IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MIRON E. REYNOLDS, Plaintiff,	)	SX-13-CV-188
v.	)	ACTION FOR DAMAGES
	)	**(JURY)**
LEE J. ROHN, ESQ and LEE J. ROHN AND ASSOCIATES, LLC, Defendants.	)	

MEMORANDUM OPINION

THIS MATTER comes before the Court on *pro se* Plaintiff-Counterclaim Defendant Miron E. Reynolds's ("Reynolds") Motion for Summary Judgment ("Motion"), filed December 3, 2014; Defendants-Counterclaim Plaintiffs Lee J. Rohn and Lee J. Rohn and Associates, LLC's (jointly "Rohn") Opposition to Motion for Summary Judgment and Counter Statement of Facts in Dispute ("Rohn SOF"), both filed February 9, 2015; and Reynolds's Reply to Counter-Plaintiff Counter Statement of Facts in Dispute ("Reynolds SOF"), filed March 21, 2015. For the reasons that follow, Reynolds's Motion will be GRANTED in part and DENIED in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Underlying Claim

Reynolds originally hired Rohn to represent him in October 2009 to handle a defamation claim against his former employer Islands Mechanical Contractors, Inc. ("IMC"). (Reynolds SOF

¶1; Rohn SOF ¶1).[1] During the course of Rohn's representation of Reynolds through Attorney Ryan Greene, Attorney Greene's association with Rohn was terminated.[2] *See* Order entered herein July 8, 2014 setting forth historical background, at 2. Reynolds chose to stay with Attorney Greene who handled his arbitration in 2010.[3] Reynolds attempted to include in arbitration a Title VII claim, which was denied as time-barred because it was not filed within 90 days of receipt of his EEOC right to sue letter. *Id.* Attorney Greene concluded the case by settlement with IMC. *Id.*

Reynolds filed a grievance against Rohn alleging attorney misconduct heard by the Ethics and Grievance Committee of the Virgin Islands Bar Association.[4] In his grievance, Reynolds

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[1] The scope of Rohn's representation is unclear: (1) Reynolds filed his EEOC complaint *pro se.* (Rohn SOF Exhibit 1, Reynolds Dep. at 11:10-12.); (2) Reynolds knew that Rohn had filed a defamation claim against IMC that he had approved before it was filed and regarding which he received notice of the motion to compel arbitration. (*Id.* at 12:10-15, 13:10-14); Rohn SOF Exhibit 5; (3) Reynolds never spoke with Rohn about his EEOC complaint after he received his right to sue letter and he believed that he was acting *pro se* only as to his discrimination claim. (Reynolds Dep. at 14:1-15, 61:1-3); (4) Reynolds claims that he believed that his arbitration hearing was to arbitrate claims for defamation, Title VII, and claims under the local statute. (*Id.*at 18:9-12, 47:3-4); Rohn SOF Exhibit 2; (5) Reynolds claims he believed that at the time of arbitration, he was a client of Rohn. (Reynolds Dep. at 19:1-3); (6) Reynolds signed a document to have Attorney Greene continue to represent him when Attorney Greene's association with Rohn was terminated because there were "some issues going forward with the arbitrations" from Rohn's handling of the case. (*Id.* at 20:14-17); (7) Reynolds signed a Confidential Settlement Agreement with IMC on or about October 2, 2012. (*Id.* at 22:19-24.); (8) Reynolds dismissed a grievance against Rohn in settling the arbitration. (*Id.* at 34:10-18, 52:7-54:9; Rohn SOF Exhibit 19).

[2] Rohn gave Reynolds the option to maintain his representation with Rohn, and notified him that if he decided to leave the firm, Rohn would file a lien against his case for expenses and time. Rohn SOF Exhibit 15.

[3] Attorney Greene submitted a brief to the American Arbitration Association on behalf of Reynolds. In the brief, Attorney Greene explained that Reynolds, *through counsel*, filed a Demand for Arbitration with the AAA on March 11, 2011. Included in that filing, he attached a copy of the complaint filed October 21, 2009 in the U.S. District Court of the Virgin Islands, which made reference to administrative filings with the EEOC and the Virgin Islands Department of Labor. At the time, Reynolds had not yet received his right to sue letter. Reynolds understood that a decision had to be made about which of his claims would be subject to arbitration; therefore, Reynolds "did not immediately notify counsel of his receipt of the Right to Sue Letter." See Rohn SOF 13, Claimant's Specification of Claims, Reynolds v. Islands Mechanical Contractors, Inc., AAA Case No. 32 160 00165 11 (July 8, 2011).

[4] The factual allegations include:

> During the course of representation, Respondent terminated an associate attorney, Ryan Greene, from the law firm. Reynolds chose to continue working with Attorney Greene, and informed Respondent that her firm would no longer represent him. Respondent did not seek leave to withdraw from the District Court. Respondent filed Notice with the District Court that pleadings and notices should be served only upon Respondent and that Greene was no longer affiliated with the law firm. Reynolds was not served with the Notice. Respondent also wrote Reynolds on or about June 26, 2012, and Reynolds considered the letter threatening. In addition, Respondent contacted Reynolds and told him that Greene was using drugs and made a number of accusations against Greene in an effort to persuade Reynolds to continue working with her firm.

alleged that Rohn missed the 90 day filing period for his Title VII claim, yet also admitted that he decided to stay with Attorney Greene, who handled the claim for Rohn, upon his termination from the firm. Reynolds SOF Exhibit 12, at 2. On October 8, 2012, Reynolds withdrew his grievance against Rohn when they came to an agreement concerning distribution of settlement proceeds. Rohn SOF Exhibit 19; Reynolds SOF Exhibit 19.[5]

On April 2, 2103, Reynolds was subpoenaed to testify in the trial of former IMC employees, Pius Hubert and Fitz Humphries, represented by Rohn. Opposition, at 5. Rohn explained to Reynolds that he would receive a witness fee, appropriate under applicable rules. Yet, Reynolds demanded that Rohn also pay him for lost wages. Rohn told Reynolds repeatedly that he was only required to appear on the date and time of his testimony, yet he appeared during the entire

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> Respondent asserted a lien for attorneys' fees with the arbitrator, and thereafter, Respondent sought to lift the stay in the District Court to pursue her attorney fee claims. Defendant offered to pay the settlement proceeds into the Registry of the Court, and on or about August 14, 2012, Respondent filed a Notice as an attorney for plaintiff Reynolds, informing the court that Reynolds had no objection to the Defendant's paying the settlement funds into the court's registry. Neither Reynolds nor Greene were served with the Notice.
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> . . .
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> Reynolds contends that if he did not sign the release in favor of Rohn and withdraw his grievance with the Ethics and Grievance Committee, he would not be able to collect the proceeds of the settlement pursuant to the settlement agreement.

Reynolds SOF Exhibit 12, at 2.

[5] In his letter to disciplinary counsel withdrawing the grievance, Reynolds stated:

> I make this decision of my own free will. Attorney Greene and Attorney Lee Rohn reached an agreement to allow me to get paid the settlement money and I am satisfied with that, and the way the situation was resolved. Greene and Rohn each waived their claims for attorneys' fees and I agreed to pay Rohn's case expenses back to her as part of concluding my claims with the Respondent in arbitration, and have directed Attorney Simpson to disperse the funds. I agree that once I am paid the District Court case may be dismissed.

Rohn SOF Exhibit 19.

trial. Affidavits of Conrad Prevost,[6] Pius Hubert[7] and Fitz Humphries[8] relate Reynolds's communications regarding Rohn during the trial and after the trial. Reynolds then re-filed his

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[6] Conrad Prevost stated:

> After I got terminated, Reynolds came up and asked me what I was going to do about it. I told Reynolds I had been to Lee Rohn and she was going to take my case. I told him he should go to Lee Rohn. He said "Hell no, she is too expensive and I would rather do it myself and get more money." He then told me he had filed his own discrimination complaint with Labor and things were coming along. He repeatedly said I will not go to Lee Rohn, for nothing, no way, because he would have to pay too much of what he would get. He often said that he was not like us because he is not a West Indian, but he is from the States so he is smarter and we should know better and not go to Lee Rohn. I was a witness in the Fritz and Hubert case and I attended witness preparation. Also present was Myron [sic] Reynolds. Attorney Rohn told us several times we did not need to take time off from work to sit at the Courthouse and she would call us a little before our testimony to come to the Courthouse. When I came to testify one day and went home, and the next day Reynolds was there both days. We were all in a witness room and I heard Reynolds remind Fitz and Hubert when they came in, "Remember I am testifying for you." He got up in their faces and indicated they would owe him for his testimony.

Rohn SOF ¶5, Exhibit 23.

[7] Similarly, Pius Hubert stated:

> Mr. Reynolds was a witness in my case against IMC on the issue of whether we had agreed to arbitrate the case. He was subpoenaed and I was present when *Attorney Rohn told him he did not have to be in court for the entire time and she would call him and he would only have to be in court for his testimony time.* Despite that instruction from Attorney Rohn, he came to court each day and sat in the witness room talking and caring [sic] on with the other witnesses. *Before the trial Mr. Reynolds told me that Attorney Rohn was very "scampish" and that I should be careful with her as she would negotiate behind our backs and cheat me. He told me to be careful that she would unfairly take forty (40) percent of the funds.* I told him that I had agreed to that and he told me she was charging too much money and she was taking my money if she charged that amount. After the trial Mr. Reynolds came to my house and told me I had to pay him for testifying in my case. As a result I contacted Attorney Rohn to tell her and she told me to tell him to come in and see her, which I did.... Mr. Reynolds came to see me after that and told me he had heard from people that I had settled my lawsuit. He again told me I had to pay him for testifying as his testimony helped me settle my case. He was very aggressive and I was afraid of him and to get him to go away, I gave him $200.00 for his time and I told him that was all I would give him and to leave me alone. After that he came back to me again and demanded that I give him at least a thousand dollars and I told him no and again asked him to leave me alone. At that point he told me that the settlement that Attorney Rohn got for me was a big rip off and she should have gotten me more money if she did her job right. He then claimed that she settled our case behind our backs because it was not on the up and up, but I told him that was not true that I was at the mediation. He then demanded to know how much money I got. He then claimed Rohn probably got more money and is not telling us. He told me to check Rohn sent us was wrong and improper and we should send it back. *Because I did not understand all about what was going on I believed him for a while and thought Rohn had done something improper*. Reynolds told me that Rohn had used his name in a lawsuit and had gotten money and owed him money for the use of the name and would not pay him and he told me that Rohn was suing him. He asked me to give him an affidavit so he could stop Rohn from suing him. He never told me he was actually suing Rohn. I didn't really understand what he was saying or what I was signing, no one read it to me or had me swear to the fact that what was on the paper was true. He told me Rohn had a case for him against Hovensa and she won the case and she would only pay him if he gave an affidavit that wasn't true. When Reynolds found out I had bought my house, he again came to me and asked me how much I had gotten. I told him I wouldn't tell. He asked how

grievance with the Supreme Court of the Virgin Islands on September 20, 2012. Rohn SOF ¶31; Exhibit 18. On June 5, 2013, *pro se* Plaintiff Reynolds filed his Complaint against Rohn in this action alleging negligent legal practice, negligent infliction of emotional distress, and intentional infliction of emotional distress, and requested to be awarded punitive damages. *See* Complaint, at ¶¶ 50-59.

On July 8, 2014, this Court dismissed Plaintiff's Complaint with prejudice, for Reynolds's failure to state a claim upon which relief may be granted. *See* Order, July 8, 2014.[9] Reynolds filed a Motion for Reconsideration and Motion for Leave to Amend Complaint on July 16, 2014. On August 22, 2014, the Court denied Reynolds's Motion for Reconsideration and Motion for Leave to Amend Complaint. *See* Order entered August 28, 2014. Reynolds appealed both the July 8, 2014 and the August 22, 2014 Orders. The Supreme Court of the Virgin Islands dismissed Reynolds's appeal for lack of jurisdiction on October 16, 2014. *See Reynolds v. Rohn*, S.Ct. Civ. No. 2014-006 slip op. (V.I. Oct. 16, 2014).

B. <u>The Malicious Prosecution and Defamation Actions</u>

Rohn filed her Answer and Counterclaim on August 1, 2013, asserting several affirmative defenses, including failure to state a claim, and alleging defamation *per se* and malicious

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> much Rohn got and I told him I didn't know and he said Rohn was outsmarting me. He asked me about what happened in the case about Prevost and I told him I didn't know about it and he should ask Prevost. He said Rohn settled the case for Prevost for only $75,000 and he had gone to the court and seen the papers and that Rohn had settled for too little money and done a bad job in the case. When Reynolds kept trying to get me to tell him how much money I got in my law suit I told him if he wanted to know call Rohn. He said he wouldn't call her because she was a bitch. He told me when he finished against Rohn he was going to "f" her over.

Rohn SOF¶28, Exhibit 25 (emphasis added).

[8] Humphries Fitz stated that "Mr. Reynolds asked me to sign an affidavit he had prepared. He told me he was suing Lee J. Rohn because she hadn't paid him money she owed him and she had used his name without permission." Rohn SOF 5¶, Exhibit 26.

[9] Reynolds characterizes the Court's ruling: "that Rohn owed a duty to Reynolds and that duty was Breached [sic]. What the Court disagreed with was damages Reynolds sustained as a result of the breach." Reynolds SOF ¶33.

prosecution, and requesting punitive and compensatory damages. *See* Answer and Counterclaim, at ¶¶ 25-31. Now pending is Reynolds's Motion for Summary Judgment on Rohn's Counterclaim.

II. LEGAL STANDARD

A moving party will prevail on a motion for summary judgment where the record shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008) (citations omitted). The Court must determine whether there exists a dispute as to a material fact, the determination of which will affect the outcome of the action under the applicable law. *Id*; *see also Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 527 (V.I. 2013) (citations and quotations omitted). Such a dispute is genuine if the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 391-92 (V.I. 2014). In analyzing the evidence, the Court must consider the pleadings and full factual record, drawing all justifiable inferences in favor of the nonmoving party, to determine whether the movant has met its burden of showing that there is no unresolved genuine issue of material fact. *Williams*, 50 V.I. at 194 (citations omitted). "[T]o survive summary judgment, the nonmoving party's evidence must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Id.* at 195 (quotation omitted). The nonmoving party then has the burden of "set[ting] out specific facts showing a genuine issue for trial." *Id.* (citation omitted). The Court may not weigh the evidence or determine the credibility of witnesses. *Id.* at 194-95. Instead, the Court must view all inferences from the evidence in the light most favorable to the nonmoving party, and take the nonmoving party's conflicting allegations as true if properly supported. *Id*; *see also Perez,* 59 V.I. at 527. As to materiality, "only those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Williams*, 50

V.I. at 195 (citations omitted). A movant must meet his burden of demonstrating the absence of genuine material factual issues and his entitlement to judgment as a matter of law. *Seales v. Devine*, 2008 V.I. Supreme LEXIS 23, at *4 (V.I. 2008) (unpublished).

III. DISCUSSION

Rohn argues that Reynolds failed to meet his initial burden of identifying evidence to indicate that there is an absence of any issue of material fact to support summary judgment because he failed "to set forth a comprehensible Statement of Undisputed Facts as required by Rule 56." Opposition at 1. As Virgin Islands law and rules have no such requirement, Rohn's argument is apparently based on District Court of the Virgin Islands Local Rule of Civil Procedure 56.1 that each summary judgment motion shall be accompanied by "a separate statement of the material facts about which the movant contends there is no genuine issue." LRCi 56.1(a)(1). That requirement is no longer "reflexively and mechanistically" applied in the Superior Court. *See Vanterpool v. Gov't of the Virgin Islands*, 2015 V.I. Supreme LEXIS 23, at *26 (V.I. 2015).[10]

Reynolds's failure to file a separate statement of undisputed facts is not fatal to his motion, to the extent that a review of the record establishes the existence of a dispute relating to any genuine issue of material fact.

A. Malicious Prosecution Legal Standard

The "malicious prosecution" label is a misnomer. Rohn's claim for relief is properly presented as for "wrongful use of civil proceedings." *See Seales,* 2008 V.I. Supreme LEXIS at *4.

[10] "Consequently, the Superior Court should not have applied District Court Rule 56.1 through Superior Court Rule 7, but instead should have independently determined whether the rule served a valid purpose when applied to the Superior Court rather than to the District Court.... [t]here is no legitimate reason to extend District Court Rule 56.1 to proceedings in the Superior Court." *Vanterpool,* 2015 V.I. Supreme LEXIS, at *27, 29 n.8.

In *Seales,* the Supreme Court adopted as the elements of such a claim the provisions of RESTATEMENT (SECOND) TORTS § 674, as follows:

> One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if
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> (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and
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> (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

RESTATEMENT (SECOND) TORTS § 674.[11]

To determine whether probable cause existed for Reynolds to file a claim for legal malpractice, the Court relies on the RESTATEMENT (SECOND) TORTS § 675,[12] which states:

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[11] *Seales* was a pre-*Banks* decision where the Supreme Court applied without analysis the elements of the claim, presumably relying upon the provisions of 1 V.I.C. § 4, now recognized as having been implicitly repealed, without determining whether those elements constituted the appropriate common law rule for the Virgin Islands. Accordingly, a *Banks* analysis is necessary to consider three non-dispositive factors: "(1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands." *Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013) (citing *Matthew v. Herman*, 56 V.I. 674, 680-81 (V.I. 2012)).

Courts in the Virgin Islands and the Third Circuit have adopted the RESTATEMENT (SECOND) TORTS § 674 for claims alleging wrongful use of civil proceedings. *See Airlines Reporting Corp. v. Belfon*, 46 V.I. 419, 421, (D.V.I. 2004); *Silver v. Mendel*, 894 F.2d 598, 604 (3d Cir. Pa. 1990); *U.S. Express Lines, LTD. v. Higgins*, 281 F.3d 383, 394 (3d Cir. Pa. 2002); *Schmidt v. Currie*, 217 Fed. Appx. 153, 157 (3d Cir. Pa. 2007). Thirty states have adopted RESTATEMENT (SECOND) TORTS § 674 and 16 of the states that do not accept the general principle are usually ready to recognize recovery on the basis of §§ 677 and 678 and often § 679. A majority of jurisdictions also holds that a counterclaim for wrongful civil proceedings is not permissible since the initial action has not terminated in the defendant's favor. (*See* Reporter's notes.) Considering the consistent application of RESTATEMENT (SECOND) TORTS § 674 in the Virgin Islands and the Third Circuit, as well as the fact that a majority of states has adopted RESTATEMENT (SECOND) TORTS § 674, the Court finds that adopting RESTATEMENT (SECOND) TORTS § 674 as setting forth the elements of the claim for wrongful use of civil proceedings represents the soundest rule for the Virgin Islands.

[12] By adopting RESTATEMENT (SECOND) TORTS § 674, adopting its definition of its probable cause standard as set forth in § 675 represents the soundest rule for the Virgin Islands. *See supra,* n. 11.

Although courts in the Virgin Islands have not relied on RESTATEMENT (SECOND) TORTS § 675, generally, jurisdictions that have adopted the RESTATEMENT (SECOND) TORTS § 674 have also adopted RESTATEMENT (SECOND) TORTS §§ 675 and 676 to assist with the analysis of a case claiming wrongful use of civil proceedings. *See Zimmerman v. CitiMortgage, Inc.*, 2012 U.S. Dist. LEXIS 43717, at *9 (W.D. Ky. Mar. 29, 2012); *Nielsen v. Spencer*, 196 P.3d 616, 621 (Utah Ct. App. 2008); *Palumbo v. Connors*, 1996 U.S. Dist. LEXIS 6260, at *19 (E.D. Pa. May 9, 1996); *Prewitt v. Sexton*, 777 S.W.2d 891, 894 (Ky. 1989); *Wilson v. Hayes*, 464 N.W.2d 250, 259 (Iowa 1990); *Friedman v. Dozorc*, 312 N.W.2d 585, 607 (Mich. 1981). Considering the consistent application of RESTATEMENT (SECOND) TORTS § 674 with RESTATEMENT (SECOND) TORTS §§ 675 and 676, the Court finds that adopting RESTATEMENT (SECOND) TORTS § 675 as setting forth the standard for determining whether probable cause exists to file the underlying claim in a dispute for wrongful use of civil proceedings represents the soundest rule for the Virgin Islands.

> One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either
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> (a) correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or
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> (b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.[13]

By RESTATEMENT (SECOND) TORTS § 675, the reasonable person standard for probable cause in claims for malicious prosecution cases, adopted in the Virgin Islands, applies also to claims for wrongful use of civil proceedings.[14]

> [I]t may be said that the defendant has probable cause only when a reasonable man in his position would believe, and the defendant does in fact believe, that he has sufficient information as to both the facts and the applicable law to justify him in initiating the [] proceeding. [T]he question of lack of probable cause "is to be determined in the light of those facts that the [complainant in the underlying proceedings] knows or reasonably believes to exist at the time when he acts."

Palisoc v. Poblete, 60 V.I. 607, 617 (V.I. 2014) (citing RESTATEMENT (SECOND) OF TORTS § 662 cmt. j; *D'Angelo v. Mussler*, 290 S.W.3d 75, 80 (Ky. Ct. App. 2009)).

To rule upon Reynolds's Motion, the Court must determine under RESTATEMENT § 674(a) whether there are facts in dispute that indicate that Reynolds acted without probable cause and primarily for a purpose other than that of securing the proper adjudication of his claim for legal

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[13] If the legal validity of a claim is uncertain, the person who initiates the civil proceeding may believe that his claim is meritorious, but he can have no more than an opinion that the chances are good that the court might decide to uphold it. The question is not whether he is correct in believing that the court would sustain the claim, but whether his opinion that there was a sound chance that the claim might be sustained was a reasonable one. To hold that the person initiating civil proceedings is liable unless the claim proves to be valid, would throw an undesirable burden upon those who by advancing claims not heretofore recognized nevertheless aid in making the law consistent with changing conditions and changing opinions. RESTATEMENT (SECOND) TORTS § 675, cmt f.

[14] Cases that give "probable cause" the same meaning as in malicious prosecution cases: *Stewart v. Sonneborn*, 98 U.S. 187 (1878); *T. E. Hill Co. v. Contractors Supply and Equipment Co.*, 94 N.E. 544 (Ill.1910); *Leeseberg v. Builders Plumbing Supply Co.*, 149 N.W. 2d 263 (Mich. 1967); *Wilcox v. Gilmore*, 8 S.W.2d 961 (Mo. 1928); *Spengler v. Davy*, 56 Va. (15 Gratt.) 381 (1859); *Novick v. Becker*, 90 N.W. 2d 620 (Wis. 1958). *See* RESTATEMENT (SECOND) TORTS § 675 Reporter's Notes.

malpractice at the time he filed the suit. The second prong (§ 674(b)) has been met by the Court's Order granting summary judgment dismissing Reynolds's legal malpractice action.

1. Undisputed Facts

In the instant case, the record shows the following relevant facts:

(1) Reynolds uses legal blogs and the law library to conduct his research on Title VII claims and other legal topics; (Reynolds Dep. at 16:2-6, 16:19-21, 17:18-18, 31:9-25, 32:1-9);
(2) Reynolds refiled his grievance against Rohn because he believed the provisions of the settlement agreement were not ethical; (Reynolds Dep. at 19-24, 54:15-25);
(3) Reynolds believed that his arbitration hearing "was botched." (Reynolds Dep. at 47:2);
(4) The Retainer Agreement states: "Client hereby retains and employs Attorneys to represent him/her in prosecuting any claim or claims that Client might have against Islands Mechanical Contractors, Inc., or any other person , firm or corporation, arising from injuries suffered by Client in or around March 2009 and after that date in St. Croix, U.S. Virgin Islands." Rohn SOF at ¶ 3; Exhibit 24 ¶1.
(5) Reynolds appealed both the July 8, 2014 and the August 22, 2014 Orders of the Virgin Islands Superior Court dismissing and denying reconsideration of his legal malpractice claim.
(6) Reynolds has filed two grievances against Rohn with the Supreme Court.

2. A Cognizable Claim for "Malicious Prosecution" Does Not Exist

Based upon the record in this case, the Court finds that the undisputed facts do not support a claim for wrongful use of civil proceedings. The Court finds that the Notice of Hearing from the Virgin Islands Bar Association Ethics and Grievance Committee is informative in presenting facts about what Reynolds believed happened in his case. *See* Reynolds SOF Exhibit 12. The record shows that Reynolds filed his grievance, followed by his legal malpractice action, followed by a Motion for Reconsideration upon the Court's adverse ruling, and finally by his appeal to the Supreme Court of the Virgin Islands. Although Reynolds may be an opportunistic litigant, as evidenced by his former co-workers' affidavits, the record reflects sufficient undisputed facts, even in the light most favorable to the non-moving party, such that a reasonable jury could find that Reynolds "correctly and reasonably believe[d]" that his claim for legal malpractice may be valid under applicable law. Thus, although the Court has previously ruled that Reynolds does not have a viable legal malpractice claim, even now Reynolds continues to believe that he does. As a result, the Court finds that the record establishes that Reynolds reasonably believed that he had sufficient information about the facts and law to file a *pro se* legal malpractice claim against Rohn, [15] such that Rohn's claim for wrongful misuse of civil proceedings must fail, and Reynolds's Motion is granted as to that count of Rohn's Counterclaim.

B. Defamation Legal Standard

The Supreme Court of the Virgin Islands has adopted the basic elements for a claim of defamation set forth in the Second Restatement of Torts. *See Kendall v. Daily News Pub. Co.*, 55 V.I. 781, 787 (V.I. 2011); *Joseph v. Daily News Publishing Co.*, Inc., 57 V.I. 566, 585-588 (V.I. 2012). The elements are: (1) "a false and defamatory statement concerning another"

[15] In reviewing case law in other jurisdictions, the Court notes that because Reynolds is a *pro se* litigant, the probable cause standard should be more lenient for him than for a licensed attorney. For example, under "Pennsylvania law, *lawyers* may be sued in their individual capacities for wrongful use of civil proceedings . . . and *an attorney* who knowingly prosecutes a groundless action to accomplish a malicious purpose may be held accountable. . . Liability attaches to those who act in a grossly negligent manner or without probable cause and primarily for a purpose other than adjudication of a claim. The parties may argue that claims were not brought in *good faith*." *U.S. Express Lines, LTD. v. Higgins*, 281 F.3d 383, 394 (3d Cir. Pa. 2002) (internal citations omitted) (emphasis added); *see also Gentzler v. Atlee*, 660 A.2d 1378 (Pa. Super. Ct. 1995) (Appellees lacked probable cause to initiate the civil proceeding because they did not reasonably believe that the client's claim was valid under the facts and made the allegations despite known factual inaccuracies. Appellant physician's treatment was too remote from the harm suffered by the client to establish liability under either legal theory. Appellant's complaint stated facts of improper purpose sufficient to withstand the demurrer); *Zimmerman v. CitiMortgage, Inc.*, 2012 U.S. Dist. LEXIS 43717 (W.D. Ky. Mar. 29, 2012) (Defendant argued he had reasonable suspicion to begin foreclosure proceedings in good faith); *Prewitt v. Sexton*, 777 S.W.2d 891, 894 (Ky. 1989) (probable cause to initiate a civil action does not require "the same degree of certainty as to the relevant facts that is required of a private prosecutor of criminal proceedings." *See* RESTATEMENT (SECOND) TORTS § 675, cmt d.

(RESTATEMENT (SECOND) OF TORTS § 558(a));[16] (2) "an unprivileged publication to a third party" (RESTATEMENT (SECOND) OF TORTS § 558(b));[17] (3) "fault;"[18] (4) "either the actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." (RESTATEMENT (SECOND) OF TORTS § 558(d)).[19] *Id.* A disparaging remark tending to harm someone in his business or profession fits within the definition of slander *per se*. *Ross v. Bricker*, 770 F. Supp. 1038, 1042 (D.V.I. 1991) (citing RESTATEMENT (SECOND) OF TORTS §573).

1. Discussion

The Court finds that there is a genuine dispute of material fact concerning the defamation action. Assuming that Reynolds made the statements as Rohn alleges, Rohn has set forth a cause of action for *per se* defamation because the statements tend to harm Rohn's reputation by lowering

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[16] The truth or falsity of a statement is generally a question of fact for the jury; the statement is defamatory if "it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559; *Joseph*, 57 V.I. at 585.

[17] "Publication" means the "communication intentionally or by negligent act to one other than the person defamed." RESTATEMENT (SECOND) OF TORTS § 557. There are two methods of publication: libel and slander. Libel is the "the publication of defamatory matter by written or printed words." RESTATEMENT (SECOND) OF TORTS § 568(1). Slander is the "publication of defamatory matter by spoken words." RESTATEMENT (SECOND) OF TORTS § 568(2). The term "unprivileged" refers to the alleged defamer's inability to demonstrate that he was in some way "privileged" to make the defamatory communication. The types of privilege defenses available fall into two categories, "absolute privileges," RESTATEMENT (SECOND) OF TORTS §§ 583-592A, and "conditional privileges," RESTATEMENT (SECOND) OF TORTS §§ 593-598; *Joseph*, 57 V.I. at 586.

[18] The Restatement employs the minimum standard in its general definition of defamation: "fault amounting to at least negligence on the part of the publisher." RESTATEMENT (SECOND) OF TORTS § 558(c). The minimum standard applies to defendants who are not public figures or officials, so defendant need prove only that the publisher acted at least negligently in failing to ascertain whether the statements concerning the defendant were true or false. For public officials or public figures and where the defamatory statements reference matters of public concern, the defendant must prove malice. *Joseph*, 57 V.I. at 587.

[19] The Restatement defines "special harm" as "the loss of something having economic or pecuniary value which must result from the conduct of a person other than the defamer or the one defamed and must be legally caused by the defamation." RESTATEMENT (SECOND) OF TORTS § 575, cmt. b.11. This element refers to two general categories of liability-producing statements: (1) plaintiff is able to demonstrate the statement caused him special harm; (2) plaintiff need not prove the existence of special harm because the statement is actionable on its face. A statement that is actionable *per se* depends in part on whether the statement is either a libel or a slander. Slander is tortious if the words spoken fall within a limited class of cases in which the words are actionable *per se*, or if they cause special damages. Libel is actionable *per se*. RESTATEMENT (SECOND) OF TORTS § 568 cmt. b. Special damages need only be proven when the statement is slanderous and it does not fall into one of the limited classes of speech which is actionable *per se*. The classes of speech that are actionable *per se* are outlined in RESTATEMENT (SECOND) OF TORTS, §§ 570-574; *Joseph*, 57 V.I. at 588.

her in the estimation of the community and by attempting to deter third parties from associating or dealing with her. Reynolds agrees that Conrad Provost's Affidavit provides evidence that Reynolds defamed Rohn. Motion, at 13. However, he claims that he will be able to prove that Provost's testimony is false. *Id.* In his deposition, Reynolds testified that he never made derogatory statements about Rohn and denies having ever spoken to anyone in the community about Rohn or telling anyone that she charges too much and advising anyone not to hire her. Reynolds Dep. at 30:8-16. Reynolds also denies threatening to sue Rohn for lost wages Reynolds Dep. at 33:10-13. Reynolds does not address the Affidavit of Hubert, wherein Hubert avers that Reynolds made *per se* defamatory statements to the effect that Rohn was incompetent, that Rohn had cheated him out of money, that Rohn routinely cheats clients out of money, and that Rohn used his name without his authorization. *See* Rohn SOF Exhibit 25. Because the alleged statements may affect Rohn's trade or business, Rohn does not need to show she incurred special harm.

Reynolds could avoid liability for the publication of his statements if (1) conditional privilege applies and (2) the privilege is not abused. A conditional privilege exists "if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest. *Flanders v. Shell Seekers*, 39 V.I. 63, 69 (V.I. Super. Ct. 1998) (quoting RESTATEMENT (SECOND) OF TORTS § 594). Here, Reynolds allegedly published statements to three of Rohn's clients. These statements clearly do not fall under the conditional privilege exception, and furthermore, at least for a time induced Hubert to think poorly of Rohn: "I believed him for a while and thought Rohn had done something improper." Rohn SOF Exhibit 25, ¶ 10.

The facts in the record show that there is a genuine dispute of material fact concerning whether Reynolds made false and defamatory statements regarding Rohn to third parties, intentionally or negligently, which statements are actionable with or without proof that Rohn suffered harm as a result of the statements.[20] As such, the trier of fact must determine whether Rohn has a viable cause of action for defamation, and Reynolds is not entitled to judgment as a matter of law with regard to the defamation action.

IV. CONCLUSION

Because there are no genuine issues of material fact with regard to the "malicious prosecution" claim, Reynolds is entitled to judgment as a matter of law. There are genuine issues of material fact in dispute regarding Rohn's defamation claim; therefore, Reynolds is not entitled to judgment as a matter of law. The Court will grant summary judgment on the "malicious prosecution" claim, and deny summary judgment on the defamation claim. An Order consistent with this Memorandum Opinion will issue herewith.

Dated: September 3, 2015.

DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By:
Court Clerk Supervisor 9/4/15

CERTIFIED A TRUE COPY
DATE: Sept 4, 2015
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY:
COURT CLERK II

[20] "One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for profit, is subject to liability without proof of special harm." RESTATEMENT (SECOND) OF TORTS § 573.