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2019 DEC 13 PM 3:40
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II,

Plaintiff,

v.

AMBER LAURA HEARD,

Defendant.

Civil Action No.: CL-2019-0002911

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S DEMURRER AND PLEA IN BAR SEEKING DISMISSAL OF ALL CLAIMS

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ARGUMENT

On May 27, 2016, Defendant Amber Laura Heard walked into California state court with bruises on her face to seek the protection of a domestic violence restraining order ("DVRO"). Compl. ¶ 2. To make the required showing under California law, Ms. Heard submitted photos and affidavits reflecting Plaintiff John C. Depp, II's abuse of her, and the court granted Ms. Heard a temporary restraining order on the strength of that showing. *Id.* ¶¶ 6, 30, 33.

In this action, Mr. Depp now seeks—perversely—to weaponize the fact that Ms. Heard sought the protection of the courts, arguing in his opposition brief that Ms. Heard's May 2016 request for a DVRO in a judicial proceeding somehow imbues a *Washington Post* op-ed written more than two years later with actionable defamatory innuendo. Mr. Depp is wrong on all counts. As a threshold matter, the op-ed is, by definition, an *opinion* piece—in this instance, one about what Ms. Heard experienced *after* she sought the DVRO. All of the statements at issue, whether read individually or in combination, express opinions that are constitutionally protected and cannot form the basis for a defamation claim for the reasons that Ms. Heard has already explained. *See* Def.'s Br. 6-14.

Unable to attack the four corners of the op-ed, Mr. Depp resorts to arguing that the op-ed implicitly defames him because "it is glaringly obvious that [Ms. Heard] was . . . again stating . . . that Mr. Depp abused her." Pl.'s Opp'n Br. 1. But no such implication can be "reasonably drawn from the words actually used." *Webb v. Virginian-Pilot Media Cos., LLC*, 287 Va. 84, 89 (2014). At most, the op-ed may remind readers that Ms. Heard sought a DVRO in May 2016 and describe the backlash that she experienced as a result. But that is all. The op-ed does not renew, repeat, or reassert any of the time-barred, judicially immune allegations underlying Ms. Heard's 2016 request, and Mr. Depp's arguments to the contrary rely on the untenable proposition that every

time that Ms. Heard mentions the term domestic violence—no matter what words she uses and no matter what the context—she necessarily is accusing Mr. Depp of abuse. Taken to their logical end, what Mr. Depp's arguments demand is that Ms. Heard be silent, or else be punished in perpetuity for her decision to seek the protection of the California courts in May 2016. Virginia law does not condone such a result, and Ms. Heard's Demurrer and Plea in Bar should be granted.

* * *

As the Virginia Supreme Court has held, resolving whether a statement carries a defamatory implication "is an essential threshold, gatekeeping function of the court before a case is submitted to the jury." *Id.* at 90-91.[1] In fulfilling that duty, courts cannot allow "the meaning of the alleged defamatory language . . . by innuendo, [to] be extended beyond its ordinary and common acceptation," nor can they allow innuendo to "introduce new matter, . . . extend the meaning of the words used, or make that certain which is in fact uncertain." *Id.* at 89-90 (quoting *Carwile v. Richmond Newspapers*, 196 Va. 1, 8 (1954)). Rather, "the alleged implication must be reasonably drawn from the words actually used," *id.* at 89, considering "the context in which [the] statements were made," *Richmond Newspapers, Inc v. Lipscomb*, 234 Va. 277, 298 (1987).

All of Mr. Depp's arguments in opposition require this Court to construe Ms. Heard's op-ed to "again stat[e] . . . that Mr. Depp abused her." Pl.'s Opp'n Br. 1; *see also id.* at 6 (relying on defamatory implication of "Ms. Heard . . . falsely telling the world that Mr. Depp abused her"); *id.* at 11 (relying on "republication" and "repackag[ing]" of allegations that Mr. Depp abused Ms.

[1] Because determining whether a defamatory implication can be drawn from a statement is a question of law, not fact, the articles attached to Mr. Depp's opposition brief are irrelevant. *See id.* (rejecting relevance of witness testimony concerning implications drawn by witnesses from statements at issue). Mr. Depp's reference to the declaration that Ms. Heard submitted in support of her motion to transfer venue in this case is similarly off-base since that declaration cannot give rise to defamation liability. *See Lindeman v. Lesnick*, 268 Va. 532, 537 (2004) (affording absolute privilege to statements made in judicial proceedings). Nor can a subsequent declaration alter the plain meaning of the "words actually used" in the op-ed. *Webb*, 287 Va. at 89.

Heard); *id.* at 13 (relying on "factual kernel" of "Ms. Heard [being] the victim of domestic abuse at the hands of Mr. Depp"). But no such defamatory implication can be "reasonably drawn" from the statements at issue. *Webb*, 287 Va. at 89.

Under Virginia law, the analysis must begin with "the words actually used," *id.*, considering "the context in which [the] statements were made," *Lipscomb*, 234 Va. at 298.[2] Here, Ms. Heard's op-ed expresses her personal viewpoint that reforms are needed to change how society treats women who report abuse. Drawing on her own subjective experiences, Ms. Heard notes that she "spoke up against sexual violence" and that "two years ago, I became a public figure representing domestic abuse." Compl. ¶ 22. When "the plain and natural meaning" of those words is examined, *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993), the only factual implication that emerges is that Ms. Heard sought a DVRO in May 2016. That factual implication is not actionable because there is no dispute that Ms. Heard in fact sought a DVRO against Mr. Depp in May 2016, nor any dispute that her request was widely covered by the media. *See* Compl. ¶¶ 2, 30, 33, 50; *see also Schaecher v. Bouffault*, 290 Va. 83, 91 (2015) (holding that a statement must be false in order to be actionable).

Moreover, the other statements in the op-ed at issue (*i.e.*, "fac[ing] our culture's wrath"; "hav[ing] the rare vantage point of seeing, in real time, how institutions protect men accused of abuse"; "getting death threats"; and being "on trial in the court of public opinion," Compl. ¶ 22) describe Ms. Heard's subjective experience of the events set in motion by her decision to seek the DVRO. None of those statements—whether read individually or in combination—ever discusses, details or defends the allegations underlying Ms. Heard's request for a DVRO, much less overtly

[2] The statements at issue here were made in "an editorial or op-ed column"—a form of expression that is "ordinarily not actionable" because it appears "in a place usually devoted to, or in a manner usually thought of as representing, personal viewpoints." Judge Robert D. Sack, 1 *Sack on Defamation: Libel, Slander, and Related Problems* § 4:3.1 (5th ed. 2017).

accuses Mr. Depp of abusing her. And that makes perfect sense given the context. The op-ed is not about what Mr. Depp did *before* Ms. Heard's allegations; it is about what Ms. Heard endured *after* she made them.

Mr. Depp's "republication" theory fares no better. Pl.'s Opp'n Br. 10-12; *see also* Compl. ¶¶ 6, 66, 72 (alleging that Ms. Heard "revived" those allegations via the op-ed). As Mr. Depp himself concedes, *see* Pl.'s Opp'n Br. 10-11, courts have consistently held that "a mere reference to another writing . . . does not constitute an actionable repetition or republication" of the original material, *Goforth v. Avemco Life Ins. Co. of Silver Spring, Md.*, 368 F.2d 25, 28 n.7 (4th Cir. 1966); *accord. Higgs v. Erie Ins. Exch.*, 8 Va. Cir. 53 (Va. Cir. Ct. 1983). Here, where Ms. Heard did little more than obliquely reference the fact that she sought a DVRO, the allegations underlying her request are not republished or made anew simply because some might be reminded of their existence, *see, e.g.*, *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012) ("[T]hough a link and reference may bring readers' attention to the existence of an article, they do not republish the article."); *see also Chapin*, 993 F.2d at 1094 (holding that language that merely "provokes public scrutiny of the plaintiffs' activities" is not actionable, "however embarrassing or unpleasant to its subject").[3]

Although Mr. Depp posits the case of *Pendleton v. Newsome*, 290 Va. 162 (2015), as the cure-all for his inability to find a defamatory implication in Ms. Heard's op-ed, *see* Pl.'s Opp'n Br. 1 (characterizing this case, like *Pendleton*, as one in which "a defendant attempt[s] to evade defamation liability by leaving out the plaintiff's name while making it perfectly clear she is referring to him"), he misses the point. The question here is not whether Ms. Heard's op-ed refers

[3] If Mr. Depp's argument were to be taken to its logical extreme, every time that Ms. Heard publicly acknowledged the fact of her divorce, all allegations made in her divorce proceedings would immediately be "republished," merely because the reference might call to mind the allegations made in the underlying proceeding. That is not how the law of defamation works.

to Mr. Depp. Rather, as *Pendleton* itself makes clear, the question is whether the op-ed is "reasonably capable of conveying the defamatory innuendo of which the plaintiff complains." 290 Va. at 175. And here, even taking into account the backdrop of Ms. Heard's request for a DVRO and the ensuing media coverage, Mr. Depp cannot show that the op-ed can be reasonably read to carry the defamatory implication of which Mr. Depp complains: that Mr. Depp abused Ms. Heard.

Fundamentally, what Mr. Depp seeks to do is relitigate allegations that Ms. Heard made to secure court protection in May 2016 and that are thus both time-barred and judicially immune from defamation liability. *See* Va. Code § 8.01-247.1 (one-year statute of limitations); *Lindeman*, 268 Va. at 537 (affording absolute privilege to statements made in judicial proceedings). Those allegations remain out of bounds—their substance cannot be "reasonably drawn from the words actually used" in Ms. Heard's op-ed, *Webb*, 287 Va. at 89, and Mr. Depp is not entitled to proceed to trial merely because he sees himself in Ms. Heard's op-ed or because it may cause others to recall the allegations underlying the DVRO request, *see Pendleton*, 290 Va. at 172 (reaffirming that "ensuring that defamation actions proceed only upon statements which may actually defame a plaintiff 'is an essential gatekeeping function of the court'" (quoting *Webb*, 287 Va. at 90)). To conclude otherwise would punish Ms. Heard for seeking court protection in the first place and effectively bar her (or any other woman who dares come forward) from speaking publicly on an issue of public concern—no matter the words she "actually used" or the context in which she used them. *Webb*, 287 Va. at 89. While Ms. Heard can and will prove at trial that she was in fact abused by Mr. Depp if required, it would be fundamentally unjust—not to mention deeply ironic—to force her to do so on the basis of Mr. Depp's opportunistic misreading of an op-ed that calls for women to be treated with fairness and respect. Mr. Depp's claims should be dismissed in their entirety.

CONCLUSION

WHEREFORE, Ms. Heard respectfully requests that this Court grant her Demurrer and Plea in Bar.

Dated this 13th day of December, 2019

Respectfully submitted,
Amber L. Heard

By Counsel: [redacted]

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