak unquestionably used some excoriating language to condemn Mr. Sawyers’ use of sexual innuendo in his LILF Comment. What the trial court failed to appreciate, however, is that although Mr. Petrak did indeed refer to Mr. Sawyers as a “sexual predator” and “harasser,” Mr. Petrak did not use these labels in a vacuum; rather, he made very clear that the sole reason he viewed Mr. Sawyers as a predator and harasser of women was that “Ryan Sawyers, a married man, is publicly saying on social media that he would like to have sex with this woman.” (See Facebook Post, R. 17, 3470-3472). “If *that* isn’t the behavior of a SEXUAL PREDATOR or HARASSER I don’t know what is,” he writes (italics added). The italicized word “that” can only be understood to refer to the LILF Comment (and nothing else). Nothing in the Facebook Post suggests Mr. Petrak was privy to certain additional, undisclosed facts about Mr. Sawyers that would have further supported his opinions. Rather, Mr. Petrak fully disclosed to the reader that Mr. Sawyers’ LILF Comment

was the factual basis for calling Mr. Sawyers a sexual predator and harasser.

The reader therefore understands that Mr. Petrak's use of the "sexual predator" label represented Mr. Petrak's own personal view of Mr. Sawyers based solely on his posting the LILF Comment. The reader does not receive a defamatory message because Mr. Sawyers admits he wrote the LILF Comment (R. 1719) and the reader is free to draw his or her own conclusions based upon his admitted behavior. Readers may agree or disagree with Mr. Petrak's views or the terminology he used; and the fact that they may agree or disagree demonstrates that the Facebook Post amounts to a subjective opinion.

As a mere expression of Mr. Petrak's personal views, the factual foundation for which is both fully disclosed and factually true, the Facebook Post amounts to constitutionally protected opinion, which is not actionable. The trial court should have sustained the Demurrer and dismissed the case.

## **II. This Action Is Time Barred By the Statute of Limitations.**

### **A. Standard of Review (Second Assignment of Error)**

A statute of limitations defense presents a mixed question of law and fact. *Mackey v. McDannald*, 298 Va. 645, 654 (2020). This Court applies a de novo standard of review with respect to the trial court's determinations on questions of law. *Janvier v. Arminio*, 272 Va. 353, 363 (2006). The trial court's factual findings in accepting or rejecting a statute-of-limitations defense should be upheld unless they are plainly wrong or without credible supporting evidence. *Mackey*, 298 Va. at 654. Statutes of limitations are strictly enforced and must be applied unless the General Assembly has clearly created an exception to their application. *Casey v. Merck & Co.*, 283 Va. 411, 416 (2012). Any doubt must be resolved in favor of the enforcement of the statute. *Arrington v. Peoples Sec. Life Ins. Co.*, 250 Va. 52, 55 (1995).

## **B. Discussion**

### **1. The Statute of Limitations on Mr. Sawyers' Defamation Claim Expired on December 9, 2020.**

The statute of limitations for defamation actions is one year. Va. Code § 8.01-247.1. The statements claimed to be defamatory were made on December 2, 2017. Mr. Sawyers therefore had until December 2, 2018, to file suit. He first brought his defamation claim very early, just four days after the cause of action allegedly arose. The 2017 litigation dragged on for several years before it ended with a nonsuit entered on February 5, 2020.

Nonsuits can extend a limitations period by as much as six months. Section 8.01-229(E)(3) of the Virginia Code permits a plaintiff, after the entry of a nonsuit order, to “re-commence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision B 1 [applicable when a party dies], whichever period is longer.” The Supreme Court of Virginia has held that the term “original period of limitation” means “the original statute of limitations without any tolling of that statute while a nonsuited action is pending,” and that “when

a plaintiff...suffers a nonsuit and does not renew the action within the allotted six months, the 'original period of limitation' is not tolled." See *Simon v. Forer*, 265 Va. 483, 489-90 (2003).

This lawsuit is based on statements made on December 2, 2017, so the "original period of limitation" expired on December 2, 2018. This period was not tolled by the pendency of the earlier action. Mr. Sawyers took a nonsuit on February 5, 2020, after the original period of limitation had already passed. Therefore, he was entitled to only six additional months to renew his claim. That period expired on August 5, 2020.

Shortly before the end of the limitations period, we had the COVID-19 judicial emergency. The Virginia Supreme Court entered a series of emergency orders that, taken together, resulted in all case-related deadlines being suspended for 126 days between March 16, 2020, to July 19, 2020. *Clutteur v. Rosier*, 79 Va. App. 55, 76 (2023). Consequently, the August 5, 2020 deadline for Mr. Sawyers to commence his defamation suit against Mr. Petrak was extended 126 days to December 9, 2020.

Mr. Sawyers did not file this action until March 23, 2021. (R.1).

Therefore, the action was not timely filed and should have been dismissed at the outset.

**2. Section 8.01-229(E)(3)'s Six-Month Extension Runs from the Date of the Nonsuit Order Regardless of Whether the Nonsuit Order Is a Final Order.**

Section 8.01-229(E)(3) allows plaintiffs an additional six months in which to re-file a claim after suffering a nonsuit when the original limitation period has already passed. That six-month period is measured “from the date of the order entered by the court.” Orders are “entered” on the day they are signed by the judge. *Kosko v. Ramser*, 299 Va. 684, 689 (2021). Here, the Nonsuit Order was signed by the judge (and therefore entered) on February 5, 2020. (See Nonsuit Order, R. 50-51 (ordering that “Plaintiff’s motion for nonsuit...is granted and the remaining Defamation Count is nonsuited”). Therefore, the six-month period expired on August 5, 2020.

The trial court, however, did not agree that the Nonsuit Order was entered on the day it was signed by the judge. In a letter opinion denying

Mr. Petrak’s Motion to Reconsider, the court held that “the Nonsuit Order was entered on September 24, 2020,” reasoning that nonsuit orders—by definition—are final orders, and the final order was not entered until September 24, 2020. (R. 127). Based on this faulty premise, the court ruled that the six-month period *did not even begin to run* until September 24, 2020, the date of the final order that disposed of the sanctions motions. (R. 85-86, 124-27).

The trial court made a clear error of law in refusing to dismiss this case. Nonsuit orders are not necessarily final orders. *See Johnson v. Woodard*, 281 Va. 403, 410 (2011) (holding that nonsuit orders that retain jurisdiction to consider other matters are not final orders). Whether the Nonsuit Order in this case was a final order is irrelevant for purposes of calculating the statute of limitations. Section 8.01-229(E)(3) is clear: a plaintiff gets six extra months “from the date of the order” entering the nonsuit. That order may or may not be an order that disposes of the entire case and leaves nothing further to be done. *See Super Fresh Food Markets of Virginia, Inc. v. Ruffin*, 263 Va. 555, 560 (2002) (defining a final judgment as “one which disposes of the

entire action and leaves nothing to be done except the ministerial superintendence of execution of the judgment”). Nothing in Section 8.01-229(E)(3) requires that the nonsuit order be a final order.

In this case, the Nonsuit Order was not a final order because the Court retained jurisdiction “beyond 21 days in order to potentially hear Petrak’s two motions for sanctions.” (R. 50-51). It doesn’t matter. The Nonsuit Order was signed by the judge, and therefore entered, on February 5, 2020.

### **III. The Trial Court Should Have Dismissed the Case and Awarded Attorney Fees to Mr. Petrak Under Virginia Code § 8.01-223.2.**

#### **A. Standard of Review (Third Assignment of Error)**

The construction and interpretation of a statute presents a pure question of law to which a de novo standard of review applies. *Perreault v. The Free Lance-Star*, 276 Va. 375, 384 (2008).

#### **B. Discussion**

##### **1. The Anti-SLAPP Statute Applies to the Facebook Post and Grants Immunity to Mr. Petrak.**

Virginia’s anti-SLAPP statute, Va. Code § 8.01-223.2, provides in pertinent part that “a person shall be immune from civil liability for

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.” Va. Code § 8.01-223.2(A). Mr. Petrak’s Facebook Post was a communication to various third parties and Mr. Sawyers’ defamation claim is based solely on the statements made in that post. Therefore, Mr. Petrak is protected by the statute and immune from liability if the statements at issue are regarding matters of public concern and no exception applies.

As stipulated by Mr. Sawyers, there is no dispute that the Facebook Post deals with matters of public concern. (R. 1527-28, 1582). Moreover, a discussion about an individual’s suitability for public office is not only a matter of public concern but the type of debate that enjoys the very strongest protection the First Amendment has to offer. *See Mahan v. National Conservative Political Action Comm.*, 227 Va. 330, 336 (1984) (“There can be no doubt that discussion of public issues and debate on the qualifications of candidates for public office are integral to the operation of our system of government and are entitled to the broadest protection the

First Amendment can afford”). The trial court refused to apply the protections of the anti-SLAPP statute, however, because it determined that the statements were factual assertions (not opinions) (R. 2469-71) and “because the jury concluded the Defendant made the statements with actual malice.” (R. 1527).

The immunity provided by the anti-SLAPP statute does not apply “to any statements that the declarant knew or should have known were false or were made with reckless disregard for whether they were false.” *See* Va. Code § 8.01-223.2(B). Thus, if a declarant makes a misrepresentation of fact about a public official, he or she may not be entitled to immunity, depending on the extent to which the declarant knew or should have known his or her statement was false.

Expressions of opinion, however, are not covered by Va. Code § 8.01-223.2(B) because—unlike factual assertions—opinions are subjective and not capable of being proved true or false. *See Schaecher v. Bouffault*, 290 Va. 83, 103-05 (2015) (noting that “opinions fully disclosing their factual bases constitute a subjective view and are not actionable”); *Tronfeld v. Nationwide*

*Mut. Ins. Co.*, 272 Va. 709, 716 (2006) (distinguishing statements of opinion from statements “capable of being proven true or false”); *WJLA-TV v. Levin*, 264 Va. 140, 156 (2002) (observing that an expression of opinion “does not contain a provably false factual connotation”).

The trial court erred in relying on Va. Code § 8.01-223.2(B) to deny Mr. Petrak the protection of the anti-SLAPP statute because (as argued *supra*) Mr. Petrak’s statements in the Facebook Post are his constitutionally protected personal opinions. As opinions, they cannot be viewed as “false” within the meaning of Section 8.01-223.2(B). Thus, when a person expresses an *opinion* on a matter of public concern, that person is absolutely immune from tort liability under the anti-SLAPP statute—there are no exceptions.

The anti-SLAPP statute is designed to protect citizens like Mr. Petrak against expensive and cumbersome lawsuits by wealthy, thin-skinned politicians like Mr. Sawyers. Mr. Petrak expressed his personal views on a matter of public concern and got sued for it. The trial court should have granted him immunity under Section 8.01-223.2 and dismissed the case.

## 2. The Court Should Award Attorney Fees to Mr. Petrak.

If a defendant prevails in a case covered by the anti-SLAPP statute, he may recover reasonable attorney fees and costs from the plaintiff.

*Harless v. Nicely*, No. 0702-23-3, 2024 WL 2000621, at \*6 (Va. Ct. App. May 7, 2024) (holding that “the defendants may be entitled to reasonable attorney fees” under the anti-SLAPP statute even though their demurrer had already been sustained); *see* Va. Code § 8.01-223.2(C) (“Any person who...prevails in a legal action, pursuant to the immunity provided by this section may be awarded reasonable attorney fees and costs”).

This is a case that should have never been allowed past the metaphorical gate. *See Webb v. Virginian-Pilot Media Companies, LLC*, 287 Va. 84, 90 (2014) (holding that trial courts perform “an essential gatekeeping function” by “ensuring that defamation suits proceed only upon statements which actually may defame a plaintiff, rather than those which merely may inflame a jury to an award of damages”). Instead, the trial court rejected all of Mr. Petrak’s dispositive motions and allowed the case to proceed, resulting in litigation that has now been going on for nearly

seven years. Mr. Petrak has incurred over \$200,000.00 in legal fees (R. 2550) and has been hit with a \$1,000,000.00 judgment, all because he decided to exercise his constitutional right to sharply criticize a politician for making lewd comments in a public forum. This Court should correct the injustice and remand the case to the Prince William Circuit Court with instructions to award Mr. Petrak a reasonable amount of attorney fees.

### **CONCLUSION AND RELIEF SOUGHT**

This Court should vacate the judgment entered against Mr. Petrak and award the following additional relief:

1. The Court should reverse the trial court's order denying the Anti-SLAPP motion, enter judgment in favor of Mr. Petrak, award attorney fees to Mr. Petrak, and remand to the trial court solely for a determination of the reasonableness of those fees and the amount of fees to award.
2. In the alternative, the Court should reverse the trial court's orders (a) overruling the Demurrer and (b) overruling the Plea in Bar (raising the statute of limitations defense) and dismiss the Complaint with prejudice.

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## Certificate

I hereby certify that on this 20th day of May, 2024, pursuant to Rules 5A:1, 5A:4, and 5A:20, an electronic copy of the Appellant's Opening Brief has been filed with the Clerk of the Court of Appeals of Virginia via VACES. On this same day, an electronic copy of the Appellant's Opening Brief was served via email upon:

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This Brief contains 4,950 words, excluding those portions that by rule do not count toward the word limit. Counsel for the Appellant respectfully requests oral argument.

  
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