

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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JUDITH EY
Civil Action No.: CE-2019-0002911

JOHN C. DEPP, II

Plaintiff/Counterclaim Defendant,

v.

AMBER LAURA HEARD,

Defendant/Counterclaim Plaintiff.

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT RE: COUNTERCLAIM OF AMBER HEARD**

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Ms. Heard's Counterclaim is defective, and Mr. Depp is entitled to summary judgment.¹ At issue are three statements ("Counterclaim Statements") made by nonparty Adam Waldman. *Not* by Mr. Depp. Ms. Heard fails to state a valid claim against Mr. Depp, for at least three reasons. *First*, no evidence supports Ms. Heard's allegations that Mr. Depp "conspired" with or directed Mr. Waldman to make the Counterclaim Statements, so Ms. Heard cannot establish that Mr. Depp is directly liable. *Second*, to the extent Ms. Heard seeks to hold Mr. Depp vicariously liable for Mr. Waldman's conduct, she must establish that Mr. Waldman committed the tort of defamation. But Ms. Heard – a public figure – *cannot establish* that Mr. Waldman acted with actual malice. *Third*, in context, the Counterclaim Statements are non-actionable opinions.

SUMMARY OF MATERIAL FACTS

Mr. Depp and Ms. Heard had a relationship that ended in a widely-publicized divorce amid allegations of domestic abuse, which have been the subject of high-profile, widely publicized litigations in the UK against a tabloid, and in Virginia between Mr. Depp and Ms. Heard. Ms. Heard is a self-described "public figure," actress, and activist, and is affiliated with a major film franchise. (See Request for Judicial Notice of Undisputed Material Facts (Ex. 1 hereto) at ¶ 1.) Ms. Heard seeks to hold Mr. Depp liable for statements that were indisputably made by Mr. Waldman, on the theory that Mr. "Depp has authorized and conspired with his attorney, Adam Waldman (acting on Depp's behalf), to attempt to destroy and defame Ms. Heard in the press[.]" (Counterclaim at ¶¶ 41; 66(d)-(f)). The Counterclaim Statements appeared in the UK tabloid the *Daily Mail*, (Counterclaim Exhibits F-H, attached hereto as collective Ex. 2) in the lead-up to a highly publicized trial in in the UK that revolved, in part, around Ms. Heard's abuse allegations. (Ex. 1 at ¶¶ 2).

¹ By Letter Opinion of January 24, 2021, the Honorable Bruce D. White, Chief Judge, dismissed Counts I and III of the Counterclaim in their entirety and sustained Mr. Depp's Plea in Bar as to Counterclaim Statements "A" through and including "E."

Statement F is an article with the headline “Amber Heard’s ‘Sexual Violence’ Evidence Against Johnny Depp will Be Kept Secret In His Libel Claim Against The Sun Despite Him Arguing Claims Should Be Made Public,” which contains discussion of the parties’ conflicting contentions. The article describes Ms. Heard’s “lurid 300-page filing of her own, cataloging the ‘horrific’ abuse she claims to have suffered at Mr. Depp’s hands;” and sets out a description of Ms. Heard’s allegations by a UK barrister adverse to Mr. Depp, who asserts that “Mr. Depp would usually when under the influence of drugs and alcohol, but not always, flip and suddenly turn into ‘the monster’ and it was on those occasions, she says, that he lost control and attacked her.” Mr. Waldman’s statement appears shortly thereafter, dismissing Ms. Heard’s “fake sexual violence allegations” and predicting that Ms. Heard’s “hoax” would be “obliterated” at trial.

Statement G starts with the headline: “EXCLUSIVE: ‘I need to report an assault.’ Listen to the 911 call made the night Johnny Depp and Amber Heard had blowout fight that ended their toxic 18-month marriage—but both claim tape backs up their version of events.” The article describes allegations by Ms. Heard and reports that Ms. “Heard’s attorney says that phone records and police department logs vindicate Heard’s account of the final shocking episode of domestic violence [Ms. Heard] endured before filing for divorce.” The article states: “Depp’s lawyer Adam Waldman said the various discrepancies [in Ms. Heard’s account] proved that nothing Heard and her friends said about the events of May 21, 2016 could be considered credible;” that “this was an ambush, a hoax;” and that “two domestic abuse-trained LAPD officers would later provide a pair of sworn depositions saying they saw no evidence of a crime.” The article quotes Ms. Heard’s then-counsel, Roberta Kaplan, calling Mr. Waldman’s arguments “fantasies,” asserting that “Mr. Depp’s representations about the 911 call on the night of May 21,

2016 are false,” and that “the evidence – including sworn testimony from multiple witnesses, phone records, and police department logs” supports Ms. Heard.

Statement H is an article about a friend of Ms. Heard’s, Amanda de Cadenet, who withdrew her support for Ms. Heard after she listened to audio recordings of Mr. Depp and Ms. Heard and concluded that Ms. Heard had not been “forthcoming” with her. The article states Ms. De Cadenet “feels she was used and misled by Amber,” and is “horrified” after listening to Ms. Heard be “verbally abusive to Johnny.” The article quotes Ms. Heard’s former attorney as saying “[w]e believe Amber, and we believe in Amber,” and Mr. Waldman as saying: “[w]hen Amanda de Cadenet . . . recants her support for Ms. Heard and testifies against her, you know we have reached the beginning of the end of Ms. Heard’s abuse hoax against Johnny Depp.”

Mr. Depp’s Fifth Interrogatories to Ms. Heard included the following: “State all facts that support Your contention that Mr. Depp is responsible for any damages You contend You have suffered as a result of the Counterclaim Statements.” To date, Ms. Heard’s only response is to state that “Ms. Heard will provide a substantive response.” (Ex. 1 at ¶ 3).

LEGAL STANDARD

The Court can grant summary judgment, as the material facts needed to adjudicate this Motion are not subject to dispute. *See* Va. R. S. Ct. 3:20. Summary judgment is justified “against a party who fails to make showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Realstar Realtors, LLC v. Glenn ex rel. Smith*, 56 Va. Cir. 179 (2001) (citation omitted).

ARGUMENT

I. Ms. Heard Has No Evidence Of Direct Liability

Ms. Heard alleges that Mr. Depp directly authorized and “conspired” with Mr. Waldman to make the Counterclaim Statements, but there is *no evidence* to that effect anywhere in the

record. There is no evidence of *any* communication or coordination between Mr. Depp and Mr. Waldman regarding the Counterclaim Statements or anything else. Tellingly, in response to Mr. Depp's Fifth Interrogatories' request that Ms. Heard state the facts supporting her contention that Mr. Depp is responsible for Mr. Waldman's conduct, Ms. Heard has offered nothing but an unfulfilled promise to provide a substantive response. Ms. Heard carries the burden of proving her allegation that Mr. Depp intentionally directed Mr. Waldman's conduct. *See, e.g., Hartzell Fan, Inc. v. Waco, Inc.*, 256 Va. 294, 300 (1998). She cannot do so.

II. Ms. Heard Cannot Prove Actual Malice By Mr. Waldman

To the extent Ms. Heard attempts to argue (contrary to her Counterclaim) that she is merely seeking to hold Mr. Depp liable under a vicarious liability theory, Ms. Heard's arguments fare no better. To state the obvious, vicarious liability is "liability for the tort of another person," so to hold Mr. Depp liable for Mr. Waldman's statements, Ms. Heard must establish that Mr. Waldman committed all elements of defamation. *See, Dobbs, et al., Dobbs' Law of Torts* § 425 (2d ed.); *see also, Roughton Pontiac Corp. v. Alston*, 236 Va. 152, 156 (1988).

The elements of defamation are "(1) publication of (2) an actionable statement with (3) the requisite intent." *Schaecher v. Bouffault*, 290 Va. 83, 91 (2015). A public figure must prove, by clear and convincing evidence, that a defamatory statement was made with "actual malice," *i.e.*, "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964). Reckless disregard "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing . . . there must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added).

The Virginia Supreme Court has confirmed that summary judgment is appropriately granted against a plaintiff that fails to present evidence from which a jury could find actual malice by clear and convincing evidence. *See, Jackson v. Hartig*, 274 Va. 219 (2007); *Sanders v. Harris*, 213 Va. 369, 373 (1972). Here, Ms. Heard is a public figure and, as such, must establish that Mr. Waldman uttered a defamatory statement about her with actual malice. ***There is no evidence in the record that Mr. Waldman knew the Counterclaim Statements were false. Nor is there is any evidence in the record that Mr. Waldman subjectively entertained serious doubts about the falsity of the Counterclaim Statements.*** Ms. Heard’s factually-empty response to Mr. Depp’s Fifth Interrogatories is damning – she had an opportunity to explain how Mr. Depp can be held legally responsible, which requires, as a threshold matter, establishing that Mr. Waldman committed the tort, including acting with actual malice. She cannot meet her burden.

III. In Context, The Counterclaim Statements Are Protected Opinion

Finally, taken in their proper context, the Counterclaim Statements are non-actionable expressions of opinion, entitled to protection under the First Amendment. *See, Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). Indeed, “a statement cannot be defamatory if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts.” *Piccone v. Bartels*, 785 F.3d 766, 771 (1st Cir. 2000). “Pure expressions of opinion . . . cannot form the basis of an action for defamation.” *Chaves v. Johnson*, 230 Va. 112, 119 (1985); *see also, Fuste v. Riverside Healthcare Ass’n, Inc.*, 265 Va. 127, 132 (2003); *Schaecher v. Bouffault*, 290 Va. 83 (2015) (noting that where “all sides of the issue, as well as the rationale for [the speaker’s] view, were exposed, the assertion of deceit reasonably could be understood only as [the speaker’s] personal conclusion,” and finding an accusation of deceit to be opinion) (quotation omitted).

As is explicitly reflected in Statements F, G, and H, the Counterclaim Statements were each made in the context of highly public and contentious litigation, with conflicting testimony from both sides. Each article lays out two diametrically opposing characterizations of the facts, by opposing attorneys. Each article presents Mr. Waldman's assessment of particular items of evidence or developments, *and* the opposing side's very *different* assessment. Each article is explicit that the facts are very much in dispute – *indeed, the main thrust of each article is to describe the clash of completely different views between the Depp and Heard camps.*

In context, any reporter or reasonable reader would understand and expect a lawyer associated with Mr. Depp to challenge Ms. Heard's version of the inherently murky events of the parties' marriage, just as Ms. Heard's lawyers challenged Mr. Depp. That context necessarily negates any suggestion that the statements are properly understood as objective statements of fact that could be deemed defamatory. *See, Chaves, supra*, 230 Va. at 119 (“[t]he most unsophisticated recipient of such a claim, made by one competitor against another, could only regard it as a relative statement of opinion, grounded upon the speaker's obvious bias”); *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995) (if a statement is made in a “forum in which a reader would be likely to recognize that the critiques . . . represent the highly subjective opinions of the author,” and relates to “inherently ambiguous” subject matter about which reasonable minds could draw different conclusions, then “the general context in which the statements were made negates the impression that they imply a false assertion of fact”).

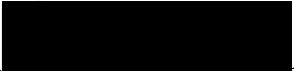
Mr. Waldman's opinions are not presented as a definitive version of events or as statements of a percipient witness, but as mere advocacy – one side of a fiercely contested story as characterized by a lawyer, where it is clear from context and the content of the statements that the facts are contested. *See, Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d

1280, 1290 (4th Cir. 1987) (summary judgment appropriate where “the statement in question readily appears to be nothing more than the author’s personal inference,” and where “a reasonable reader would recognize” the author as biased and would not expect “a dispassionate and impartial assessment”). Mr. Waldman is never described as a fact witness with personal knowledge, but merely a lawyer – a partisan hired gun – expressing his opinion and evaluation about a “he said, she said” dispute. *Biospherics Inc. v. Forbes*, 151 F.3d 180 (4th Cir. 1998) (no liability where “there was no claim to first-hand knowledge of facts” and the “context and tenor of the article thus suggest that it reflects the writer’s subjective and speculative supposition”); *Lane v. Random House, Inc.*, 985 F.Supp. 141, 152 (1995) (where a statement “reflects differing interpretations of the murky facts” and is therefore “expressing a point of view only... the challenged language is immune from liability”). Ultimately, Mr. Waldman’s statements reflect the existence of two competing narratives, and are merely his “subjective view, an interpretation, a theory, conjecture, or surmise” about events he never claims to have witnessed. *Piccone v. Bartels*, *supra*. 785 F.3d at 771; *Schnare v. Ziessow*, 104 Fed.Appx. 847, 852-53 (4th Cir. 2004); *Spencer v. American Intern. Group, Inc.*, Civil No. 3:08CV00591, 2009 WL 47111 (E.D. Va. 2009). No reasonable reader would believe otherwise, especially as Mr. Waldman’s statements are directly contradicted by Ms. Heard’s lawyers in the same articles. Moreover, the recipients of Mr. Waldman’s statements – whether reporters or readers – were necessarily informed of the existence of factual disputes (the reporters having written articles describing the disputes, and the readers having read them), which negates defamation. *Schaecher*, 290 Va. at 105; *see also Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96, 108 (3d Cir. 1988). The statements are no more than vivid expressions of opinion, from which no liability for defamation can arise.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion.

Respectfully submitted,


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