

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 AND COUNTERCLAIM PLAINTIFF'S MEMORANDUM
SUPPORTING MOTION FOR ENTRY OF AN ORDER ESTABLISHING
AN ADJUDICATION PROCESS FOR ATTORNEYS' FEES**

Defendant and Counterclaim-Plaintiff Amber Laura Heard ("Ms. Heard"), by counsel, hereby moves this Court, pursuant to Rule 3:25(D) of the Rules of the Virginia Supreme Court, for an Order establishing a procedure to adjudicate any claim for attorneys' fees and costs following the entry of any relevant Order or verdict in this case, and in the event the Court determines that an award of attorneys' fees and costs is warranted.

BACKGROUND

On September 1, 2020, the parties, after months of discussion, agreed upon a process under Rule 3:25(D) for submitting and adjudicating attorneys' fees and costs after a determination by the jury, and the Court's ruling on whether attorneys' fees and costs were warranted under the facts and law. The parties submitted a Consent Order to the Court. **Att. 1.** However, on September 11, 2020, while continuing the trial to May 2021, the Court informed the parties of His Honor's retirement as of July 1, 2021, and in light of this, asked if the parties wanted to reconsider, as this process would likely result in another Judge deciding the attorneys' fees and costs. The parties indicated that they

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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

would like to revisit the issue based on this news. Over the past three months, the parties have met and conferred, and exchanged emails, addressing potential solutions, including reducing the submissions to still fit in before July 1, 2021, submitting to the jury, bifurcating and submitting to the jury after a brief delay, and engaging in a much lengthier process and submitting to a brand new jury. Unfortunately, the parties have been unable to reach resolution. Counsel for Plaintiff has now indicated that they want to wait until the Pretrial, scheduled for March 10, 2021, to address this further. Because the expert witness designation deadline is February 16, 2021 in the event the fees and costs need to be submitted to a jury without bifurcation, this motion cannot practically wait for further discussion or resolution at the pre-trial conference and is therefore brought now. Under Rule 3:25(D), the Court has the ability to make a determination on this issue even without full consent of the parties, which is now required.

ARGUMENT

I. RULE 3:25(D) AND STATUTORY BASIS FOR ATTORNEYS' FEES

Va. Sup. Ct. R. 3:25(D) provides that “Upon the motion of any party, the court shall, or upon its own motion, the court may, in advance of trial, establish a procedures to adjudicate any claim for attorney’s fees.”

In this case, Mr. Depp brought three claims for defamation against Ms. Heard. *Compl.*, ¶¶ 74-106. Ms. Heard then filed her Counterclaim, including Count I seeking a declaratory judgment that “she is immune from civil liability for Mr. Depp’s claims in his complaint because the statement in question were part an op-ed “regarding matters of public concern that would be protected under the First Amendment.” *Counterclaim*, ¶ 59 (*citing* Va. Code § 8.01-223.29(A)).

This statute is also referred to as the “anti-SLAPP” (Strategic Lawsuit Against Public Participation”) statute, and further provides that a person shall be immune from a defamation suit if the statements at issue were “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(A). If Ms. Heard prevails on the Defamation claims, and the Court finds that the statements were matters of public concern, under the Anti-SLAPP statute, the Court may then award Ms. Heard reasonable attorney’s fees and costs incurred in obtaining such a dismissal. Va. Code § 8.01-223.2(B).

Because there are a number of pre-conditions to obtaining attorneys’ fees and costs, creating a post-trial procedure for determining attorneys’ fees and costs makes sense for several reasons, and will benefit all parties, minimize jury confusion and delay, and promote judicial efficiency.

II. ATTORNEYS’ FEES AND COSTS SHOULD BE ADDRESSED POST-TRIAL

A procedural order directing post-trial determination of fees in this action is warranted for several reasons. These reasons apply neutrally to both sides, and both sides would benefit from the procedures proposed by Ms. Heard.

First, requiring both parties to immediately incur the expense of either presenting or defending against a claim for an award of attorney’s fees at trial will be inefficient because the claims are contingent upon a prevailing party and this Court making a specific ruling in light of the determination. Requiring both parties to fully prepare their case to both support and oppose claims for attorney’s fees will be costly and will likely require expert witnesses on both sides to present and respond to the fee evidence. *See*

Mullins v. Richlands Nat'l Bank, 241 Va. 447, 449 (expert evidence usually required to support fee application).

Second, the presentation of contingent fee claims also may be confusing to the jury, who will already have a lot of complex factual issues to decide under the Court's jury instructions. Therefore, deferring the consideration of fees until after the "prevailing party" issue and whether the statements are of public concern has been decided will conserve party and judicial resources, and spare the jury the confusing task of juggling competing, contingent fee claims.

Third, a post-trial determination of any fee award will protect each sides' attorney-client communications and attorney work product during ongoing litigation. If fee applications will be presented at trial, then both sides will be required to produce legal fee invoices during discovery. *See Schlegel v. Bank of America*, 271 Va. 542, 556 (2006) (determination of reasonable fees entails review of invoices). As other courts have recognized, however, that legal fee invoices often contain privileged communications with the client and descriptions of protectable attorney work product. *See Chaudry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999) (privileges and protections of information contained in attorney invoices may be asserted). To protect work product and avoid privilege waivers, both sides will have an interest in redacting invoices that are produced during discovery, which will both increase the litigation costs and detract from the certainty of the evidence. The need to make redactions, however, will be greatly reduced if the fee determination is conducted after trial—indeed, it will at least be cut in half as only the "prevailing party" will have to undertake that task.

Finally, if the Court defers the consideration of fees until after a verdict, Defendant and Counter-claim Plaintiff consents to the fees and costs award being made by the Court instead of the jury and if it cannot be determined by this Court because of the retirement, then it can be made by another Court. There is no right to a jury determination of fees and costs under Rule 3:25(D), as the Court has the independent discretion to determine a procedure, and also one side can move without the consent of the other, and have the Court make the determination. If the Court determines that the fees and costs should be determined by the jury, however, then Plaintiff proposes the jury trial be bifurcated, and that, after the jury renders its verdict on the merits, and the Court determines that attorneys' fees and costs are warranted, Defendant and Counterclaim-Plaintiff would commence its presentation of its fee evidence to the jury. While not resulting in as great a savings of party and Court resources, it will mean that potentially only one party will present a fee application once triggered by the appropriate rulings of the Court and Jury, rather than both sides if that does not become necessary based on those rulings. Defendant and Counter-Plaintiff does not agree to a lengthy delay and then empaneling a new jury to determine the fees and costs, as this would unreasonably prolong the process, and result in significant expense and delay to both sides, and highly prejudicial to the parties in bringing this matter to closure as quickly as possible.

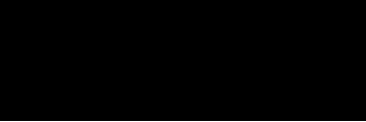
CONCLUSION

For the reasons stated above, Defendant and Counterclaim-Plaintiff requests this Court grant her Motion and enter the earlier proposed Order Establishing Adjudication Process for Attorneys' Fees, **Att. 1**, or a reasonable alternative as determined by the Court.

December 30, 2020

Respectfully submitted,

Amber L. Heard



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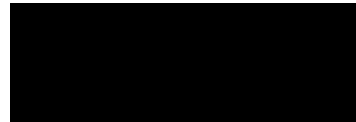
CERTIFICATE OF SERVICE

I certify that on this 30th day of December 2020, a copy of the foregoing was served by email, by agreement of the parties, addressed as follows:

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ATTACHMENT 1

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IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II,

Plaintiff,

v.

AMBER LAURA HEARD,

Defendant.

Civil Action No.: CL-2019-0002911

**CONSENT ORDER RESPECTING
ADJUDICATION PROCESS FOR ATTORNEYS' FEES**

COMES NOW the Defendant, Amber Laura Heard, with the consent of the Plaintiff, John C. Depp, II, by and through counsel, and requests this Court, pursuant to Rule 3:25(D) of the Rules of the Virginia Supreme Court, to establish a procedure to adjudicate any claim for attorneys' fees and costs following the entry of any relevant Order or verdict in this case; and

Upon consideration of this Consent Order executed by counsel for the parties, it is hereby

ORDERED as follows:

In the event an Order or verdict is obtained in favor of either party, and the Court determines that an award of attorneys' fees and costs is warranted under the facts and the law, the prevailing party shall submit an Affidavit for Attorneys' fees and costs within 10 days of date of the Order or verdict, or such other date as the Court may set. The opposing party shall submit any Opposition within 14 days thereafter, and the prevailing party shall submit any Reply within five (5) business days after receiving any Opposition.

A hearing on the attorneys' fees and costs shall be held upon the request of the Court, or either party may request a hearing, but whether the Court holds a hearing is at the discretion of the Court. In the event the Court determines no hearing is necessary, the issues respecting attorneys' fees and costs shall be deemed submitted on the papers and the Court shall make a determination and issue an Order based upon the written submissions.

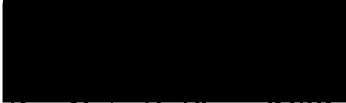
This Consent Order does not suggest that the parties agree that attorneys' fees and costs are recoverable by the other party, and instead, is merely an agreed mechanism for submitting attorneys' fees and costs to the Court, in the event the Court determines that attorneys' fees and costs are warranted under the law and the facts.

This Order may be modified for good cause shown.

Date: _____

The Honorable Bruce D. White
Chief Judge, Fairfax County Circuit Court

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