

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED
CIVIL PROCESSING

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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

JOHN C. DEPP, II,

Plaintiff,

v.

Civil Action No.: CL-2019-0002911

AMBER LAURA HEARD,

Defendant.

**PLAINTIFF JOHN C. DEPP, II'S MEMORANDUM IN SUPPORT OF OBJECTION TO
IMPROPER ARGUMENT AND MOTION FOR A CURATIVE INSTRUCTION AND
REVISED SPECIAL VERDICT FORM**

Plaintiff John C. Depp, II, by and through his undersigned counsel, hereby moves this Honorable Court to (i) strike defendant's inappropriate argument made during closing argument on May 27, 2022 and instruct the jury to disregard the inappropriate argument and (ii) revise the Special Verdict Form with respect to Mr. Depp's affirmative claims against Ms. Heard to conform to the language adopted by the Court in the Jury Instructions.

ARGUMENT

1. The Court Should Provide A Curative Jury Instruction

During closing arguments on May 27, 2022, counsel for Ms. Heard told the jury that their decision in this case would send a message to "every victim of domestic abuse everywhere." Tr. of Jury Trial Day 25 (May 27, 2022) at 7812:17-18.¹ Counsel for Ms. Heard also stated that "[a] ruling against Amber here sends a message that no matter what you do as an abuse victim, you

¹ Relevant excerpts of the closing argument given by Ms. Heard's counsel on May 27, 2022 are attached hereto as Exhibit A.

always have to do more. No matter what you document, you always have to document more. No matter whom you tell, you always have to tell more people. No matter how honest you are about your own imperfections and your own shortcomings in a relationship, you have to be perfect in order for people to believe you. Don't send that message. That's what [Mr. Depp] wants you to send." *Id.* at 7879:19-7880:7.

The remarks made by Ms. Heard's counsel to the jury "improperly invite the jury to focus on a larger social objective beyond the [case]." *Plymail v. Mirandy*, 8 F.4th 308, 317 (4th Cir. 2021) ("Prosecutors violate this edict when they stray beyond the defendant's crimes and ask the jury to convict in order to 'send a message to the community.'") (quoting *United States v. Runyon*, 707 F.3d 475, 514 (4th Cir. 2013)); *Cnty. Sch. Bd. of Orange Cnty. v. Thomas*, 201 Va. 608, 608, 112 S.E.2d 877 (1960) (finding no error where trial court instructed the jury to disregard parts of counsel for plaintiff's closing argument in which he made an improper appeal for sympathy). Indeed, "[a]n attorney must not ask a jury to 'send a message' to anyone . . . Juries are not in the message-sending business. Their sole duty is to return a verdict based on the facts before them. Urging a jury to 'send a message' is impermissible because it implies that there is a reason to find the defendant guilty other than what the evidence has show." *Bowman v. United States*, 652 A.2d 64, 71 (D.C. 1994).

Such argument by Ms. Heard's counsel improperly invites the jury to decide the case "based on passion and prejudice" and a specific jury instruction is necessary to cure this impropriety. *United States v. Sanchez*, 659 F.3d 1252, 1259-60 (9th Cir. 2011) (finding that "*Bracy* does not compel the conclusion that a generalized jury instruction that the statements of counsel are not evidence is sufficient to dispel the level and type of prejudice generated by the

prosecutor in this case” and, accordingly, “that the general instructions the district court gave to the jury were insufficient to mitigate the prejudice of the ‘send a memo’ statement”).

Mr. Depp hereby requests that the Court instruct the jury to disregard this argument and read the instructions as reflected in the proposed Order submitted herewith. The Court has discretion to give this curative instruction. *Johnson v. Raviotta*, 264 Va. 27, 33, 563 S.E.2d 727, 731 (2002) (“an objection must be made contemporaneously with the introduction of the objectionable evidence or at a point in the proceeding when the trial court is in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error”). Mr. Depp’s request for this curative instruction during deliberations is substantively similar to the curative instruction Justice McCulloch advocated for in his dissenting opinion in *Maxwell*. See *Maxwell v. Commonwealth*, 287 Va. 258, 273–74, 754 S.E.2d 516, 524 (2014) (McCulloch, J., dissenting).

2. The Court Should Correct The Verdict Form To Conform To The Jury Instructions

Mr. Depp also requests that minor corrections be made to the Special Verdict Form with respect to Mr. Depp’s affirmative claims against Ms. Heard, to conform to the language adopted by the Court in the Jury Instructions.² Mr. Depp’s proposed changes to the Verdict Form are necessary to correct an inconsistency between the Jury Instructions and Verdict Form that could confuse or mislead the jury, and merely track the substance of the Court’s prior rulings. Specifically, the question in the Verdict Form that reads “The statement was false” should be modified consistent with the language adopted by the Court in the finding instructions, to read as follows: “The statement **about Mr. Depp** was false?”

² Attached as Exhibit B is a version of the Special Verdict Form with Mr. Depp’s proposed changes. Attached as Exhibit C is a redlined version of the Special Verdict Form reflecting the edits.

In addition, the order of questions in the Verdict Form should be adjusted slightly to conform to the order of the Jury Instructions. The current order of questions in the Verdict Form is as follows:

1. The statement was made or published by Ms. Heard?
2. The statement was about Mr. Depp?
3. The statement was false?
4. The statement has a defamatory implication about Mr. Depp?
5. The defamatory implication was designed and intended by Ms. Heard?
6. Due to circumstances surrounding the publication of the statement, it conveyed a defamatory implication to someone who saw it other than Mr. Depp?

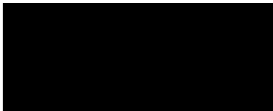
Mr. Depp's proposed revised order is below, with the proposed additional language included in bold, underlined font:

1. The statement was made or published by Ms. Heard?
2. The statement was about Mr. Depp?
3. The statement has a defamatory implication about Mr. Depp?
4. The defamatory implication was designed and intended by Ms. Heard?
5. Due to circumstances surrounding the publication of the statement, it conveyed a defamatory implication to someone who saw it other than Mr. Depp?
6. The statement **about Mr. Depp** was false?

CONCLUSION

Based on the foregoing, the Court should grant Plaintiff's motion, instruct the jury with the language reflected in the proposed Order, and revise the Special Verdict Form.

Respectfully submitted,

 (VSB #29113)

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*Counsel for Plaintiff and
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Dated: May 31, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of May 2022, I caused copies of the foregoing to be served on the following:

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