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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

JOHN C. DEPP, II

Plaintiff,

v.

AMBER LAURA HEARD,

Defendant.

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Civil Action No.: CL-2019-0002911

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION FOR LEAVE TO FILE AMENDED RESPONSIVE PLEADING**

ARGUMENT

I. Ms. Heard's Proposed Amended Pleading Is Untimely And Would Be Significantly Prejudicial To Mr. Depp If Allowed.

Rule 1:8 provides that "[n]o amendments shall be made to any pleading after it is filed save by leave of court." Va. S. Ct. Rule 1:8. "A court's primary consideration in deciding whether to allow an amendment is whether the opposing party will be prejudiced by allowing the amendment." *In re Episcopal Church Prop.*, 76 Va. Cir. 873 (2008) (denying leave to amend).

The Notice of Scheduling Conference in this case, dated April 24, 2019, makes clear:

Please make **SURE** that all of the following things have been taken care of **BEFORE** the Scheduling Conference:

1. Resolve all demurrers, pleas in bar, motions to quash process and other special pleas. Set them down for hearing on a Friday Motions Day.

Exhibit A (emphasis in original). Accordingly, Ms. Heard's proposed amended demurrer and plea in bar comes far too late, as the Notice required that it should have been filed and argued *prior* to the Scheduling Conference on June 27, *more than four months ago*.

Moreover, Ms. Heard's untimely dismissal attempts would cause significant unfair prejudice to Mr. Depp. Mr. Depp filed this action on March 1, 2019. Ms. Heard filed her first demurrer and plea in bar on April 11, 2019. That motion was fully briefed, heard by this Court, and denied. Ms. Heard then hired a brand new legal team, and seeks second demurrer and plea in bar, *six months into the case*. The parties have a short window to complete discovery before the January 2020 cut-off. Mr. Depp bears the burden of proof, and should be allowed the opportunity to carry that burden. It would be unfair for Mr. Depp to be forced, once again, to brief and argue a demurrer and plea in bar in parallel with the ongoing discovery effort. That harm outweighs the *de minimis* prejudice to Ms. Heard in not being allowed to file a second dismissal attempt. Nothing prevented Ms. Heard from presenting her new dismissal arguments before the June 27 deadline, and as Ms. Heard admits, she "can raise the same grounds for dismissal on summary judgment." Mot. at 4. Indeed, at the recent hearing on Defendant's motion for a confidentiality order, her counsel stated "when we're trying that issue [whether Ms. Heard's op-ed was defamatory], if we're going to get factually to that issue, we have to do a lot of discovery." Ex. A, 9/13/2019 Hr'g Tr. at 33:11-13.

II. Ms. Heard's Proposed Amended Pleading Is Futile.

Ms. Heard could not prevail on the arguments she presents in her proposed amended demurrer and plea in bar; for that reason, too, the Court should not indulge the untimely distraction that her proposed amended pleading creates. "Demonstrated futility may lead the Court to conclude, in the exercise of its discretion, that the ends of justice would not be advanced" by permitting the amendment. *In re Episcopal Church Prop.*, 76 Va. Cir. at 873 (finding amendment would be futile) (citation omitted). *See also Tsapel v. Anderegg*, 51 Va. Cir. 139 (1999) (same).

Demurrer. The crux of Ms. Heard's proposed second demurrer is that the statements in her op-ed are (1) non-actionable opinions that (2) do not refer to Mr. Depp. But those arguments mischaracterize the law and are meritless. Ms. Heard claims that under Virginia law, "[b]ecause statements of opinion cannot be 'false,' they are never actionable." Mem. i/s/o Demurrer at 5. But that is a dramatically overbroad and inaccurate statement. The Virginia Supreme Court has held that opinions "laden with factual content" properly were sent to a jury and found to be defamatory. *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 298 n. 8, 362 S.E.2d 32, 43 n. 8 (1987). Indeed, in *Raytheon Tech. Servs. Co. v. Hyland*, that Court endorsed the United States Supreme Court's conclusions in *Milkovich v. Lorain Journal Co.*, that "opinions may be actionable where they 'imply an assertion' of objective fact." 273 Va. 292, 303 (citing 497 U.S. 1, 21 (1990)) (internal citations omitted) ("*Hyland P*"). As Ms. Heard concedes, "Virginia recognizes that facially non-defamatory statements may possess a prohibited defamatory implication." Mem. i/s/o Demurrer at 6. *See also Pendleton v. Newsome*, 290 Va. 162, 172 (2015) (Virginia law allows "a defamation action based on a statement expressing a defamatory meaning 'not apparent on its face.')" (citing *Webb v. Virginian-Pilot Media Cos., LLC*, 287 Va. 84, 89 n.7 (2014)).

It is hard to imagine a case where defamation by implication could be clearer. Ms. Heard and her handlers danced around referring to Mr. Depp by name, but there was no question that the statements in the Op-Ed that, for example, Ms. Heard became a "public figure representing domestic abuse" impliedly asserted that she did so because she suffered such abuse from her former husband Mr. Depp, particularly given the earlier allegations Ms. Heard made in 2016, which the Complaint recounts at length and in detail. *See* Complaint ¶¶ 15-18, 23, 33-61. Ms. Heard and her prior lawyers admitted as much in her first dismissal motion. *See, e.g.*, Apr. 11,

2019 Mem. i/s/o Mot. to Dismiss at 2 (referring to the supposed “dozens of violent episodes throughout the couple’s relationship” as the purported “basis for Ms. Heard’s perspective as a domestic abuse victim”). *The Washington Post*, which published the Op-Ed, as well as other press outlets, identified it as referring to Mr. Depp.¹ It is precisely this sort of defamatory statement—where the plaintiff is not expressly named, but the context of the statement makes it clear the statement was “aimed directly at [the plaintiff] and at no other person”—that the Virginia Supreme Court found was actionable in *Pendleton*. 290 Va. at 172-73 (overruling demurrer).

Nor can Ms. Heard chop up the Op-Ed and try to defend its statements *seriatim*. It is precisely because defamatory statements may be made by “implication, inference, or insinuation” that “an allegedly defamatory statement [must] be considered as a whole” including “those portions imparting an opinion.” *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 47 (2009) (“*Hyland II*”). Ms. Heard concedes this principle, *see* Mem. i/s/o Demurrer and Plea in Bar at 10-11, but ignores its application. Put in context, Ms. Heard’s repeated references to the supposed domestic abuse she now represents unmistakably involve a predicate statement of purported fact: that she suffered such abuse from Mr. Depp. Indeed, Ms. Heard’s gratuitous—and false—declaration, submitted with her first dismissal pleading, embraces that (defamatory) implication.

¹ Sonia Rao, *A timeline of Johnny Depp and Amber Heard’s ongoing legal battle*, WASHINGTON POST, May 22, 2019, available at <https://www.washingtonpost.com/artsentertainment/2019/05/22/timeline-johnny-depp-amber-heards-ongoing-legal-battle/> (“Though Heard didn’t name Depp or any specific allegations, her piece was widely interpreted as being in reference to him because of the media coverage of their tense split.”); Gina Carbone, *Johnny Depp’s Pirates of the Caribbean-Related Lawsuit Against Amber Heard Set A Trial Date*, CINEMA BLEND, available at <https://www.cinemablend.com/news/2475816/johnny-depps-pirates-of-the-caribbean-related-lawsuit-against-amber-heard-set-a-trial-date> (“Johnny Depp claimed Amber Heard’s op-ed alleging abuse (which did not name him, but clearly referred to him) . . .”).

Plea in bar. Ms. Heard's proposed amended plea in bar would fare no better. First, Mr. Depp's claims all concern the publication of the Op-Ed which occurred in December 2018. Mr. Depp filed suit on March 1, 2019, well-within Virginia's one-year statute of limitations for defamation actions. Trying to circumvent this obvious problem to her time-bar argument, Ms. Heard claims that Mr. Depp's complaint is overwhelmingly about statements she made in 2016. Mem. i/s/o Demurrer at 14. Tellingly, however, Ms. Heard does not cite *any* case law supporting her argument that the limitations period somehow started years before she published the Op-Ed that led to Mr. Depp filing suit. That lack of case law is no accident: under Virginia law, "where there are separate publications of the same defamatory statement, a new cause of action, *and thus a new statute of limitations, accrues with each republication.*" *Doe v. Roe*, 295 F. Supp. 3d 664, 671 (E.D. Va. 2018) ("[E]ach defamatory statement is governed by its own one-year statute of limitations, not by the statute of limitations period beginning with [the defendant's] first statement.").


Second, Virginia's anti-SLAPP law provides no immunity for "any statements made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false." Va. Code § 8.01-223.2. Obviously, Ms. Heard knows whether her Op-Ed, portraying herself as a victim of domestic abuse, is actually false; this is not a situation of a defendant communicating secondhand information received from another. Recognizing this, Ms. Heard simply repeats the same arguments from her demurrer, that the Op-Ed is not actionable because it sets forth opinions and does not refer explicitly to Mr. Depp. Mem. i/s/o Demurrer and Plea in Bar, at 16. Those arguments fail for the reasons stated above: despite the "opinion" window-dressing, the Op-Ed undoubtedly implies a false assertion of fact, that Mr. Depp perpetrated the supposed abuse Ms. Heard claims to have suffered.

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Dated: November 1, 2019

Respectfully submitted,


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EXHIBIT A

**FAIRFAX CIRCUIT COURT
NOTICE OF SCHEDULING CONFERENCE
LAW TRACK**

JOHN C DEPP II

VS.

Case No. CL-2019-0002911

AMBER LAURA HEARD

To: **Manatt Phelps & Phillips, LLP
Benjamin G Chew
1050 Connecticut Avenue, NW, Suite 600
Washington DC 20036**

In an effort to resolve your case quickly and fairly, the court has placed a Scheduling Conference for this case on the docket. At the conference, we will establish a trial date and discovery schedule, enter a **Scheduling Order**, and deal with other pre-trial matters. We will also discuss whether a settlement conference is appropriate. **DO NOT SET THIS CASE FOR TERM DAY.**

You are to appear for the Scheduling Conference at **8:30 AM on June 27, 2019**, at the Judicial Center, 4110 Chain Bridge Road in Fairfax. The docket with courtroom assignments will be posted electronically on the monitors located on the 4th and 5th floor of the Judicial Center the morning of the scheduling conference.

Please make **SURE** that all of the following things have been taken care of **BEFORE** the Scheduling Conference:

1. Resolve all demurrers, pleas in bars, motions to quash process and other special pleas. Set them down for argument on a Friday Motions Day.
2. Check service of process on each defendant. If a defendant has not been served, either obtain service or be prepared to explain why service has not been effected.
3. If any defendant is in default, obtain a default judgment against him, if possible, or at least a judicial declaration that he/she is in default.
4. Corporations must be represented by counsel.

If there is a problem with the assigned date, please contact the Case Management staff at (703) 246-2880, AT **LEAST TEN CALENDAR DAYS** before the scheduled conference for further instructions.

The Judges of the Fairfax Circuit Court

04/24/2019

NOTE: On-Line Scheduling (OSS) is available for members of the Virginia State Bar with cases meeting the OSS requirements. (See Attachment)

**FAIRFAX CIRCUIT COURT
NOTICE OF SCHEDULING CONFERENCE
LAW TRACK**

JOHN C DEPP II

VS.

Case No. CL-2019-0002911

AMBER LAURA HEARD

**To: CAMERON/McEVOY
Sean Patrick Roche
4100 Monument Corner Drive, Suite 420
Fairfax VA 22030**

In an effort to resolve your case quickly and fairly, the court has placed a Scheduling Conference for this case on the docket. At the conference, we will establish a trial date and discovery schedule, **enter a Scheduling Order**, and deal with other pre-trial matters. We will also discuss whether a settlement conference is appropriate. **DO NOT SET THIS CASE FOR TERM DAY.**

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04/24/2019

The Judges of the Fairfax Circuit Court

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CERTIFICATE OF SERVICE

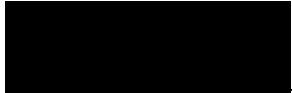
I HEREBY CERTIFY that on this 1st day of November, 2019, I caused a copy of the foregoing document to be served by email and first class mail pursuant to Rule 1:12 of the Supreme Court of Virginia to the following:

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