

Exhibit A

FILED
MOTIONS DOCKET
2021 JAN 22 PM 1:59

VIRGINIA: IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II

Plaintiff
vs.

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

Civil Action No. CL 2019-0002911

AMBER LAURA HEARD

Previous Chancery No. CH

Defendant

FRIDAY MOTIONS DAY - RESPONSE/OPPOSITION TO MOTION

Title of Motion(s) to which Response is filed: Mot to Deny the Remainder of Def's Plea in Bar and Schedule an Evidentiary Hearing Before a Jury on the Remaining Issues

Responding Party: Defendant/Counter-Plaintiff, Amber Laura Heard

DATE TO BE HEARD: 1/29/2021


Time Estimate (combined, no more than 30 minutes): 60 minutes per Chief Judge White

Responding Party will use Court Call telephonic appearance: [X] Yes [] No

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CERTIFICATIONS

- [X] I certify that I have in good faith conferred or attempted to confer with other affected parties in an effort to resolve the subject of the motion without Court action; and,
- [X] I have read, and complied with, each of the Instructions for Responding Party on the reverse side of this form.


Responding Party/Counsel of Record

CERTIFICATE OF SERVICE

I certify on the 22nd day of January, 2021, a true copy of the foregoing Response was [X] mailed [] faxed [] delivered to all counsel of record pursuant to the provisions of Rule 4:15(e) of the Rules of the Supreme Court of Virginia.


Responding Party/Counsel of Record

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II,

Plaintiff and Counter-defendant,

v.

AMBER LAURA HEARD,

Defendant and Counter-plaintiff.

Civil Action No.: CL-2019-0002911

**DEFENDANT’S OPPOSITION TO PLAINTIFF’S MOTION TO DENY THE
REMAINDER OF DEFENDANT’S PLEA IN BAR, AND SCHEDULE AN
EVIDENTIARY HEARING BEFORE A JURY ON THE REMAINING ISSUES**

January 22, 2021

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Amber Laura Heard*

Mr. Depp has brought a defamation claim based on Ms. Heard's Op-Ed article she drafted, at the request of and with the assistance of the ACLU, on topics addressing the ability to speak out, be heard, receive proper investigation, and not be retaliated against, respecting domestic abuse and violence, sexual harassment and assault, the #MeToo movement, Violence Against Women Act, and Title IX rules. Mr. Depp was not named in the article. The Op Ed article was published in *The Washington Post*, a highly regarded publication that reserves its Op Eds for significant and pressing issues of public concern, and not private disputes. In response to the Complaint alleging defamation because of the Op Ed article, Ms. Heard filed a Plea in Bar based on Virginia's Anti-SLAPP statute, requesting an evidentiary hearing before a jury. Ms. Heard, like all Virginia litigants, has a right to demand a jury on such an issue. Yet Mr. Depp seeks to shortcut this right by refusing Ms. Heard's request to first contact the Court through Calendar Control for scheduling long briefing and setting an evidentiary hearing, before a jury. Mr. Depp instead noticed Ms. Heard's Plea in Bar for a hearing based solely on the pleadings, as a 30-minute matter, with only five pages of briefing.¹ Ms. Heard does not agree to waive her rights to a jury trial or evidentiary hearing on her assertion of Anti-SLAPP immunity.

Mr. Depp's justification for simply ignoring an evidentiary hearing and jury demand is, since he chose to submit his Plea in Bar to the Court on the pleadings, and the Court dismissed his Anti-SLAPP defense, Ms. Heard should follow suit. First, the statements at issue are nothing alike. Mr. Depp's statements were personal attacks on Ms. Heard, nothing more. In contrast, Ms.

¹ While the Court requested that all of these issues, including that this matter should not be heard on January 29, in briefing and a hearing on January 29, the Court permitted Ms. Heard 10 pages to address these issues, and 5 additional pages to Mr. Depp, and indicated the parties could have up to one hour to argue.

Heard's statements² were in the context of an Op-Ed, in conjunction with the ACLU and in her role as an ambassador of for the ACLU, calling for "Congress [to] reauthorize and strengthen the Violence Against Women Act," and called for "changes to laws and rules and social norms" so that "women who come forward to talk about violence receive more support." Ex. 7

(Declaration of ACLU) ¶¶4-6. These topics are clearly matters of public concern. *Id.* ¶ 5. If the Court finds that the Op-Ed contains matters of public concern, Ms. Heard possesses immunity under the Anti-SLAAP act, unless Mr. Depp can prove by clear and convincing evidence that Ms. Heard knew the statements were false or made them with reckless disregard. This is clearly a jury question, and Ms. Heard appropriately requested a jury trial. Because this same issue (whether the statements were false or made with reckless disregard) will be considered by the jury on Mr. Depp's defamation claim, Ms. Heard requests this issue be heard by the jury at trial, rather than scheduling a separate evidentiary hearing, which would be largely redundant and inefficient for the parties and this Court. To the extent the Court believes it can determine whether the statements satisfied the first prong, "statements...regarding matters of public concern that would be protected under the First Amendment to the United States Constitution made by that person that are communicated to a third party," without further evidence, then Ms. Heard requests the Court so rule. If the Court believes it requires an evidentiary hearing (as Ms. Heard earlier requested), then Ms. Heard requests that either the Court defer the ruling until trial or set an evidentiary hearing on this issue.

² Oddly, Mr. Depp argues that only "opinions" are protected under the Anti-SLAPP statute, Depp Memo at 3-4. Yet the Anti-SLAPP statute explicitly protects "**statements**...regarding matters of public concern that would be protected under the First Amendment to the United States Constitution made by that person that are communicated to a third party." Va. Code §8.01-223.2 (emphasis added).

BACKGROUND

In late 2017, the nation witnessed a series of accusations of famous, powerful men abusing women. This triggered an intense, ongoing debate about the prevalence of abuse and the nature of the societal forces that have long caused victims – mainly women – to remain silent.³

On December 18, 2018, Ms. Heard joined that conversation by publishing an Op-Ed online in *The Washington Post*. See **Att. 1**. Ms. Heard is described in the Op-Ed as “an actress and ambassador on women’s rights at the American Civil Liberties Union.” *Id.* The ACLU suggested Ms. Heard write, and assisted Ms. Heard in submitting, an Op-Ed piece to the *Washington Post* addressing how victims are often intimidated by institutions and social dynamics that protect abusers, and that these dynamics cause people to question victims. **Att. 7 ¶ 5.**

The editors at *The Post* (not Ms. Heard) created the title, “Amber Heard: I spoke up against sexual violence – and faced our culture’s wrath. That has to change.” When the same Op-Ed appeared in *The Post*’s print edition one day later, the editors changed the title to “A Transformative Moment for Women.” **Att. 2.**

The dominant message of the Op-Ed is that “[w]e are in a transformative political moment” and “have an opening now to bolster and build institutions protective of women.” Ms. Heard described the lessons of the #MeToo movement, surveyed the dramatic rise of women in electoral politics, and declared that “[w]omen’s rage and determination to end

³ See, e.g., Jeannie Suk Gersen, *Bill Cosby’s Crimes and the Impact of #MeToo on the American Legal System*, NEW YORKER (Apr. 27, 2018); Amy Kaufman & Daniel Miller, *Six Women Accuse Filmmaker Brett Ratner of Sexual Harassment or Misconduct*, L.A. TIMES (Nov. 1, 2017); Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017).

sexual violence are turning into a political force.” She therefore called on Congress to “reauthorize and strengthen the Violence Against Women Act,” and criticized “proposed changes to Title IX rules governing the treatment of sexual harassment and assault in schools.” More broadly, she advocated the election of “representatives who know how deeply we care about these issues,” as well as the adoption of cultural and political reforms to “right the imbalances that have shaped our lives.”

On March 1, 2019, Mr. Depp filed a Complaint alleging defamation against Ms. Heard based on the Op-Ed. In response, on April 11, 2019, Ms. Heard filed a Motion to Dismiss and Plea in Bar, in which she stated “Mr. Depp’s claims are also subject to dismissal under the Virginia Anti-SLAPP statute,” and “demands that any Plea in Bar in Virginia be tried as an evidentiary hearing before a jury.” **Att. 3 at 2 and n.3.** On March 27, 2020, this Court ruled on the Demurrer, but recognized that “Ms. Heard reserved her arguments that ... she is entitled to immunity under Virginia’s Anti-SLAPP statute ... for a later evidentiary hearing.” **Att. 4 at n.1**

Despite demanding an evidentiary hearing in front of a jury on her Plea in Bar, Mr. Depp insisted on setting the Plea in Bar based solely on the pleadings, on the Friday Motions docket. The parties met and conferred, Ms. Heard reasserted her jury demand, Mr. Depp indicated he would look further into the issue and respond to Ms. Heard. **Att. 5.** Instead of responding, Mr. Depp filed this Motion to deny Ms. Heard’s Plea in Bar on the papers and set it for January 29, 2021. Granting Mr. Depp’s Motion would deny Ms. Heard her Constitutional rights as recognized under Va. Code §8.01-336 and Rule 3:21 of the Rules of the Virginia Supreme Court.

ARGUMENT

I. Ms. Heard has a Right to an Evidentiary Hearing by Jury on Her Plea in Bar

“[A] plea in bar is a defensive pleading that reduces the litigation to a single issue.”

Kroger Co. v. Appalachian Power Co., 244 Va. 560, 562 (1992). “Its very purpose is to decide factual issues whose determination, when applied to certain legal principles, may end or limit pending litigation.” *Painter v. Singh*, 73 Va. Cir. 77, 78 (Fairfax Cir. Ct. 2007) (Wooldridge, Jr., J.) (citing *Nelms v. Nelms*, 236 Va. 281 (1988).)

In *Painter*, the Court explained that Defendant “was free to demand a jury trial on the plea in bar. Va. Code § 8.01-336(B) holds that in any action at law, ‘unless one of the parties demands that the case **or any issue** thereof be tried by a jury...the whole matter of law and fact may be heard and judgment given by the court.’” 73 Va. Cir. at 78. (emphasis in original). In fact, “[j]ury trials on pleas in bar are not a rarity in this court.” *Id.* In *Painter*, a jury did not hear the Plea in Bar because “Plaintiff did not request a jury when the plea in bar was set for a hearing at calendar control. Plaintiff did not request a jury on the morning of the hearing, or ask why one was not present. Plaintiff did not even request a jury in her responses to the court’s questions during closing argument.” *Id.* The Court held “[h]aving not requested a jury, either in writing or orally at the hearing itself, **Plaintiff waived her right to have a jury decide the factual issues raised at the plea in bar.**” *Id.* at 79. (emphasis added).

In contrast, Ms. Heard requested an evidentiary hearing by jury on her Plea in Bar as to her Anti-SLAPP immunity defense. She has never waived that request. The only way a Plea in Bar can be heard on the papers is “[u]pon agreement of the parties.” *Kroger Co.*, 244 Va. at 562. Mr. Depp cannot request, on his own, that Ms. Heard’s Plea in Bar be heard on the papers. The “right of trial by jury as declared in Article I, Section 11 of the Constitution of Virginia and by

statutes thereof shall be preserved inviolate to the parties.” Va. Code §8.01-336; *see also* Rule 3:21. Thus, Mr. Depp’s Motion should be denied. In the event the Court may be able to determine whether the statements made by Ms. Heard in the Op-Ed were matters of public concern based on the submissions and argument, Ms. Heard asks that this Court issue that finding, and then Ms. Heard should be granted an evidentiary hearing in front of a jury on the remaining portion of the Anti-SLAPP statute. Given that a jury will be empaneled for this case already in May, and much of the same evidence will be presented at that trial as would be presented on the remaining issues, Ms. Heard suggests this issue be determined by the same jury for judicial economy and efficiency.

II. Mr. Depp’s Motion to Seek to Dismiss Ms. Heard’s Plea in Bar is Without Merit.

Virginia’s anti-SLAPP statute, Va. Code § 8.01-223.2, enacted in 2017, grants immunity to persons alleged to have made certain defamatory statements regarding matters of public concern:

A person shall be immune from civil liability for... a claim of defamation based solely on statements (i) regarding matters of public concern that would be protected under the First Amendment to the United States Constitution made by that person that are communicated to a third party.... The immunity provided by this section shall not apply to 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(A). Thus, there are two issues that must be determined. First, whether the statements at issue regard a matter of public concern, which if they do, would attach the immunity. While there is scarce Virginia caselaw on the anti-SLAPP statute, the Eastern District of Virginia recently held that the first issue is a question of law. *Alexis v. Kamras*, 2020 U.S. Dist. LEXIS 227962, at *55 (E.D. Va. Dec. 3, 2020) (Payne, J). The Court held the statements at issue were matters of public concern because of the “nature of the topic discussed (i.e., the reliability of the city’s educational system) and by the intense local media interest in the Carver

scandal and the persons responsible for it.” *Id.* at *56. The Court further held that, “[a]lthough the termination of a private employee by a private employer may not be a matter of public concern, allegations that public school teachers coached public school students to cheat on state examinations are a matter of public concern.” *Id.* at *56-*57 (citations omitted).

Second, if the immunity applies, it can only be lost if the statements were made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false. “[T]he question of whether the statements were made with reckless disregard for their truth or constructive knowledge of their falsity will go to a jury.” *Id.* at *57. Mr. Depp has the burden, “by clear and convincing evidence” to prove Ms. Heard acted with an improper mental state. *Id.* at *56.⁴

A. Ms. Heard’s Statements Concern Public Issues and are Protected

Based on this Court’s ruling on Mr. Depp’s Demurrer, the following statements from Ms. Heard’s Op-Ed are at issue:

- Amber Heard: I spoke up against sexual violence—and faced our culture’s wrath. That has to change.
- Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture’s wrath for women who speak out.
- I had the rare vantage point of seeing, in real time, how institutions, protect men accused of abuse.

Att. at 4 at 4-5. The Court, in ruling on the Demurrer, has already held that “Defendant’s op-ed concerns the matter of what happened after Defendant attained the status of a public figure

⁴ Mr. Depp cites *Pendleton v. Newsome*, 290 Va. 162, 174 (2015) to claim Virginia’s Anti-SLAPP statute does not apply in defamation claims. In fact, the opposite is true: the Anti-SLAPP statute is explicitly designed to provide immunity for defamation claims under certain circumstances. Not surprisingly, *Pendleton* did not involve the Anti-SLAPP statute. It merely held that at the demurrer stage, innuendo can potentially be defamatory. *Pendleton* is, thus, inapposite to the issue at hand.

representing domestic abuse.” *Id.* at 6. Therefore, this Court has already found that Ms. Heard’s statements are of public concern. This holding tracks with courts throughout the country, which have held that statements regarding domestic violence and sexual harassment are issues of public concern.⁵ In fact, a California federal case, *Guzman v. Finch*, 2019 WL 1877184, at *5–6 (S.D. Cal. Apr. 26, 2019), with facts similar to circumstances here, recently found that a Facebook post discussing the author’s experience with rape and domestic violence to empower other survivors qualified as an issue of public interest because “the focus of Defendant’s conduct appear[ed] to be the public interest in domestic violence and/or abusive relationships rather than an effort to gather ammunition for another round of [private] controversy.” *Id.* (internal citations omitted). Importantly, “[i]t need not be proved that a particular adult is in actuality a sexual predator in order for the matter to be a legitimate subject of discussion.” *Terry v. Davis Cmty. Church*, 131 Cal. App. 4th 1534, 1548 (2005).

⁵ See e.g., *Sipple v. Found. for Nat’l Progress*, 71 Cal. App. 4th 226, 239 (1999) (holding held that a complaint arising from a magazine article that accused a nationally known political consultant of domestic violence fell within the scope of the anti-SLAPP statute because “domestic violence is an extremely important public issue in our society”) *M.G. v. Time Warner, Inc.*, 89 Cal.App.4th 623 (2001) (applying anti-SLAPP statute where “[t]he broad topic of the article and the program was not whether a particular child was molested but rather the general topic of child molestation in youth sports, an issue which, like domestic violence, is significant and of public interest.”); *Campane v. Kline*, 2018 WL 3652231, at *7 (Tex. App. Aug. 2, 2018) (holding that allegations that a religious leader had made multiple women feel uncomfortable were protected under Texas’s anti-SLAPP statute because “[t]hose allegations can be viewed as touching on issues of . . . public safety (whether he made women feel unsafe) . . .” *Cavin v. Abbott*, 545 S.W.3d 47, 60-65 (Tex. Ct. App. 2017) (establishing that subjects of mental illness or domestic abuse plainly fall within the ordinary meaning of “health” or “safety” and it is clear that such “health” and “safety” under the TCPA includes that of private parties embroiled in an otherwise private dispute, including domestic violence); *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146 (2004) (charges of domestic abuse by one partner in a lesbian relationship that had achieved national prominence due to adoption litigation were an issue of public interest because claims “potentially affected a large number of children and adoptive parents beyond the direct participants.”)

Mr. Depp, citing no Anti-SLAPP cases, advances two arguments. First, he asserts the Court has already held that the statements could be defamatory, and therefore capable of being proven false. But that has no relevancy at this stage: “[T]he inquiry at this stage of the anti-SLAPP analysis is not whether the statements are true, but whether the allegations in the complaint are a matter of public interest.” *Briganti v. Chow*, 42 Cal.App.5th 504, 509 (2019). The Anti-SLAPP statute is designed to provide immunity to potentially defamatory statements. Therefore, the fact this Court held that Ms. Heard’s statements from the Op-Ed are potentially defamatory is of no consequence as to whether Anti-SLAPP immunity applies.

Second, Mr. Depp argues that because the Court found his statements about Ms. Heard were not of the public concern, then neither could Ms. Heard’s statements be of public concern. Unlike Ms. Heard’s Op-Ed, published in a highly recognized and respected publication, which focused on the “transformative political [#MeToo] movement,” called for “Congress [to] reauthorize and strengthen the Violence Against Women Act,” and called for “changes to laws and rules and social norms” so that “women who come forward to talk about violence receive more support,” Mr. Depp’s defamatory statements were not directed to matters of public concern that would be protected by the First Amendment and subject to immunity under Virginia’s Anti-SLAPP statute. Rather, they are directed primarily at Ms. Heard in whether she was committing perjury and created a “hoax” against Mr. Depp. These are highly personal matters, and the statements were made by Mr. Depp solely for his own personal benefit. *See Padilla v. S. Harrison R-II Sch. Dist.*, 181 F.3d 992, 997 (8th Cir. 1999) (“The question before us is whether the compelled expression of a teacher’s opinion on the propriety of a sexual relationship between a teacher and a nonstudent minor is entitled to First Amendment protection. We conclude that it is not[.]”); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1205 (10th Cir. 2007)

“In determining whether speech pertains to a matter of public concern, the court may consider the motive of the speaker and whether the speech is calculated to disclose misconduct or merely deals with personal disputes and grievances unrelated to the public’s interest.” (quotations omitted). Moreover, Mr. Depp failed to respond to Ms. Heard’s arguments that his statements were not of public concern: “Mr. Depp’s counsel neither argued nor addressed this point during oral argument on in their reply brief.” **Att. 6 at 10**. There is no comparison between the statements at issue.

B. The Truth of the Statements are a Question of Fact for the Jury

It is quite obvious there is a dispute between the parties as to whether Ms. Heard’s statements are true. But Mr. Depp argues that because he has alleged the statements are false, Anti-SLAPP immunity cannot apply. This argument makes no sense, because it would mean that Anti-SLAPP immunity would never apply if a Plaintiff merely alleges falsity. In fact, the case Mr. Depp cites, *Steele v. Goodman*, 382 F. Supp. 3d 403, 427 (E.D. Va. 2019) (Lauck, J.) was not a Plea in Bar or a Summary Judgment decision. Rather, it was a decision on a Motion to Dismiss. *Id.* at 428. This case is inapplicable to the issue. This question, instead, must “go to a jury.” *Alexis*, 2020 U.S. Dist. LEXIS 227962, at *57.

CONCLUSION

For these reasons, Ms. Heard respectfully requests this Court to deny Mr. Depp’s Motion, issue a determination that the statements satisfied the first prong of the Anti-SLAPP statute “of public concern,” and if not able, grant an evidentiary hearing on this issue, and permit Ms. Heard to present the remaining issues on the Anti-SLAPP defense to a jury at the May 17, 2021 trial.

Dated this 22nd day of January 2021.

Respectfully submitted,

Amber L. Heard



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CERTIFICATE OF SERVICE

I certify that on this 22nd day of January, 2021, a copy of the foregoing shall be served by via email, pursuant to the Agreed Order dated August 16, 2019, as follows:

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