NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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VIA EMAIL ONLY

Timothy P. Bosson, Esq.
BOSSON LEGAL GROUP, PC
8300 Arlington Blvd., Ste. B2
Fairfax, VA 22031
tbosson@bossonlaw.com

Jason E. Ohana, Esq.
WILLCOX & SAVAGE, P.C.
440 Monticello Avenue, Suite 2200
Norfolk, VA 23510
johana@wilsav.com
Counsel for Defendant

Anthony I. Shin, Esq.
LAW OFFICE OF ANTHONY I. SHIN, PLLC
116-R Edwards Ferry Road, N.E.
Leesburg, VA 20176
shin@shinlawoffice.com
Counsel for Plaintiffs

RE: Robin and Peter Brannon v. BOP Reston F, LLC d/b/a The Edmund
Case No. CL-2023-14228

Dear Counsel:

This matter comes before the Court on the demurrer to Counts I, II, IV, and VI of the Complaint, filed by Defendant BOP Reston F, LLC d/b/a The Edmund ("***Landlord***"). Plaintiffs Robin and Peter Brannon (together, the "***Tenants***") leased an apartment (the "***Leased Premises***") from Landlord pursuant to a written rental agreement that is attached to the Complaint (the "***Lease***").

Landlord demurs to Counts I (Negligence) and II (Negligence *Pe Se*) of the Complaint, asserting that the damages claimed by Plaintiffs Robin and Peter Brannon (together, "***Tenants***") for "Lost Wage Damages" and "Emotional Distress Damages" could not have been proximately caused by the failure to remediate mold alleged in those counts. Landlord further asserts that the "Relocation Damages" claimed in Counts I and II, which include the damages Tenants allegedly

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suffered as a result of having to secure alternative housing, are barred by the economic loss rule. Landlord's arguments are correct and, on these issues, the demurrer is SUSTAINED, except as to damage alleged to Tenants' personal property.

Landlord demurs to Count IV of the Complaint (Constructive Fraud), asserting that allegedly false representations by the Landlord that repairs were "complete" and that Tenants were "good to go" are too remote from the resulting harm alleged and do not constitute the misrepresentation of fact necessary to support a fraud claim. The representation that Landlord had completed the necessary repairs to the Leased Premises was a statement as to a then-existing material fact and Tenants properly allege resultant harm proximately caused by their reliance on that misrepresentation. The demurrer to Count IV is, therefore, OVERRULED.

Landlord demurs to Count V of the Complaint (Violation of the Virginia Residential Landlord Tenant Act ("***VRLTA***" or the "***Act***")), asserting that damages sought by Tenants are not available under the Act and their claims are barred by a contractual limitation of liability set forth in the Lease. "Lost Wage Damages" flowing from alleged personal injuries are not recoverable as a statutory or contractual remedy under the VRLTA. Relocation damages, attorney's fees, court costs, and interest are all recoverable under the VRLTA. The demurrer to the "Lost Wage Damages" alleged in Count V is, therefore, SUSTAINED; as to all other issues pertaining to Count V, the demurrer is OVERRULED.

Landlord demurs to Count VI of the Complaint (Breach of Contract), asserting that the claim is barred by Tenants' failure to invoke a contractual provision permitting them to vacate the Leased Premises and terminate the Lease under certain circumstances. The Lease provision upon which Landlord relies is not mandatory. The demurrer on this ground is, therefore, OVERRULED.

Landlord also asks the Court to strike Tenants' jury demand. That request is DENIED because the jury trial waiver set forth in the Lease was "eliminated" by a later provision set forth in an addendum to the Lease.

ALLEGATIONS OF THE COMPLAINT

The Complaint alleges the following facts:

Tenants signed the lease on or about March 13, 2022. Compl. ¶ 1. The term of the Lease was from March 14, 2022 to March 13, 2023. Compl. ¶ 2.

Before entering into the Lease, Tenants informed Landlord that one of them would be working remotely in the Leased Premises. They requested certain features to accommodate that Tenant's need to work remotely. Compl. ¶¶ 9-10.

On or about March 31, 2022, Tenants observed water pooling around their refrigerator and throughout the entryway of the Leased Premises, causing water damage to the area. They reported the leak to the Landlord. Compl. ¶¶ 11-12. Landlord investigated and determined that the

waterline connecting to the refrigerator's ice maker was leaking water onto the floor of the Leased Premises and into the surrounding dry wall. Compl. ¶ 13.

On or about April 1, 2022, Landlord repaired the damaged flooring and dry wall but failed to repair the source of the leak. As a result, water continued leaking from the faulty waterline onto the floors and into the walls near Tenants' refrigerator. At the time, Tenants were unaware of the continued leak as the water was seeping into portions of the Leased Premises hidden from Tenants' view. Compl. ¶¶ 14-16.

On April 1, 2022, Landlord told Tenants that "the repairs to the Apartment were 'complete' and that Tenants were 'good to go'." Compl. ¶ 17. Relying on Landlord's representation, Tenants reentered and continued living in the Leased Premises.

In the months following April 1, 2022, Tenants began experiencing health symptoms including coughing, shortness of breath, sinus issues, ear pain, headaches, and lethargy, which required medical treatment. Compl. ¶¶ 20-22. In October 2022, Tenants "were alerted to the possibility that their declining respiratory health may be linked to the [Leased Premises]"; at this point, they "immediately began investigating for possible irritants." Compl. ¶ 23.

On or about October 31, 2022, Tenants moved the refrigerator and discovered that the floor thereunder was wet and covered with mold. The mold was previously concealed by the refrigerator. Compl. ¶¶ 24-25. Immediately after discovering the mold, Tenants alerted Landlord about the continued leak and the presence of visible "black mold carpeting the floors beneath the refrigerator." Compl. ¶ 26.

Tenants moved out of the leased premises the following day, November 1, 2022, and began living in temporary housing. Compl. ¶ 27. Landlord attempted to remediate the mold by spraying bleach on the area under the refrigerator. Compl. ¶¶ 28-29.

When Tenants briefly returned to the Leased Premises to move their property, on November 10, 2022, they saw that the mold had spread to some of their furniture. Compl. ¶ 30. Tenants sent samples of the mold to third-party environmental testing companies; those samples tested positive for "toxigenic" mold growing in the Leased Premises on November 14, 2022; December 2, 2023; and March 6, 2023. Compl. ¶¶ 31-32. Despite the mold in the Leased Premises and the resulting effects on Tenants' health, Landlord refused to terminate the Lease.

Tenants were required to pay rent through the last day of the Lease and incur tens of thousands of dollars of additional moving and living expenses. Compl. ¶¶ 37-38. Moreover, they were forced to abandon their personal property that was covered in mold. Tenants refer to these damages as "Relocation Damages." Compl. ¶¶ 37-39.

Tenants allege as "Personal Injury Damages" the medical treatment resulting from their mold exposure while living in the Leased Premises and allege as "Lost Wage Damages" the damages they suffered as a result of having to miss work for medical appointments to treat the

effects of mold exposure. These damages are limited to "harms experienced post November 1st." Compl. n. 1, at 7.

ANALYSIS

I. LEGAL STANDARD ON DEMURRER

> [T]he contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer. All demurrers shall be in writing and shall state specifically the grounds on which the demurrant concludes that the pleading is insufficient at law. No grounds other than those stated specifically in the demurrer shall be considered by the court.

Va. Code § 8.01-273.

"A demurrer admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations." *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 102, 540 S.E.2d 134, 136-37 (2001) (citation omitted). "A demurrer does not, however, admit the correctness of the pleader's conclusions of law." *Id.* (citation omitted).

"To survive a challenge by demurrer," factual allegations "must be made with 'sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.'" *Squire v. Virginia Hous. Dev. Auth.*, 287 Va. 507, 514, 758 S.E.2d 55 (2014) (citation omitted). "A plaintiff may rely upon inferences to satisfy this requirement, but only 'to the extent that they are reasonable.'" *A.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 613, 831 S.E.2d 460, 465 (2019) (quoting *Coward v. Wellmont Health Sys.*, 295 Va. 351, 358, 812 S.E.2d 766, 770 (2018)). "Distinguishing between reasonable and unreasonable inferences is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense,' guided by the principle that 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable.'" *Church of God in Christ, Inc.*, 297 Va. at 613, 831 S.E.2d at 465 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

II. COUNT I (NEGLIGENCE) FAILS TO STATE FACTS UPON WHICH "LOST WAGE DAMAGES," "EMOTIONAL DISTRESS DAMAGES," OR "RELOCATION DAMAGES" CAN BE RECOVERED.

Count I of the Complaint purports to allege a claim for common law negligence. The elements of a negligence claim are: (1) a legal duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) a showing that the breach was the proximate cause of injury to the plaintiff. *Blue Ridge Serv. Corp. v. Saxon Shoes, Inc.*, 271 Va. 206, 218, 624 S.E.2d 55, 62 (2006) (citing *Trimyer v. Norfolk Tallow Co.*, 192 Va. 776, 780, 66 S.E. 2d 441, 443 (1951)).

The Complaint alleges that Landlord had a "duty to [Tenants] to exercise ordinary care by providing mold remediation after [Landlord] became aware of [the] evidence of visible mold present in the Apartment on October 31, 2022." Complaint ¶ 49. It further alleges that Landlord breached that duty by "failing to provide mold remediation." Complaint ¶ 49. This Count, in contrast to Count II, does not allege that the Landlord undertook mold remediation in a manner that breached any applicable standard of care. Count I is more precisely described as a claim for "negligent failure to remediate mold," rather than "negligent mold remediation."

Landlord demurs not to the negligence claim, in its entirety, but to the "Lost Wage Damages," "Emotional Distress Damages," and "Relocation Damages" that Tenants allege were caused by Landlord's negligence. Under Virginia Code section 8.01-273's directive to consider only those grounds stated specifically in the demurrer, the Court must consider only whether Tenants' pleading states facts upon which the relief demanded can be granted and cannot address whether the negligence claim set forth in the Complaint states a cause of action, generally.

A. Count I fails to state facts upon which "Lost Wage Damages" can be granted.

In Count I, Tenants allege that Landlord "had a duty to exercise ordinary care [to conduct] mold remediation after [it] became aware of evidence of visible mold present in the [Leased Premises] on *October 31, 2022*." Compl. ¶ 49 (emphasis added). Though Tenants allege that they were forced to miss work due to Landlord's actions and omissions, the facts alleged in the Complaint, and those that may be reasonably and fairly implied and inferred from the allegations alleged in the Complaint, demonstrate that Tenants lost no work as a result of any breach by Landlord that commenced on or after October 31, 2022.

It is reasonable to infer that Tenants missed work to attend to their medical issues, which they allege resulted from the mold growing in the Leased Premises. If those medical issues were caused by mold exposure, however, they could not have resulted from Landlord's failure to remediate the mold on or after October 31, 2022 because Tenants vacated the leased premises the following day and returned only briefly to retrieve some of their personal property. *See* Compl. ¶¶ 27 & 30. The medical issues that Tenants assert were caused by mold exposure manifested prior to October 31, 2022. *See* Compl. ¶ 20 (alleging that, in the months between the April 1, 2022 and October 31, 2022, Tenants "began experiencing concerning symptoms, including, but not limited to, coughing, shortness of breath, sinus issues, ear pain, headaches, and lethargy") & 21 ("While living in the [Leased Premises, before moving out on November 1, 2022], both [Tenants] were forced to seek medical treatment to address these symptoms, which included multiple visits to the urgent care for shortness of breath."). In fact, it was these medical issues that led Tenants to undertake an investigation for "possible irritants," which eventually resulted in the discovery of the "visible mold" they allege Landlord had a duty to remediate. *See* Compl. ¶¶ 23-26.

For the "Lost Wage Damages" claim to survive under Count I, the Court would have to infer that the medical issues that caused Tenants to miss work to seek treatment were caused by their residing in the leased premises for part of a single day, November 1, 2022, contrary to the allegations in the Complaint that those medical issues were caused earlier, by their exposure to

mold prior to its discovery. Such an inference is unreasonable. Accordingly, Count I fails to state a claim for "Lost Wages Damages" upon which such relief can be granted and the demurrer on that ground is SUSTAINED.

B. Count I fails to state facts upon which "Emotional Distress Damages" can be granted.

"A plaintiff can recover damages for emotional distress when the defendant's negligence causes both emotional disturbance and physical injury." *Doe v. Baker*, 299 Va. 628, 653, 857 S.E.2d 573, 588 (2021) (citing *Hughes v. Moore*, 214 Va. 27, 34, 197 S.E.2d 214 (1973)). To the extent that Tenants allege, in Count I, that Landlord's failure to engage in mold remediation on or after October 31, 2022 caused both physical injury and emotional disturbance, Count I fails to state a claim for "Emotional Distress Damages" for the same reason that it fails to state a claim for "Lost Wages Damages." The allegedly resultant physical injury and emotional disturbance could not have been caused by Landlord's failure to remediation mold on and after October 31, 2022, because those effects were felt, if at all, prior to the commencement of the Landlord's alleged duty to remediate the mold. See Compl. ¶¶ 20-21. Accordingly, Count I fails to state a claim for emotional distress upon which such relief can be granted and the demurrer on that ground is SUSTAINED.

C. The Relocation Damages claimed in Count I, except for the alleged damage to Tenants' personal property, are barred by the economic loss rule.

Tenants concede that Count I of the Complaint seeks tort remedies for economic losses. *See* Pl.'s Opp. to Demurrer, at 3-4. As Landlord correctly argues, that requires the Court to consider the effect of the "economic loss rule." *See, e.g., Tingler v. Graystone Homes, Inc.*, 298 Va. 63, 98, 834 S.E.2d 244, 264 (2019) (citations omitted).

The "economic loss rule" is "a remedy-specific application of the source-of-duty rule." *Id.* "In determining whether a cause of action sounds in contract or tort, the source of the duty violated must be ascertained." *Richmond Metro. Auth. v. McDevitt St. Bovis*, 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998); *see MCR Fed., LLC v. JB&A, Inc.*, 294 Va. 446, 458, 808 S.E.2d 186 (2017) (citation omitted).

> No matter the alleged harm, tort liability cannot be imposed upon a contracting party for failing to do a contractual task when no common-law tort duty would have required him to do it anyway — and thus, as the maxim restates, "in order to recover in tort, the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract"

Tingler v. Graystone Homes, Inc., 298 Va. 63, 82, 834 S.E.2d 244, 255 (2019) (quoting *MCR Fed., LLC*, 294 Va. at 458 (citation omitted)).

"The source-of-duty rule finds its most secure roots in the historical distinction between the escalating degrees of blameworthiness recognized by the common-law doctrines of 'omission or non-feasance'[1] on the one hand, and 'misfeasance'[2] or malfeasance[3] on the other." *Tingler v. Graystone Homes, Inc.*, 298 Va. 63, 83-84, 834 S.E.2d 244, 256 (2019) (citing *Richmond Metro. Auth. v. McDevitt St. Bovis*, 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998), (citation omitted); William Lloyd Prosser, Selected Topics on the Law of Torts 387 & n.37 (reprt. ed. 1982)). "Though subject to various exceptions, the traditional view recognizes that '[t]here is no tort liability for nonfeasance, i.e., for failing to do what one has promised to do in the absence of a duty to act apart from the promise made.'" *Tingler*, 298 Va. at 84, 834 S.E.2d at 256 (quoting William L. Prosser & W. Page Keeton, Prosser and Keeton on the Law of Torts § 92, at 657 (Dan B. Dobbs et al. eds., 5th ed. 1984) (emphasis omitted)).

> 'There is a fundamental difference between doing something that causes physical harm and failing to do something that would have prevented harm . . . .' Put another way, a fundamental difference exists 'between lack of performance of something that would have prevented harm and defective performance that caused harm either from a dangerous force or a dangerous condition of something.'

Id. (quoting Prosser and Keeton on the Law of Torts § 92, at 657). So,

> If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort.

Oleyar v. Kerr, 217 Va. 88, 90, 225 S.E.2d 398, 399-400 (1976) (quoting Burks Pleading and Practice (4th ed., 1952), § 234 at 406). *See also Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 256 Va. 553, 558, 507 S.E.2d 344 (1998) (emphases added) (citation

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[1] "Nonfeasance is '[t]he failure to act when a duty to act exists.'" *Tingler v. Graystone Homes, Inc.*, 298 Va. 63, 84, 834 S.E.2d 244, 256 (2019) (quoting Black's Law Dictionary 1265 (11th ed. 2019)).

[2] "Misfeasance is '[a] lawful act performed in a wrongful manner' or, '[m]ore broadly, a transgression or trespass.'" *Tingler v. Graystone Homes, Inc.*, 298 Va. 63, 84, 834 S.E.2d 244, 256 (2019) (quoting Black's Law Dictionary 1197 (11th ed. 2019)).

[3] "[M]alfeasance is an affirmative, 'wrongful, unlawful, or dishonest act,' or in other words, something wrongful in itself." *Tingler v. Graystone Homes, Inc.*, 298 Va. 63, 84, 834 S.E.2d 244, 256 (2019) (quoting Black's Law Dictionary 1145 (11th ed. 2019)).

omitted); *accord Atlantic & Pac. Ry. v. Laird*, 164 U.S. 393, 399, 17 S. Ct. 120, 41 L. Ed. 485 (1896).

"Under [the economic loss doctrine], claims for 'damages which were within the contemplation of the parties when framing their agreement' — such as economic losses and damage to property that is the subject of the agreement — remain 'the particular province of the law of contracts.'" *Tingler,* 298 Va. at 98-99, 834 S.E.2d at 264-65 (quoting *Abi-Najm*, 280 Va. at 360 (quoting *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 425, 374 S.E.2d 55, 5 Va. Law Rep. 1040 (1988)). "A party may not use tort claims of negligence to seek such damages." *Id.*

"[A] party can, in certain circumstances, show both a breach of contract and a tortious breach of duty." *Richmond Metro. Auth.*, 256 Va. at 558, 507 S.E.2d at 347 (citing *Foreign Mission Bd. v. Wade*, 242 Va. 234, 241, 409 S.E.2d 144, 148 (1991)). "However, 'the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract.'" *Id.* (quoting *Foreign Mission Bd.*, 242 Va. at 241, 409 S.E.2d at 148).

The latter concept appears central to Tenants' opposition to the demurrer. At common law, a landlord had no obligation to perform mold remediation on leased premises in the tenant's exclusive control. *Cherry v. Lawson Realty Corp.*, 295 Va. 369, 377, 812 S.E.2d 775, 779 (2018) (citing *Isbell v. Commercial Inv. Assocs.*, 273 Va. 605, 611, 644 S.E.2d 72, 74 (2007)). However, Tenants argue that "Code § 8.01-226.12(E) contemplates that the landlord and/or the managing agent can be held liable for failing to satisfy its statutory obligation to perform proper mold remediation when visible mold has occurred." *Cherry*, 295 Va. at 377, 812 S.E.2d at 779. Tenants allege that this duty is independent of the contractual relationship between the parties and permits them to recover the damages they allege. The Court disagrees.

While it is true that Virginia Code § 8.01-226.12 imposes a duty upon a landlord to engage in mold remediation, the triggering event giving rise to that duty is the occurrence of "*visible evidence of mold* . . . within the dwelling unit." *See* Virginia Code § 8.01-226.12(E) (emphasis added). The same code section defines "visible evidence of mold" as "the existence of mold in the residential dwelling unit that is *visible to the naked eye of the landlord or tenant at the time of the move-in inspection*." *Id.* (emphasis added).

Pursuant to Virginia Code section 55.1-1214(B), Landlord allowed Tenants to prepare the written report of the move-in inspection. Paragraph 26 of the Lease provides that Tenants would "be given an Inventory and Condition form on or before move-in," which they were to, "[w]ithin 5 days after move-in . . . note . . . all defects or damage" before returning it to Landlord. Compl. Ex. 1, Apartment Lease Contract at ¶ 26. The Complaint fails to allege that there was mold in the Leased Premises that was visible to the naked eye at the time of the move-in inspection. In fact, the allegations set forth in the Complaint make clear that the first existence of mold visible to the naked eye occurred on October 31, 2022, more than seven months after the March 14, 2022 commencement of the lease term. *See* Compl. Ex. 1, Apartment Lease Contract at ¶ 3. The

Complaint expressly alleges that the "mold began growing" in the Leased Premises due to Landlord's negligent repair of a leak first observed by Tenants on March 31, 2022, more than two weeks after the commencement of the lease term on March 14, 2022. *See* Compl. Ex. 1, Apartment Lease Contract at ¶ 3. The statute upon which Tenants rely imposed no tort duty of mold remediation on Landlord and, therefore, no tort liability on Landlord for an alleged failure to engage in mold remediation. [4]

Any duty that Landlord owed to Tenants to engage in mold remediation, which would be breached by a failure to perform such remediation (as opposed to the negligent performance of such remediation), arose, if at all, from the lease agreement between the parties or the VRLTA. However,

> the General Assembly did not plainly manifest an intention, either through express language or by necessary implication, to abrogate the common law and make a landlord liable in tort for a tenant's personal injuries sustained on leased premises within the tenant's control and possession as a result of the landlord's breach of duties imposed by the [VRLTA]. Instead, the [VRLTA] provides a comprehensive scheme of landlords' and tenants' *contractual* rights and remedies.

Isbell v. Commercial Inv. Assocs., 273 Va. 605, 618, 644 S.E.2d 72, 78 (2007) (emphasis added).

> [T]he remedy for breaching the mold-remediation duties under VRLTA is almost indisputably contractual and within the statutory remedies delineated under Va. Code Ann. § 55-248.21,[5] which provides remedies for noncompliance by landlords. The narrow exception to this would be if Va. Code Ann § 8.01-226.12 does in fact provide a cause of action in tort, which would result in an overlap of a landlord's duties to perform mold remediation under both VRLTA and Va. Code Ann § 8.01-226.12(E) until the time of the move-in inspection ends and a cause of action under VRLTA becomes the appropriate avenue of recovery.

Batts v. S.L. Nusbaum Realty Co., No. CL1603269M-05, 2017 Va. Cir. LEXIS 155, at *13-14 (Cir. Ct. Sep. 9, 2017) (citing *Isbell*, 273 Va. 605, at 617-18, 644 S.E.2d 72).

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[4] At least one Circuit Court has concluded that the VRTLA "specifically established a corresponding common law duty upon a landlord in relation to mold." *Stith v. Liberty Pointe LP*, 110 Va. Cir. 141, 143 (Petersburg 2022). The matter before this Court does not require it to address whether the duty imposed by Code § 8.01-226.12 is one imposing liability in tort, because the duty imposed by that statute, of whatever nature, has not been triggered.

[5] This Code section was repealed in 2019. The statutory remedies for noncompliance by landlords now appear in the new VRLTA, Virginia Code § 55.1-1200, *et seq.*

Tenants may not use a tort claim of negligence to claim their economic losses as damages for a breach of the Landlord's contractual duties. Accordingly, the demurrer to the "Relocation Damages" claimed in Count I, except for the alleged damage to Tenants' personal property,[6] is SUSTAINED.

III. COUNT II (NEGLIGENCE *PER SE*) FAILS TO STATE FACTS UPON WHICH "LOST WAGE DAMAGES," "EMOTIONAL DISTRESS DAMAGES," OR "RELOCATION DAMAGES" CAN BE RECOVERED.

Count II of the Complaint purports to state a claim for negligence *per se*. The concept of negligence *per se* "represents the adoption of 'the requirements of a legislative enactment as the standard of conduct of a reasonable [person].'" *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 496, 706 S.E.2d 864, 872 (2011) (quoting *Butler v. Frieden*, 208 Va. 352, 353, 158 S.E.2d 121, 122 (1967)). Generally, to prevail on a negligence *per se* claim, the plaintiff must plead and prove that: (1) the defendant violated a statute enacted for public safety; (2) the plaintiff belongs to the class of persons for whose benefit the statute was enacted and the harm suffered by the plaintiff was the type against which the statute was designed to protect; and (3) the defendant's violation of the statute was the proximate cause of the plaintiff's injury. *E.g., Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 496, 706 S.E.2d 864, 872 (2011) (citations omitted).

> When the standard of care is set by statute, an act which violates the statute is a per se violation of the standard of care. A cause of action based on such a statutory violation is designated a negligence per se cause of action and requires a showing that the tortfeasor had a duty of care to the plaintiff, the standard of care for that duty was set by statute, the tortfeasor engaged in acts that violated the standard of care set out in the statute, the statute was enacted for public health and safety reasons, the plaintiff was a member of the class protected by the statute, the injury was of the sort intended to be covered by the statute, and the violation of the statute was a proximate cause of the injury.

Steward v. Holland Family Props., LLC, 284 Va. 282, 287, 726 S.E.2d 251, 254 (2012) (citing *Schlimmer v. Poverty Hunt Club*, 268 Va. 74, 78-79, 597 S.E.2d 43, 46 (2004); *McGuire v. Hodges*, 273 Va. 199, 206, 639 S.E.2d 284, 288 (2007).

Tenants allege that, in accordance with Virginia Code section 8.01-226.12, Landlord "had a duty of ordinary care . . . to [Tenants] to perform mold remediation in accordance with professional standards after [Landlord] was informed that the Apartment contained visible evidence of mold." Compl. ¶ 56. Tenants allege that Landlord breached this duty "and the standard of care owed to [Tenants] by failing to perform mold remediation in accordance with professional standards after [the Landlord was] informed of the presence of visible mold in the [Leased Premises]." Compl. ¶ 57. They further allege that Virginia Code section 8.01-226.12

[6] Landlord concedes that Tenants can seek damages for the mold covering the personal property they attempted to recover from the Leased Premises.

"was enacted for public health and safety reasons," Compl. ¶ 58, and that they were members of the class the statute was intended to protect and suffered injuries of the sort that the statute was intended to prevent. Compl. ¶¶ 59 & 60. Tenants allege that their injuries, and their "Relocation Damages," "Lost Wage Damages," and "Emotional Distress Damages," were proximately caused by Landlord's breach of the duty imposed by Virginia Code section 8.01-226.12. Compl. ¶ 62.

Again, Landlord demurs not to the negligence *per se* claim, in its entirety, but to the "Lost Wage Damages," "Emotional Distress Damages," and "Relocation Damages" that Tenants allege were caused thereby. Under Virginia Code section 8.01-273's directive to consider only those grounds stated specifically in the demurrer, the Court must consider only whether Tenants' pleading states facts upon which the relief demanded can be granted and cannot address whether the negligence *per se* claim set forth in the Complaint states a cause of action, generally.

A. Count II fails to state a claim for "Lost Wage Damages" upon which such relief may be granted.

Like Count I, the duty alleged in Count II arose, if at all, no earlier than October 31, 2022. *See* Compl. ¶ 49 & 54. Though Tenants allege that they were forced to miss work due to Landlord's actions and omissions, the facts alleged in the Complaint, and those that may be reasonably and fairly implied and inferred from the allegations alleged in the Complaint, demonstrate that Tenants lost no work as a result of any breach by Landlord that commenced on or after October 31, 2022. Accordingly, for the reasons more fully set forth in Section II(A), above, Count II fails to state a claim for "Lost Wages Damages" upon which such relief may be granted and the demurrer on that ground is SUSTAINED.

B. Counts II fails to state a claim for "Emotional Distress Damages" upon which relief may be granted.

The duty alleged in Count II arose, if at all, no earlier than October 31, 2022. The physical injury and emotional distress alleged to have resulted from the breach of that duty manifested long before the commencement of that duty. *See* Compl. ¶ 20-21. Accordingly, and for the reasons more fully set forth in Section II(B), above, Count I fails to state a claim for emotional distress upon which relief may be granted and the demurrer on that ground is SUSTAINED.

C. The Relocation Damages claimed in Count II, except for the alleged damage to Tenants' personal property, are barred by the economic loss rule.

Like Count I, Count II seeks a tort remedy for economic losses. The independent duty Tenants allege to support that recovery is not applicable to the situation alleged in the Complaint.[7]

[7] "In Isbell, this Court clearly rejected the proposition that the VRLTA abrogated the common law and created a tort duty on landlords subject to the VRLTA. If the duty was not created, it cannot supply the duty of care required for a negligence *per se* cause of action." *Steward v. Holland Family Props., LLC*, 284 Va. 282, 290, 726 S.E.2d 251, 256 (2012).

Accordingly, and for the reasons more fully set forth in Section II(C), above, the demurrer to the "Relocation Damages' claimed in Counts II, except for the alleged damage to Tenants' personal property,[8] is SUSTAINED.

IV. COUNT IV PROPERLY STATES A CLAIM FOR CONSTRUCTIVE FRAUD.

> One who advances a cause of action for actual fraud bears the burden of proving by clear and convincing evidence: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled.

Evaluation Research Corp. v. Alequin, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994). "'It is well settled that a misrepresentation, the falsity of which will afford ground for an action for damages, must be of an existing fact, and not the mere expression of an opinion. The mere expression of an opinion, however strong and positive the language may be, is no fraud.'" *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 110-11, 540 S.E.2d 134, 142 (2001) (quoting *Saxby v. Southern Land Co.*, 109 Va. 196, 198, 63 S.E. 423, 424 (1909)).

The Virginia Supreme Court has not, "however, established a bright line test to ascertain whether false representations constitute matters of opinion or statements of fact. Rather, 'each case must in a large measure be adjudged upon its own facts, taking into consideration the nature of the representation and the meaning of the language used as applied to the subject matter and as interpreted by the surrounding circumstances.'" *Mortarino v. Consultant Engineering Services, Inc.*, 251 Va. 289, 293, 467 S.E.2d 778, 781 (1996) (quoting *Packard Norfolk, Inc. v. Miller*, 198 Va. 557, 562, 95 S.E.2d 207, 211 (1956)).

Tenants allege that they found water pooling around their refrigerator and through their entryway, caused by a leaking waterline connecting to the refrigerator's ice maker. *See* Compl. ¶¶ 11 & 13. The water leaking from the waterline also damaged the flooring and surrounding dry wall. *See* Compl. ¶ 13.

In light of these circumstances, the allegation that Landlord later represented that repairs were "completed" properly alleges the representation of a material, pre-existing fact: the then-current status of the repairs to the waterline, flooring, and dry wall.[9] The Complaint properly alleges that the representation was false, in that the repairs were not actually "completed" because the leaky waterline was never repaired. *See* Compl. ¶ 14.

It does not matter that the damages allegedly resulting from the allegedly false nature of the representation were remote in time from the alleged representation, as long as the Complaint

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[8] *See* n. 6, *supra*.

[9] The Landlord's representation on April 1, 2022 had nothing to do with mold remediation, as the mold was not discovered until October 31, 2022.

properly alleges that the damages were proximately caused by Tenants' reliance upon the false representation.[10] Here, the Complaint properly alleges that Tenants were damaged as a result of their reliance upon the allegedly false representation of Landlord, in that it alleges that the leaky waterline that was not repaired, alleges that the waterline continued to leak water into the floors and walls beneath and around the refrigerator, and reasonably implies that the continued leakage led to the growth of mold found in those areas that, in turn, caused their medical issues and other damages. *See* Compl. ¶¶ 15 & 24.

Accordingly, Count III properly states a claim for constructive fraud and the demurrer to Count III is OVERRULED.

V. COUNT V (VIOLATION OF VIRGINIA RESIDENTIAL LANDLORD TENANT ACT) DOES NOT STATE A CLAIM UPON WHICH "LOST WAGE DAMAGES" MAY BE GRANTED BUT STATES FACTS UPON WHICH THE OTHER ALLEGED DAMAGES CAN BE RECOVERED.

"'[T]he General Assembly did not intend to provide relief in the Act beyond that normally available for a breach of contract." *Isbell v. Commercial Inv. Assocs.*, 273 Va. 605, 615, 644 S.E.2d 72, 76 (2007). Thus, Tenants' damages under their VRLTA claim are limited to those awardable for breach of contract and those expressly provided for by the Act.

A. Count V fails to state facts upon which "Lost Wage Damages" can be granted.

Under Count V of the Complaint, Tenants seek "compensatory damages . . . for Relocation Damages and Lost Wage Damages," court costs, attorney's fees, and pre- and post-judgment interest. *See* Compl. at 13. The "Lost Wage Damages" sought by Tenants flow from the personal injuries they allege to have suffered as a result of mold inhalation in the Leased Premises. Such "personal injury damages" are not recoverable under the VRLTA. *See McGuinness v. Miele*, 108

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[10] Landlord's reliance on *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 91, 112 (2001) is misplaced. In *Yuzefovsky*, the Virginia Supreme Court considered a tenant's claims against his landlord for fraud, negligent failure to warn, and negligent failure to protect concerning the danger of a criminal assault on the tenant by a third party that occurred on the landlord's property. In response to the tenant's expressed concern for his personal safety, the landlord told tenant that "the development was crime-free, that police officers lived there, and that police vehicles patrolled the development." *Yuzefovsky*, 261 Va. at 111, 540 S.E.2d at 142. Though the court found that those representations were material representations of fact, it found that the criminal assault, which occurred *more than a year and a half after the alleged act of fraud*, was too remote in time "and, thus, the damages for which [the tenant] sought recovery under the theory of fraud did not directly result from the fraudulent inducement to enter into [the lease]." *Yuzefovsky*, 261 Va. at 112, 540 S.E.2d at 143. Here, the mold that allegedly caused harm to Tenants grew within *six months* of the allegedly false representation that repairs to the source of the water leading to the mold were completed; more importantly, it is alleged that the continued presence of water, which lead to the growth of mold, was directly caused by the failure to complete the repairs as represented.

Va. Cir. 138, 141 (Cir. Ct. 2021) ("The VRLTA does not create tort duties and does not abrogate the common law rule that landlords cannot be held liable for a tenant's personal injury damages. Instead, claims under the VRLTA are contractual in nature and 'the remedies provided in the Act for a landlord's violation of these statutory obligations are more akin to those available in an action for breach of contract than the type of damages recoverable in an action in tort for personal injury.' The General Assembly intended to provide for 'consequential damages flowing from a breach of contract and not damages for personal injury caused by tortious conduct.'") (quoting *Isbell*, 273 Va. at 614-616, 644 S.E.2d 72 at 77; citing *Steward*, 284 Va. at 290, 726 S.E.2d at 256); *Federico v. Lincoln Military Hous.*, LLC, No. 2:12cv80, 2013 U.S. Dist. LEXIS 138613, at *22 (E.D. Va. Sep. 25, 2013) ("Monetary damages for personal injury are not authorized under the VRLTA.") (citations omitted). Accordingly, the demurrer to "Lost Wage Damages" under Count V of the Complaint is SUSTAINED.

B. Count V states facts upon which the other alleged damages can be granted.

Under Count V of the Complaint, Tenants seek "compensatory damages . . . for Relocation Damages and Lost Wages Damages," court costs, attorney's fees, and pre- and post-judgment interest. *See* Compl. at 13. The VRLTA expressly sets forth a landlord's obligation to provide alternative housing for a tenant under certain circumstances, including those in which mold remediation needs to be performed. *See* Va. Code §§ 55.1-1229(B) & 55.1-1231. Attorney's fees are provided for under Virginia Code § 55.1-1234 and pre- and post-judgment interest is arguably permitted by Virginia Code § 8.01-382. Accordingly, the demurrer to such damages sought by Count V of the Complaint is OVERRULED.

C. The effect of the Lease's limitation of liability provision is not reachable on demurrer.

In its demurrer to the Complaint, Landlord raises paragraph 25 of the Lease, which states, in pertinent part, that Landlord is not liable for "personal injury or damage or loss of personal property from any cause, including but not limited to: fire, smoke, rain, flood, water and pipe leaks . . . ." The assertion of a contractual provision limiting liability is an affirmative defense. *See, e.g., Brown v. McLeod Reg'l Med. Ctr.*, Civil Action No. 4:04-344-TLW-TER, 2005 U.S. Dist. LEXIS 58435, at *11 (D.S.C. Dec. 15, 2005); *In re Salty Sons Sports Fishing, Inc.*, 191 F. Supp. 2d 631, 634 (D. Md. 2002). Affirmative defenses "may not be raised in a demurrer, which tests only the facial validity of the allegations in a complaint rather than the validity of affirmative defenses." *Church of God in Christ, Inc.*, 297 Va. at 638 n.23, 831 S.E.2d at 479 n.23 (citing *Duggin v. Adams*, 234 Va. 221, 229, 360 S.E.2d 832 (1987)). Accordingly, Landlord's demurrer on the basis of the Lease's limitation of liability provision is OVERRULED.[11]

[11] Moreover, the VRLTA provides that "[a] rental agreement shall not contain provisions that the tenant . . . [a]grees to the exculpation or limitation of any liability of the landlord to the tenant arising under law or to indemnify the landlord for that liability or any associated cost" and further provides that any such provision included in a rental agreement is unenforceable. *See* Va. Code § 55.1-1208(A)(5) & (B).

VI. COUNT VI (BREACH OF CONTRACT) IS NOT BARRED BY TENANTS' FAILURE TO INVOKE AN OPTIONAL, CONTRACTUAL REMEDY.

Landlord contends that Tenants "unilaterally decided to vacate" the Leased Premises and incur the relocation expenses they now seek to recover. According to Landlord, if Tenants believed that the premises were uninhabitable, their sole remedy was to vacate and serve a 14-day notice of intent to terminate the tenancy, under paragraph 27 of the Lease.

Paragraph 27 of the Lease provides that "[i]f premises are damaged or destroyed by fire or other casualty to such an extent that your enjoyment of the premises is substantially impaired, you [Tenants] *may* immediately vacate and serve on us [Landlord] a written notice within 14 days thereafter, indicating your intent to terminate your tenancy." Compl. Ex. 1, ¶27 at 4 (emphasis added). The use of the word "may" in this provision is permissive, indicating an option for Tenants but not a requirement.[12]

To the extent that Landlord is arguing that Tenants were not required by the Lease to seek the remedy set out in paragraph 27 but were required to mitigate their damages by invoking that option, their demurrer cannot raise that affirmative defense.[13] Accordingly, the demurrer on these grounds is OVERRULED.

VII. AT THIS TIME, THERE ARE NO GROUNDS TO STRIKE TENANTS' JURY DEMAND.

In its demurrer, Landlord alleges that the parties agreed to a mutual "Waiver of Jury Trial" in paragraph 39 and, therefore, requests that the court strike Tenants' jury demand. While it is true that a jury trial waiver is included at paragraph 39 of the Lease, that waiver is "eliminated" by paragraph 9 of the Lease Contract Addendum for Units Participating in Government Regulated Affordable Housing Programs, attached to the Complaint as part of the Lease. *See* Compl. Ex. 1, at 9. Accordingly, the request to strike Tenants' jury demand is DENIED.

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[12] "[W]hile [the word 'shall'] may primarily be mandatory in its effect, and the word 'may' primarily permissive, yet the courts, in endeavoring to arrive at the meaning of written language, whether used in a will, a contract, or a statute, will construe 'may' and 'shall' as permissive or mandatory in accordance with the subject matter and context." *Pettus v. Hendricks*, 113 Va. 326, 330, 74 S.E. 191, 193 (1912). Here, the subject matter and context demands that the word "may" be construed as permissive.

[13] "An assertion that an injured party has failed to mitigate damages is an affirmative defense." *Forbes v. Rapp*, 269 Va. 374, 380, 611 S.E.2d 592, 596 (2005). Such defenses may not be raised on demurrer. *See, e.g., Church of God in Christ, Inc.*, 297 Va. at 638 n.23, 831 S.E.2d at 479 n.23.

CONCLUSION

The demurrer to the "Lost Wage Damages," "Emotional Distress Damages," and "Relocation Damages," (except for damage to Tenants' personal property) alleged in Counts I and II of the Complaint is SUSTAINED. The demurrer to Count IV of the Complaint is OVERRULED. The demurrer to the "Lost Wage Damages" alleged in Count V is SUSTAINED; as to all other issues pertaining to Count V, the demurrer is OVERRULED. The demurrer to Count VI of the Complaint is OVERRULED. The request to strike Tenants' request for a jury trial is DENIED. An order consistent with this ruling will follow.

Sincerely,

Jonathan D. Frieden
Judge, Fairfax County Circuit Court