

VIRGINIA:

FILED
CIVIL PROCESSING
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II

2020 OCT -5 A 2:13

Plaintiff/Counterclaim Defendant,

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

v.

Civil Action No.: CL-2019-0002911

AMBER LAURA HEARD,

Defendant/Counterclaim Plaintiff.

**REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF JOHN C. DEPP, II'S
DEMURRER AND PLEA IN BAR SEEKING DISMISSAL OF ALL COUNTERCLAIMS**

Benjamin G. Chew (VSB #29113)
Andrew C. Crawford (VSB # 89093)
BROWN RUDNICK LLP
601 Thirteenth Street NW, Suite 600
Washington, DC 20005
Tel.: (202) 536-1785
Fax: (617) 289-0717
bchew@brownrudnick.com

Camille M. Vasquez (admitted *pro hac vice*)
BROWN RUDNICK LLP
2211 Michelson Drive
Irvine, CA 92612
Tel.: (949) 752-7100
Fax: (949) 252-1514
cvasquez@brownrudnick.com

Adam R. Waldman (admitted *pro hac vice*)
THE ENDEAVOR GROUP LAW FIRM, P.C.
5163 Tilden Street, NW
Washington, DC 20016
Tel.: (202) 715-0966
Fax: (202) 715-0964
awaldman@theendevorgroup.com

Counsel for Plaintiff John C. Depp, II

Ms. Heard's Counterclaims are a transparent attempt to punish Mr. Depp for initiating this lawsuit to expose and seek redress for Ms. Heard's lies. Given this specious motive, Ms. Heard's Counterclaims, unsurprisingly, are as devoid of legal viability as they are frivolous. If permitted to stand, Ms. Heard's Counterclaims would turn Virginia defamation law on its head, undermining a defamation victim's right to prosecute an action against his defamer without fear of liability for the assertion at the heart of any defamation action: the defendant is lying.

I. Ms. Heard Fails to State a Claim for Declaratory Judgment

In her opposition, Ms. Heard does not cite *a single* case recognizing the viability of a standalone claim for declaratory judgment of anti-SLAPP liability. *See* Opp. At 2-4. Nor could she. Virginia's anti-SLAPP statute, like most, if not all, anti-SLAPP statutes, provides for "*immun[ity]* from civil liability" for defamation, not a vehicle to impose civil liability. *See* Va. Code § 8.01-223.2. Anti-SLAPP immunity is, quite simply, a defense to defamation,¹ a *defense that Ms. Heard has already raised* to Mr. Depp's defamation claims, not a valid basis for a declaratory judgment claim.

Contrary to Ms. Heard's arguments, *see* Opp. at 4-5, *Tyler v. Cashflow Technologies* is directly applicable here. Ms. Heard's argument that, in *Tyler*, the counterclaim seeking declaratory judgment that statements were not defamatory was the "inverse" of a defamation claim, while her Counterclaim for a declaratory judgment that her statements are immune from defamation liability is not, is an immaterial distinction without a difference. *See id.* In *Tyler*,

¹ *See, e.g., Steele v. Goodman*, 382 F. Supp. 3d 403, 426 (E.D. Va. 2019) (finding that Virginia Code § 8.01-223.2 "could create a possible *defense*" for a defamation claim (emphasis added)); *League of United Latin American Citizens – Richmond Region Council 46114 v. Public Interest Legal Foundation*, Civ. No. 1:18-cv-00423, 2018 WL 3848404, at *7 (E.D. Va. Aug. 13, 2018) (finding that "Defendants' Anti-SLAPP *defense . . . fails*" (emphasis)); *Smithfield Foods, Inc. v. United Foods & Commercial Workers Int'l Union*, 593 F. Supp. 2d 840 (E.D. Va. 2008) (finding that defendant's "affirmative defense" under Va. Code § 8.01-223.2 failed).

the counterclaim for a declaration of no defamation liability was dismissed because it was “a defense[] masquerading as [a] counterclaim” and, thus, “simply put, . . . duplicative” of the plaintiff’s defamation claim. *Tyler v. Cashflow Techs.*, 2016 WL 6538006, at *6 (W.D. Va. Nov. 3, 2016). The same is true here: whether Ms. Heard is liable for defamation for her statements will be resolved by adjudicating Mr. Depp’s defamation claims and Ms. Heard’s defenses thereto.

II. Ms. Heard Fails to Allege Computer Harassment Under Va. Code § 18.2-152.7:1

Ms. Heard can also cite no apposite authority in support of her Counterclaim for computer harassment under the Virginia Computer Crimes Act. *First*, she identifies no any authority to support her position that the alleged “smear campaign” constitutes an “immoral or unlawful within the meaning of Virginia Code § 18.2-152.7:1. *See* Opp. at 12-13. She cites only two cases recognizing that interference with business or contractual rights may be subject to *tort* liability, *see id.*; but a threat of conduct which could result in tort liability is a far cry from the types of threats proscribed by the criminal statute.² *Second*, Ms. Heard identifies statements by Mr. Depp that she contends are “obscene,” but fails to identify *any* authority finding the type of language proscribed by Virginia Code § 18.2-152.7:1. *See* Opp. at 13-14. In fact, sexually explicit words uttered in anger, contempt, or disgust with the target do *not* constitute “obscene” language within the meaning of Virginia Code § 18.2-152.7:1. *See Airhart v. Commonwealth*, 2007 WL 88747, at *3 (Va. App. Jan. 16, 2007) (finding use of the word “whore” and repeated use of “fuck you” were not obscene). Fatal to Ms. Heard’s Counterclaim, the communications she identifies were not only uttered by Mr. Depp in anger and contempt for a person who falsely

² *See Rives v. Commonwealth*, 284 Va. 1, 4 (2012) (threat of “physical injury in the form of sexual offense”); *Hudgins v. Commonwealth*, No. 0582-95-1, 1996 WL 393012, at *1-2 (Va. App. July 16, 1996) (threat to slit the victim’s throat and kill her son); *Perkins*, 12 Va. App. at 11, 16 (threat to rape victim’s wife and burn his house down).

and publicly accused him of domestic violence, they were not even communications to Ms. Heard, but rather *private text messages* between Mr. Depp and his friends. *See* Opp. at 13; Counterclaims ¶¶ 17-23. Ms. Heard does not explain how these *private communications*, that were only revealed to her in discovery in this action, could have been made with the requisite “intent to coerce, intimidate, or harass” her. *See* Va. Code § 18.2-152.7:1. Nor does she identify any authority recognizing liability for computer harassment based on private statements never communicated to the alleged target.

III. Ms. Heard’s Defamation Counterclaim is Subject to Dismissal on Multiple Grounds

Ms. Heard’s attempts to salvage defamation as the basis of her Counterclaim fares no better. As an initial matter, Ms. Heard has failed to show that Mr. Depp and Mr. Waldman’s statements are even actionable for defamation. Ms. Heard cites no counter to well-settled authority cited by Mr. Depp holding that statements that someone is a “liar” or has perpetrated a “hoax” are non-actionable statements of opinion.³ Instead, Ms. Heard recharacterizes all of Mr. Depp’s and Mr. Waldman’s statements – including Mr. Depp’s mere statement that there was “no truth” to Ms. Heard’s false allegations – as accusing Ms. Heard of “perjury.” *See* Opp. at 6. But the only statement actually accusing Ms. Heard of “perjury” was made *after* Mr. Depp filed his Complaint for defamation against Ms. Heard, which alleges that Ms. Heard’s allegations of

³ Compare Opp. 5-8 with, *Schaecher v. Bouffault*, 290 Va. 83, 102-06 (2015) (holding that statement that plaintiff was “lying and manipulating facts to her benefit” was a subjective statement protected by the First Amendment and, thus, not actionable); *Owens v. DRS Automotive Fantomworks, Inc.*, 87 Va. Cir. 30, *3 (2013) (sustaining demurrer of counterclaim for defamation claim alleging plaintiff called defendant a “liar”); *Habeck v. Cosby*, 78 Va. Cir. 117 (2009) (finding statements that plaintiff “put in motion a scheme that will coerce residents” and “reeks of extortion” to be non-actionable, hyperbolic statements).

abuse were “false and perjurious”⁴ and is, thus, immune from defamation liability as a fair summary of the allegations of Mr. Depp’s Complaint. *See Bull v. Logetronics, Inc.*, 323 F. Supp. 115, 135 (E.D. Va. 1971). Similarly, the statements Ms. Heard contends contain “provably false factual assertions” are immune from liability because they are also covered in the Complaint⁵ and, more broadly, statements made to defend Mr. Depp against Ms. Heard’s false abuse allegations. *See Haycox v. Dunn*, 200 Va. 212, 229-30 (1958).⁶

Nor can Ms. Heard show that her Counterclaim for defamation is timely. She takes the untenable position that five of the statements she alleges to be defamatory are not barred by Virginia’s one-year statute of limitations because they arise from the same transaction or occurrence as Mr. Depp’s defamation claims. *See* Opp. at 14-19 (citing Va. Code § 8.01-233(B)). Not a single case cited by Ms. Heard stands for the proposition she asks the Court to accept – that the filing of Mr. Depp’s defamation claims tolled the statute of limitations for her Counterclaim for defamation, arising from entirely different statements, by different persons, in different publications. *See id.*⁷ In *Wilson*, the one case in which a Virginia court found a

⁴ Compare Counterclaim ¶ 66(a) (stating Ms. Heard committed “defamation, perjury” and filed for a “fraudulent” temporary restraining order) with Compl. ¶ 6 (Ms. Heard’s “evidence” supporting her domestic abuse allegations was “false and perjurious”).

⁵ Counterclaim ¶¶ 66(c) (stating Ms. Heard’s “‘battered fact’ was a hoax”), 66(e) (describing Ms. Heard’s conduct as “an ambush, a hoax”) with Compl. ¶¶ 3 (Ms. Heard’s allegations of domestic abuse were “part of an elaborate hoax”), 16-17 (describing Ms. Heard’s “hoax” allegations and “battered face”), 33-60 (detailing the factual underpinnings of the claim that Ms. Heard’s facial injuries were fake or staged).

⁶ Ms. Heard contends *Haycox* is inapposite because her Op-Ed was not an “attack,” and certain of Mr. Depp’s statements (which are time barred) were made before the Op-Ed; but, Ms. Heard had been falsely accusing Mr. Depp of abuse for years, including in the Op-Ed, and, just because the original accusations fall outside the statute of limitation, does not mean that Mr. Depp had no right to defend himself.

⁷ Many of the cases cited by Ms. Heard do not even involve a counterclaim, but a court’s consideration of a whether a plaintiff could join claims. *See Doe v. Carilion Med. Ctr.*, 65 Va. Cir. 104 (2004) (finding misjoinder of claims that involved two separate occurrences); *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 141 (2017) (finding Rule 1:6 prohibited plaintiff from

7


plaintiff's claim tolled the statute of limitations for defendant's counterclaim for defamation, there is no discussion of what the plaintiff's claim is, let alone an analysis as to why defendant's defamation counterclaim arose from the same transaction or occurrence of such claim. *See Wilson v. Miller Auto Sales, Inc.*, 47 Va. Cir. 153, 34181941 at *8 (Winchester Cir. Ct. 1998). Contrary to Ms. Heard's position, where, as here, two defamation claims arise from different publications, they *do not* arise from the same transaction or occurrence such that the latter claim would "relate back" to the former, even if both instances of defamation concern the same topic. *See English Boiler & Tube, Inc. v. W.C. Rouse & Son, Inc.*, 172 F.3d 862 (4th Cir. 1999).⁸ Under the overwhelming weight of authority, Mr. Depp's defamation claim does not toll the statute of limitations for Ms. Heard's Counterclaim for defamation because the claims are based on different statements, made by different people, and published by different sources.

Accordingly, the Court should sustain Mr. Depp's demurrer and grant his plea in bar.

filing two separate lawsuits, where all three claims could have been joined in a single suit). Many of the others analyze whether a counterclaim is compulsory under the Federal Rules of Civil Procedure, but none address whether defamation is a compulsory counterclaim to a claim for defamation arising from a separate publication. *See* Opp. at 18-19 (collecting cases).

⁸ *See also Cojocarv v. City Univ. of New York*, 2020 WL 5768723, at *4 (S.D.N.Y. Sept. 28, 2020) ("While the alleged text messages concerned the same general subject matter as the *New York Post* interviews, they were a separate publication, directed toward a different recipient, and included some distinct accusations. Therefore, those allegations do not relate back to the Initial Answers and are time barred because they were asserted more than one year after their publication."); *NY Mach. Inc. v. Korean Cleaners Monthly*, 2018 WL 6077982, at *2 (D.N.J. Nov. 20, 2018) (finding that the defendant's defamation claim was time barred by the one year statute of limitation and that leave to amend the counterclaim to include a defamation claim would therefore be futile because "[t]he alleged defamatory statements were distinct, occurred in a different publication six months before Plaintiffs commenced this litigation, and Defendants could have asserted their claim at any point prior to the expiration of the statute of limitations"); *Caudle v. Thomason*, 942 F. Supp. 635, 641 (D.D.C. 1996) ("Because the slander claim involves publications entirely distinct . . . and made to a number of individuals not mentioned in the original complaint, the Court finds that the slander claim does not relate back to the filing of the original complaint.")

Respectfully submitted,


Benjamin G. Chew (VSB #29113)
Andrew C. Crawford (VSB # 89093)
BROWN RUDNICK LLP
601 Thirteenth Street NW, Suite 600
Washington, DC 20005
Tel.: (202) 536-1785
Fax: (617) 289-0717
bchew@brownrudnick.com

Camille M. Vasquez (*pro hac vice*)
BROWN RUDNICK LLP
2211 Michelson Drive
Irvine, CA 92612
Tel.: (949) 752-7100
Fax: (949) 252-1514
cvasquez@brownrudnick.com

Adam R. Waldman (*pro hac vice*)
THE ENDEAVOR GROUP LAW FIRM, P.C.
5163 Tilden Street, NW
Washington, DC 20016
Tel.: (202) 715-0966
Fax: (202) 715-0964
awaldman@theendeavorgroup.com

*Counsel for Plaintiff and
Counterclaim Defendant John C. Depp, II*

Dated: October 5, 2020

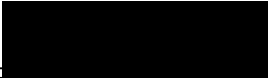
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October 2020, I caused true and correct copies of the foregoing Reply Memorandum to be served via email (per written agreement between the Parties) on the following:

J. Benjamin Rottenborn (VSB No. 84796)
Joshua R. Treece (VSB No. 79149)
WOODS ROGERS PLC
10 S. Jefferson Street, Suite 1400
P.O. Box 14125
Roanoke, Virginia 24011
Telephone: (540) 983-7540
brottenborn@woodsrogers.com
jtreece@woodsrogers.com

Elaine Charlson Bredehoft (VSB No. 23766)
Carla D. Brown (VSB No. 44803)
Adam S. Nadelhaft (VSB No. 91717)
David E. Murphy (VSB No. 90938)
CHARLSON BREDEHOFT COHEN & BROWN, P.C.
11260 Roger Bacon Dr., Suite 201
Reston, VA 20190
Phone: 703-318-6800
Fax: 703-318-6808
ebredehoft@cbcblaw.com
cbrown@cbcblaw.com
anahelhaft@cbcblaw.com
dmurphy@cbcblaw.com

Counsel for Defendant Amber Laura Heard


Benjamin G. Chew