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of Fairfax County, VA

Transcript of Hearing

Date: March 24, 2022
Case: Depp, II -v- Heard

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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JOHN C. DEPP, II, :
Plaintiff and :
Counterclaim Defendant, :
v. : Civil Action No.:
AMBER LAURA HEARD, : CL-2019-0002911
Defendant and :
Counterclaim Plaintiff. :

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HEARING

BEFORE THE HONORABLE PENNEY AZCARATE

Fairfax, Virginia

Thursday, March 24, 2022

10:01 a.m. EDT

Job No.: 432298

Pages: 1 - 77

Reported by: Judith E. Bellinger, RPR, CRR

1 A P P E A R A N C E S C O N T I N U E D
2 O N B E H A L F O F T H E D E F E N D A N T A N D C O U N T E R C L A I M
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1 THE COURT: All right. Are we ready to
2 go forward?

3 MR. CHEW: Yes, Your Honor.

4 MS. BREDEHOFT: Yes, Your Honor.

5 THE COURT: If we just take them one at
6 a time, that would be helpful. Which one would
7 you like to do first?

8 MR. CHEW: Go to anti-SLAPP first?

9 THE COURT: Okay. Sure. And, again,
10 I've read, obviously, your motions and everything
11 involved with the case. But whatever you want to
12 say for the record.

13 MR. CHEW: Thank you, Your Honor. I'll
14 try to keep it -- I have a few things that aren't
15 necessarily in the papers.

16 THE COURT: Okay.

17 MR. CHEW: Good morning, Your Honor.
18 May it please the Court for Ben Chew and Sam Moniz
19 for Plaintiff, Johnny Depp.

20 Your Honor, if I might hand up
21 something to which I'll refer to the argument.

22 THE COURT: Okay. Yes, sir. Does

1 Ms. Bredehoft have one? All right. Thank you.

2 MR. CHEW: She's familiar with the
3 document.

4 THE COURT: Okay.

5 MR. CHEW: Your Honor, the Court should
6 grant plaintiff's motion for summary judgment and
7 find that Ms. Heard is not entitled to Anti-SLAPP
8 immunity as a matter of law. As Your Honor is
9 aware, Virginia's Anti-SLAPP statute provides
10 immunity from liability only when a claim for
11 defamation is based solely on statements, i,
12 "regarding matters of public concern that would be
13 protected under the First Amendment to the U.S.
14 Constitution, made by that person that are
15 communications to a third party, citing Virginia
16 Code Section 801-223.2.

17 Applying the clear language of the
18 statute, the Court should grant Mr. Depp's motion
19 for summary judgment because Mr. Depp is not
20 seeking to hold Ms. Heard liable for any assertion
21 that could be construed as a statement of public
22 concern. Rather, Mr. Depp seeks redress for a

1 defamatory implication about private events, or
2 nonevents, of his -- of her relationship with
3 Mr. Depp, specifically, the defamatory implication
4 that Mr. Depp physically and sexually abused her.

5 Chief Judge White set this forth, quite
6 clearly, in the Court's opinion letter of
7 March 27th, 2020, starting at the bottom of page 4
8 and concluding on the top of page 6. And, Your
9 Honor, I'm not going to read the entirety of it,
10 but I've highlighted for both Your Honor and
11 Ms. Bredehoft certain salient provisions that I
12 think make our argument.

13 Your Honor will see, at the bottom of
14 page 4 and the top of page 5, the three
15 statements. Quoting from Chief Judge White,
16 first, "Plaintiff has alleged a number of
17 circumstances that would reasonably cause the
18 three statements above to convey the alleged
19 defamatory meaning, that Mr. Depp abused Ms. Heard
20 to its recipients. Specifically, the complaint
21 alleges that the events surrounding the parties'
22 divorce, including Ms. Heard's repeated

1 allegations of domestic violence, attended the
2 making statements of her statements to the
3 Washington Post Op-Ed, see Complaint paragraph 16,
4 alleging that in May of 2016, Ms. Heard falsely
5 yelled, 'Stop hitting me, Johnny,' in addition to
6 stating that Mr. Depp struck her with a cell
7 phone, hit her, and destroyed her house before she
8 presented herself to the world with a battered
9 face as she publically accused Mr. Depp of
10 domestic violence and obtained a restraining order
11 against him." Citing paragraphs 19, 20, 21, and
12 22 of the Complaint.

13 Ellipsis, now quoting the last sentence
14 of that paragraph, "Drawing every fair inference
15 in Plaintiff's favor, the Court finds that these
16 circumstances, as pleaded, would reasonably cause
17 the three statements above to convey the alleged
18 defamatory meaning that Mr. Depp abused Ms. Heard.

19 Second, Plaintiff has implied an
20 alleged meaning that is clearly defamatory,
21 Complaint at 78, noting that these statements
22 imply Ms. Heard was a victim of domestic violence

1 at the hands of Mr. Depp. The implication that
2 Mr. Depp abused Ms. Heard is defamatory per se,
3 because it imputes to plaintiff the commission of
4 some criminal offense involving moral turpitude,
5 for which the party, if the charge is true, may be
6 indicted and punished." I'll admit the citations.
7 "Because the complaint contains allegations of
8 circumstances that would reasonably cause the
9 three statements above to convey an alleged
10 defamatory meaning, and this alleged meaning that
11 Mr. Depp abused Ms. Heard is defamatory per se,
12 the Court is instructed, under Pendleton," the
13 case we will be relying on today, "to allow these
14 statements to proceed beyond demurrer."

15 And finally, Your Honor, at the top of
16 page 6, "Additionally, the Court finds that
17 allowing these three statements to proceed beyond
18 demurrer, under the standard articulated in
19 Pendleton, is consistent with the doctrine set
20 forth in Carlisle, which states that the province
21 of the innuendo is to show how the words used are
22 defamatory and how they relate to the plaintiff,

1 but it cannot introduce new matter nor extend the
2 meaning of the words used beyond their ordinary
3 and common acceptation or make that certain which
4 is, in fact, uncertain," cited in Carlisle.

5 "By holding the Plaintiff has met the
6 pleading standard set forth in Pendleton, 290 Va.
7 at 172, the Court is not allowing Plaintiff to
8 proceed on an allegation of an implicit defamatory
9 meaning that introduces new matter. The implied
10 defamatory meaning alleged was that Mr. Depp
11 abused Ms. Heard when Defendant's Op-Ed concerns
12 the matter of what happened after Defendant
13 obtained that status of a public figure
14 representing domestic abuse. Drawing every fair
15 inference in Plaintiff's favor, the Court can
16 conclude, as Plaintiff alleges, that an aspect of
17 the article relied on the factual underpinning
18 that Ms. Heard was abused by Mr. Depp."

19 Your Honor, nothing cited by Chief
20 Judge White touches on any matter of public
21 concern, much less solely relates to any matter of
22 public concern, as required by the Virginia

1 Anti-SLAPP statute for immunity to attach.

2 THE COURT: Mr. Chew I just want to --
3 I mean, the statute, it says "based solely on
4 statements." When reading your brief, I was
5 concerned that solely was getting attached to a
6 different part of the statute, and I just don't
7 read the statute that way. So, if you want to
8 address that.

9 MR. CHEW: I will, Your Honor.

10 The statute is clearly designed to
11 protect matters of public concern. And what the
12 cases clearly set forth, particularly Pendleton v.
13 Newsome, is that what is protected under
14 Anti-SLAPP are those matters relating to public
15 concern. The statute is not concerned about
16 protecting private grievances between the parties.

17 And here, Your Honor, the defamatory
18 implication relates to the personal grievances
19 between the parties, which is not covered by the
20 statute. As Judge White clearly stated,
21 Ms. Heard's statements in the 2018 Op-Ed are a
22 revival or republication of the statements made

1 and actions taken by Ms. Heard, particularly on
2 May 27th, 2016, when she showed up for her
3 ex parte TRO with a bruise and -- an alleged
4 bruise, and presented those photographs to People
5 Magazine.

6 And the March 27, 2020 opinion letter
7 also found *Pendleton v. Newsome*, 290 Va. 162 to be
8 directly on point. "A defamatory innuendo is no
9 more protected by the First Amendment than a
10 defamatory speech expressed by any other means,"
11 citing *Pendleton*, 290 Va. at 173.

12 Ms. Heard's attempt to distinguish
13 *Pendleton* failed. She says it's inapplicable
14 because it did not involve the Anti-SLAPP statute.
15 Well, that's only because the Supreme Court of
16 Virginia decided *Pendleton*, in 2015, when
17 Virginia's Anti-SLAPP statute applied only to
18 statements made at public hearings.

19 As Your Honor is aware, in 2017, the
20 Virginia Anti-SLAPP statute was amended to cover
21 matters of public concern. That's the only reason
22 that *Pendleton*, which controls here, that's the

1 only reason that there was no direct discussions
2 of Anti-SLAPP in Pendleton, because it didn't
3 apply until two years later. The fact remains
4 that, as Chief Judge White held in March 2020,
5 Pendleton applies and deals with and controls the
6 precise situation we have here. And, as in
7 Pendleton, this is a case about defamatory
8 innuendo, targeting a single person. The
9 defamatory implication in Pendleton and here is
10 not protected by the First Amendment.

11 Give you an example of what would be
12 covered by the Virginia Anti-SLAPP statute. This
13 is not an exception that swallows the rule, this
14 is the rule. An example of what would be covered
15 by Virginia's Anti-SLAPP is the statement "The
16 President is a foreign agent."

17 That statement would be covered by
18 Virginia's Anti-SLAPP because even though it's
19 defamatory, probably defamatory, per se, it would
20 be the speaker, the one who published that
21 statement, would be entitled to Anti-SLAPP
22 immunity because, clearly, whether the President

1 is a foreign agent is a matter of public concern.

2 That's what this Anti-SLAPP statute was
3 designed to immunize, not a private -- not private
4 grievances between individuals. Other courts take
5 a similar approach. A matter of public concern is
6 one which relates to "a matter of political,
7 social, or other concerns in the community, as
8 opposed to a matter only of personal interest."
9 That's the Connick v. Myers case, 461 U.S. 138 at
10 146, 1983.

11 Newsworthiness is not enough, and
12 references to particular private grievances
13 generally do not give rise to the level of matters
14 of public concern. That's the Brammer-Hoelter
15 case, which I'll get to in a moment, 492 F.3d 1192
16 at 1205, 10th Circuit.

17 Moreover, as the excerpt I read from
18 the Court's March 2020 opinion letter makes clear,
19 Ms. Heard's liability arises out of conduct that
20 is older. Two years older than the Op-Ed. It
21 republishes the original defamation and manifestly
22 did not consist of statements of public concern.

1 When she made those allegations in 2016, that had
2 nothing to do with any matter of public concern.

3 Again, Virginia's Anti-SLAPP only
4 applies to matters of public concern.

5 Ms. Heard, herself, admits, in
6 paragraph 5 of her counterclaims, that on
7 "May 27th, 2016," that's what we're talking about
8 here, "Ms. Heard walked into California State
9 Court with bruises on her face," in front of the
10 press to get an ex parte TRO.

11 That conduct was fundamentally personal
12 in nature and not entitled to immunity. See
13 Jones v. Union County, Sixth Circuit, cited at
14 page 5 of our brief.

15 While combat -- and this is the holding
16 of that case. While combating domestic violence
17 might, generally, be a matter of public concern, a
18 particular instance of seeking protection from an
19 abusive spouse "was far more a matter of private
20 interest than of public concern," 296 F.3d 417 to
21 426. And even back in the pre-2017 days, before
22 the amendment, when only statements of public

1 hearings were eligible for potential Anti-SLAPP
2 immunity, immunity did not attach when the conduct
3 involved more than statements made solely at
4 public hearings. Clearly, Ms. Heard's statement
5 involves more than matters of public concern. And
6 whatever part of the Op-Ed related to public
7 concern has no bearing, whatsoever, on Mr. Depp's
8 allegations or the substance of this case. And
9 that is Smithfield Foods case, Judge Payne's case
10 that we cite at page 5.

11 Mr. Depp does not argue -- for example,
12 let's take the flip side, Your Honor. Mr. Depp
13 does not argue that Mr. Waldman's three statements
14 in the counterclaim enjoy Anti-SLAPP immunity.
15 They are nothing but the flip side of Mr. Depp's
16 three statements. Mr. Depp says that he's been
17 falsely accused of being an abuser, and in the
18 counterclaim, Ms. Heard says, yes, you are an
19 abuser and this isn't a hoax. That's the flip
20 side of the same case. And we never argued that
21 Anti-SLAPP immunity attached. And if the Court
22 rules that Anti-SLAPP attaches here, then we

1 should probably argue that.

2 But surely, the fact that Ms. Heard
3 includes extrinsic material in the Op-Ed, that has
4 nothing to do with Mr. Depp's case, cannot make a
5 legal difference or shield her from liability or
6 entitle her to a different and more favorable
7 treatment or immunity.

8 And I just, I want to close with this,
9 Your Honor, and reserve a few minutes. This is a
10 quote from Ms. Heard's opposition to Mr. Depp's
11 demurrer to Ms. Heard's counterclaim. And this is
12 a brief that her counsel filed on September 29th,
13 2020. "Mr. Depp's defamatory statements," she's
14 referring to the three statements by Mr. Waldman,
15 "are not directed to matters of public concern
16 that would be protected by the First Amendment and
17 subject to immunity under Virginia's Anti-SLAPP
18 statute. Rather, they are directed primarily to
19 whether Ms. Heard was telling the truth about her
20 allegations of domestic violence against Mr. Depp.
21 These are highly personal matters and not of
22 public concern and were statements made by

1 Mr. Depp solely for his own personal benefit."
2 Citing Padilla and the Brammer-Hoelter case that
3 we cited in our brief. So they're citing our
4 cases for exactly the same proposition.

5 Continuing the quote, "Mr. Depp's
6 repeated accusations that Ms. Heard is a hoax
7 artist, who perjured herself in obtaining the
8 DTRO, involved highly personal matters of abuse by
9 a husband against his wife. These, in and of
10 themselves, are not matters of public concern."

11 And that's quoting Ms. Heard's
12 opposition to Mr. Depp's demurrer counterclaim at
13 page 19.

14 Your Honor, this case is about personal
15 matters that are not covered by Anti-SLAPP and
16 I'll reserve time.

17 THE COURT: Thank you, sir.

18 All right. Ms. Bredehoft.

19 MS. BREDEHOFT: Thank you, Your Honor.

20 Good morning. Elaine Bredehoft,
21 together with Adam Nadelhaft. It's always hard to
22 say the Bredehoft and then Nadelhaft.

1 Representing Amber Heard.

2 Your Honor, it's ironic that the
3 argument that's being made on behalf of Mr. Depp
4 this morning is taking the letter opinion from
5 Chief Judge White from September of 2019, I think
6 it's 2020. It was a year before Chief Judge White
7 made the decision on the plea in bar in this case,
8 which was exactly the arguments that are being
9 presented to Your Honor today.

10 In that instance, Judge White took it
11 under advisement, he had a long briefing schedule,
12 a long hearing, which he included, and we made
13 significant reference to the declaration, we've
14 attached it as an attachment here, about the
15 public concern. We argued extensively on the case
16 law that supported it. And then he took it under
17 advisement for almost two months before making the
18 determination, as a matter of law, that it was on
19 matters of public concern. So he's already made
20 that decision. Effectively, what's happening is
21 they've just recast this as a motion for summary
22 judgment, arguing exactly the same. There's no

1 new facts, no new law, nothing here that wasn't
2 argued before Judge White in an extensive hearing.
3 And there's no reason to overturn Judge White, he
4 made the right decision.

5 I do want to address, because Your
6 Honor asked that question, and we did include it
7 in our brief. Correct, I think Your Honor is
8 correct, and we interpret the statute the same way
9 Your Honor does. The "solely," I think, was
10 misplaced in the argument that Mr. Depp made. It
11 is outside of it and solely on the Op-Ed, which,
12 clearly, the complaint is based solely on the
13 Op-Ed and that's the difference here.

14 Now, Mr. Depp argued here, before the
15 Court today, and I'm just going to touch on those
16 before I go through and just highlight some of the
17 main points we made in our brief. He said that
18 this is a personal grievance targeting a single
19 person, and it's the flip side of Mr. Depp's.
20 There's a very big difference between the two of
21 them, Your Honor, and, in fact, they did try to
22 claim Anti-SLAPP and Judge White also denied that

1 for them and said there's a very, very significant
2 difference between the two of them.

3 This was an Op-Ed that never even
4 mentioned Mr. Depp. There are three statements in
5 there, and we'll be talking about those, Your
6 Honor, also within the motions in limine. But
7 there are three statements in there, none of which
8 reference Mr. Depp, and are in the context of
9 public concern, the topics within the Op-Ed.

10 In sharp contrast, the three statements
11 by Mr. Depp, and we'll talk more about those on
12 the motion for summary judgment on the
13 counterclaim, are very personal, they're made to
14 the press, and they are personal attacks on
15 Ms. Heard, very specifically mention Ms. Heard.

16 So, I know Your Honor has read the
17 briefs and I'm getting a sense of everything, so
18 I'm going to try to go through my arguments
19 relatively quickly because I am just highlighting
20 some things from the brief based other than what I
21 just answered, because I thought I should do
22 because Mr. Depp brought these up separately.

1 But summary judgment is a drastic
2 remedy that is not favored in Virginia. What
3 they're asking here is for Your Honor, also, and
4 this is important, the jury needs to make a
5 decision on the statements in the Op-Ed whether
6 they were even of or concerning Mr. Depp. That's
7 not a decision that can be assumed and that's not
8 a decision -- and Judge White never ever made the
9 finding that they were. He said they can, they
10 can make that implication, and that's something
11 that has to be proven at trial. So they're not
12 only asking Your Honor to make that determination
13 that they're of and concerning Mr. Depp, but then
14 they're asking you to reverse Judge White.

15 With respect to the motion itself, Your
16 Honor, they made the exact same argument, the
17 exact same factual issue, the exact same law, and
18 we went ahead and cited from the earlier brief and
19 compared it. There is no difference.

20 Now, the statements, and I just want to
21 cite what the judge ruled, Judge White ruled on
22 this. He said the Op-Ed published in Washington

1 Post, as a matter of law, "Regarding matters of
2 public concern that would be protected under the
3 First Amendment to the United States Constitution
4 made by that person that are communicated to a
5 third party" and, therefore, satisfying the first
6 prong, which related to the Virginia Anti-SLAPP
7 statute, Virginia Code Section 8.01223.2 and that
8 was in his March 24, '21 order at the first page.

9 Now, that ruling is consistent with the
10 case law, and we cited Alexis v. Kamras, that was
11 a Judge Payne opinion out of Eastern District of
12 Virginia, from December 2020.

13 Now, Ms. Heard's statements are
14 regarding public concern.

15 Does Your Honor want me to go through
16 those?

17 THE COURT: No, that's fine.

18 MS. BREDEHOFT: Okay.

19 THE COURT: I got them from your memo.

20 MS. BREDEHOFT: Okay. I think it's
21 very significant, Your Honor, that Mr. Depp cites
22 absolutely no Anti-SLAPP cases. Just to move it

1 along, and I want to do this quickly because I'm
2 getting a sense from Your Honor here.

3 Pendleton has nothing to do with
4 Anti-SLAPP as well. There are three cases, Your
5 Honor, that we cite in there, and I just want to
6 highlight those because they do talk about where
7 someone has personal experiences as part of the
8 public concern. That was the Sipple v. Foundation
9 for National Progress case, the Guzman v. Finch,
10 and the Campone v. Kline. All of those are cited
11 in our brief, but all of them are where the author
12 talks both about the personal experiences in the
13 context of public concern, and those Courts go
14 through and very carefully discuss and explain the
15 logic on why that still satisfies public concern.

16 Finally, and I think I've already
17 addressed this with Your Honor, the complaint is
18 based solely on the Op-Ed. Mr. Depp attempts to
19 come back and try to bring in the 2016, and you
20 heard it again today. That complaint is based
21 solely on the Op-Ed, and that's why it's matters
22 of public concern.

1 So we would ask Your Honor to deny the
2 motion for summary judgment. We believe that
3 Chief Judge White's ruling on the plea in bar
4 should be upheld and we should go forward to trial
5 on the second prong.

6 THE COURT: Yes, sir.

7 MR. CHEW: Your Honor, very briefly.
8 The case is directly on point, Pendleton. And as
9 stated at the outset, the only fact, the only
10 reason that Pendleton Court did not reference
11 Anti-SLAPP was because it was 2015, two years
12 prior to the amendment of Anti-SLAPP to include
13 things other than statements made at public
14 hearings. It's directly on point. It's the only
15 case that's directly on point before Your Honor,
16 and it's directly controlling. Because the reason
17 I read to the Court, but I know you've already
18 read, in the March 23, 2020 memorandum opinion is
19 because Chief Judge White was saying this case is
20 Pendleton. This is Pendleton. This is the same
21 thing. It's defamatory innuendo. And had the
22 amendment occurred in 2015, of course, it would

1 have talked about the Anti-SLAPP. But it was
2 right on point because Your Honor will remember
3 that there was a matter of great public concern
4 involved in the Pendleton case. But what the
5 Supreme Court of Virginia made very clear is, in
6 the context of this matter of public concern,
7 there's a defamation action that has nothing to do
8 with the matter of public concern. And the key
9 finding, or the key holding of the Supreme Court
10 of Virginia in that case was "a defamatory
11 innuendo is no more protected by the First
12 Amendment than a speech by other means." 290 Va.
13 at 173. That is our case.

14 And she says well, gee, we'll be able
15 to argue at trial that the statements by Ms. Heard
16 are not of and concerning Mr. Depp. Well, that
17 doesn't pass the straight face test. Chief Judge
18 White made it very clear that everybody
19 understood -- understands that they were about
20 Mr. Depp. She wasn't talking about her beating up
21 Tasya van Ree, it was talking about her alleged
22 abuse. Everybody understands that. And since she

1 lost that demurrer, she's made public statements
2 admitting that she was referring to Mr. Depp. So,
3 good luck with that one.

4 But this case is Pendleton, it's right
5 on point. The cases she cites are completely
6 inapposite, particularly, she talked about the
7 Sipple case. That was a California case applying
8 the California Anti-SLAPP status, which is
9 dramatically different from the Virginia
10 Anti-SLAPP statute, one of the reasons we didn't
11 file in California and why they wanted to move it
12 to California.

13 So, too, she cites the Guzman case.
14 That also is a California case applying California
15 Anti-SLAPP law, which is very different from
16 Virginia. So she hasn't cited anything from
17 Virginia which says that Anti-SLAPP controls here.
18 And as Your Honor pointed out in allowing this to
19 go forward, Chief Judge White's ruling was not law
20 of the case. And I've had cases here in Virginia
21 where we've won things and then we've lost. And
22 we did not frame the argument correctly. And,

1 clearly, Your Honor, going back and reading that
2 letter opinion, the logic is absolutely
3 inescapable. This is not what Anti-SLAPP was
4 supposed to cover. And it would be an absurd
5 result to allow any party, whether it's Ms. Heard
6 or anybody else, to escape the consequences of
7 defamatory innuendo by adding a gloss of other
8 issues. Otherwise, it would be easy for anyone to
9 escape liability. I could say all kinds of
10 defamatory things about Ms. Bredehoft, which I
11 wouldn't. But if I put them in the context of
12 lawyers need to be more honest, well, lawyers need
13 to be more honest, and she is, that's a public
14 policy argument. But I can't lodge an issue of
15 public policy in and then say, I won't use her,
16 but Ms. X is -- you know, robbed from her
17 grandmother. I mean, that clearly can't be the
18 law. Anti-SLAPP provides immunity for matters of
19 public concern. Again, the example that I can
20 think of is the President is a foreign agent.
21 That is defamatory, per se. That's like saying
22 that somebody abused his or her spouse.

1 But it would be a matter of public
2 concern if it involved the chief executive of the
3 United States, and it would be protected.

4 These are private individuals, the fact
5 that Mr. Depp happens to be a famous artist
6 doesn't make him any less protected, or make
7 Ms. Heard more protected. This is a personal --
8 this is just what we covered in Pendleton.

9 Thank you, Your Honor.

10 THE COURT: All right. Thank you, sir.

11 All right. As to the plaintiff's
12 motion for summary judgment as to defendant's
13 Anti-SLAPP immunity, obviously, at the summary
14 judgment stage, any party making a motion for
15 summary judgment, summary judgment will not be
16 entered if there's any material facts, which is
17 generally in dispute. A trial Court considering a
18 motion for summary judgment must accept, as true,
19 there's inferences from the facts that are most
20 favorable to the non-moving party. And if the
21 evidence is conflicting on a material point, where
22 reasonable persons may draw different conclusions

1 from the evidence, summary judgment is not
2 appropriate.

3 In Virginia, we do have an Anti-SLAPP
4 statute, immunity statute, at any rate,
5 Virginia Code 8.01-223.2, and particularly,
6 subsection A is what is in question today. The
7 plaintiff argues that the statute is inapplicable
8 to defendant as to the first prong, namely,
9 whether the statement at issue involves a matter
10 of public concern.

11 And the plaintiff, today, advanced
12 three arguments. First, that the statements are
13 defamatory innuendo, and since that is the case,
14 the Anti-SLAPP statute does not apply. And,
15 again, the plaintiff relies, in the memorandum and
16 today, on Pendleton v. Newsome. But in Pendleton,
17 the only issue in that matter was whether the
18 complaint had stated a claim to support an action
19 for defamation. The only finding in the opinion
20 that has any bearing on this matter is that
21 defamatory innuendo can be defamatory. So,
22 Pendleton stands for the defamatory innuendo can

1 be actionable.

2 In this particular matter that's before
3 the Court today, there are material facts at issue
4 because it's up to the fact finder to decide
5 whether these statements are defamatory innuendo
6 or whether they are protected by the First
7 Amendment.

8 The second argument plaintiff brings
9 before the Court is that the plaintiff states that
10 defamatory innuendo arising out of statements from
11 the Op-Ed are not covered by the Anti-SLAPP
12 statute because the underlying events the
13 statements spring from are not solely matters of
14 public concern.

15 Now, the plain meaning of the statute
16 states the claim for defamation must be based
17 solely on statements arising from matters of
18 public concern. So, the Court does read the
19 statute differently than plaintiff in that matter.
20 Here, the complaint alleges defamation from
21 statements, and those statements were only found
22 within the online issue of the Washington Post and

1 defendant's Twitter. The question, then, becomes
2 do the statements arise from public concern? And
3 the Court did hold, in the plea in bar stage, that
4 the defendant's statements published in the
5 Washington Post, as a matter of law, are matters
6 of public concern, as required by the Anti-SLAPP
7 statute. And while this matter arises from the
8 interpersonal relationship of the parties, the
9 publication of the statements touch on a matter of
10 public concern, as it implicates domestic
11 violence, and domestic violence is not only a
12 public safety issue, but an issue targeted by
13 public policy within the Commonwealth.

14 The final argument brought forth by the
15 plaintiff, they rely on Smithfield Foods,
16 Incorporated v. United Food and Commercial Workers
17 International, to state defendant's conduct did
18 not arise from an isolated event, but rather the
19 Op-Ed in its full context.

20 Again, plaintiff's complaint only
21 alleges defamation based on the Op-Ed statements,
22 and Smithfield is not on point. That case dealt

1 with a tortious interference claim, not a
2 defamation claim, and the plaintiff does not
3 reference the conduct of plaintiff in his
4 complaint, nor is it a basis for his action of
5 defamation against defendant.

6 The Op-Ed, for purposes of this
7 specific litigation, is the isolated event that
8 gave rise to this action; therefore, I'm going to
9 deny the motion for summary judgment based on the
10 defendant's Anti-SLAPP immunity.

11 All right?

12 MR. CHEW: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 Then we have your summary judgment
15 motion involving the counterclaims of the
16 defendant.

17 MR. CHEW: Yes, Your Honor. Mr. Moniz
18 will address that.

19 THE COURT: All right. Good morning,
20 Mr. Moniz.

21 MR. MONIZ: Good morning, Your Honor.
22 Samuel Moniz, also with Brown Rudnick, also for

1 Plaintiff Depp.

2 Your Honor, Mr. Depp's motion for
3 summary judgment, with respect to Ms. Heard's
4 counterclaim, should be granted for two broad,
5 overarching reasons. First, and really most
6 fundamentally, is that when read in their full
7 context, the counterclaim statements at issue here
8 are non-actionable statements of opinion, which
9 are protected by the First Amendment and cannot
10 support the claim for defamation.

11 Second, even if Ms. Heard could
12 overcome that initial fatal defect in her claims,
13 Ms. Heard has no basis to hold Mr. Depp
14 accountable for statements that she openly
15 acknowledges were made not by Mr. Depp, but by a
16 nonparty to this action, and that's Adam Waldman.
17 In order to hold Mr. Depp liable for Mr. Waldman's
18 statements, Ms. Heard would need to establish
19 either that Mr. Depp was directly involved in
20 making the counterclaim statements, so as to be
21 liable for his own conduct, or, in the
22 alternative, Ms. Heard would need to establish

1 that Mr. Depp is vicariously liable by virtue of
2 the fact that Mr. Waldman made the statements,
3 purportedly, as Mr. Depp's attorney, and,
4 therefore, Mr. Depp is on the hook for whatever
5 Mr. Waldman did on a vicarious liability theory.
6 Neither of those arguments is ultimately
7 tethering, You Honor.

8 First of all, there is absolutely no
9 evidence in the record before the Court to support
10 the inference that Mr. Depp knew about or was
11 directly involved in making the counterclaim
12 statements. There is not a single piece of
13 evidence that the plaintiff -- or that the
14 counterclaim plaintiff has been able to cite to
15 indicate that Mr. Depp even knew these statements
16 had been made.

17 So, direct liability is out.

18 THE COURT: Well, isn't that kind of
19 disingenuous? Because, I mean, they have an
20 attorney-client privilege which they've invoked,
21 which they can do, but then you're saying, we're
22 not going to answer that because it's

1 attorney-client privilege. But then on the other
2 hand, they don't have any direct evidence.

3 So doesn't that -- I mean, aren't these
4 cases mostly bound by circumstantial evidence,
5 correct?

6 MR. MONIZ: Well, Your Honor, an agency
7 relationship can be found based on circumstantial
8 evidence.

9 THE COURT: It usually is.

10 MR. MONIZ: Correct, Your Honor. But
11 what I'm talking about here is direct liability,
12 meaning conduct of Mr. Depp specifically involved.
13 And there's no evidence of that. And there's no
14 obligation on the part of a defendant, who has
15 been sued, to waive attorney-client privilege, nor
16 is there any adverse inference that arises from
17 the assertion of a valid privilege in this
18 context.

19 So there simply is not case law
20 support, and none has been cited by Ms. Heard, for
21 the notion that, simply by virtue of asserting the
22 attorney-client privilege, it can, therefore, be

1 assumed that Mr. Depp was actually involved.

2 THE COURT: Okay. And I agree with
3 that. Just you're here arguing saying there's no
4 direct evidence, and I'm, like, woah.

5 MR. MONIZ: And my point there, Your
6 Honor, just to be clear, my point is there is no
7 direct evidence of involvement by Mr. Depp in
8 making the counterclaim statement.

9 THE COURT: Okay.

10 MR. MONIZ: That's a separate question.

11 THE COURT: Okay.

12 MR. MONIZ: As far as the vicarious
13 liability theory goes, Your Honor, the issue there
14 is, really, in order to hold Mr. Depp liable under
15 vicarious liability theory for the tortious act of
16 his agent, you first have to establish that
17 Mr. Waldman actually committed a tortious act.
18 And here, what we're talking about is defamation.
19 And we're also talking about the defamation claim
20 that has been brought by -- what I think we all
21 agree, certainly, it's not disputed in the papers,
22 is a public figure. Ms. Heard is a public figure,

1 self-described.

2 So given that, Your Honor, the law is
3 unambiguous in Virginia, and everywhere else, that
4 you have to show actual malice in order to prevail
5 on a --

6 THE COURT: But malice is for the fact
7 finder, correct?

8 MR. MONIZ: Yes and no, Your Honor.

9 THE COURT: You're saying I can find
10 malice at a summary judgment motion?

11 MR. MONIZ: Yes, Your Honor. In the
12 Jackson v. Hartig case, which is cited in our
13 papers, establishes that unless there is
14 sufficient evidence -- and that's the Virginia
15 Supreme Court. Unless there is sufficient
16 evidence in the record on summary judgment for the
17 trier of facts to find, by clear and convincing
18 evidence, that the statements were made with
19 actual malice, then it is, in fact, appropriate to
20 resolve on summary judgment.

21 Now, in a normal case, that might be
22 for the trier of facts, but it is appropriate

1 under certain circumstances, and this is one of
2 those circumstances, Your Honor. And the reason
3 this is one of those circumstances is this: The
4 legal requirements for showing actual malice is to
5 show that the person making the allegedly
6 defamatory statement was speaking either with
7 actual knowledge of falsity or with knowledge of
8 probable falsity, and that is a subjective
9 standard; meaning, not what would a reasonable
10 person have thought, but what did Mr. Waldman
11 actually think? And, again, Your Honor, the
12 bottom line here is that the counterclaim
13 plaintiff has been unable to identify any
14 evidence, at all, that goes to Mr. Waldman's
15 subjective state of mind. That is, in fact, her
16 burden on this motion.

17 And, so, for those two broad reasons,
18 Your Honor, what we have here, at the end of the
19 day, is a counterclaim plaintiff who is pursuing
20 defamation claims on statements that are not
21 actionable to begin with, and even if they were
22 actionable, they cannot be linked, in legal terms,

1 to Mr. Depp.

2 And I want to turn back, briefly, here,
3 Your Honor, to the threshold question, at least in
4 my mind, which is that the counterclaim statements
5 are just not actionable to begin with.

6 THE COURT: Just before you do that, I
7 mean, we already had a demurrer and we had the
8 opinion in demurrer that they are actionable, but
9 they're not opinions. But they could still move
10 forward to the fact finder, so...

11 MR. MONIZ: And I fully appreciate,
12 Your Honor, that this was addressed, at some
13 extent, on demurrer.

14 What I would suggest to the Court is
15 this: First of all, we are in a different
16 procedural posture here; summary judgment and
17 demurrer is different.

18 Secondly, although it is a legal
19 question whether a statement is defamatory and
20 actionable, it's important to note that that legal
21 question is not made based on text of the
22 statements read in isolation, it is not made in

1 the abstract, and it is not a pure legal question
2 in that sense. Rather, what the Court looks at is
3 the entire, concrete, factual context. And that
4 factual context is before this Court now on
5 summary judgment in a way that it was not
6 explicitly framed for the Court on demurer.

7 THE COURT: What's the difference?

8 MR. MONIZ: The difference, Your Honor,
9 is that we are pointing to the fact, for example,
10 the broad press coverage surrounding the
11 litigation in the United Kingdom and the United
12 States, not to mention -- let's not mention the
13 fact that we had the articles themselves. But
14 regardless, Your Honor, it's not outside the scope
15 of this Court's authority, even if the plaintiff
16 in this case were correct, that somehow it was law
17 of the case, which is not a correct statement of
18 law, but even if that were the case, there's
19 nothing that precludes this Court from addressing
20 this issue head-on, on summary judgment.

21 And the bottom line here, Your Honor,
22 is that Virginia law is consistent with the law of

1 the United States in general, that pure
2 expressions of opinion cannot form the basis of an
3 action for defamation. And as numerous cases in
4 numerous jurisdictions have recognized, a
5 statement cannot be defamatory if it is plain, and
6 I'm quoting here from the Piconne v. Bartels case,
7 a statement cannot be defamatory if it is plain
8 that the speaker is expressing a subjective view,
9 an interpretation, a theory, conjecture or
10 surmise, rather than claiming to be in possession
11 of objectively verifiable facts.

12 So what the Court is called upon to do
13 here is to evaluate these statements in their full
14 context, in their full factual setting, and to
15 determine what a reasonable listener would
16 interpret that as. And the Court does make that
17 ruling as an initial matter, and it does make that
18 ruling as a legal issue, but it does so in the
19 full factual context. That factual context is
20 before the Court, and I believe that that factual
21 context only really provides -- only really
22 permits one inference to be drawn.

1 THE COURT: Is that really an argument
2 for summary judgment?

3 MR. MONIZ: Well, I'm not sure I
4 understand the Court's question here.

5 THE COURT: Well, I mean, the standard
6 for summary judgment, you know, there's issues,
7 material issue, and I just don't understand how
8 this is getting to the summary judgment standard.

9 MR. MONIZ: Well, there is no material
10 issue of fact here, Your Honor. The facts are
11 undisputed. These were -- there's massive press
12 coverage about the U.K. litigation and about the
13 U.S. litigation. There are conflicting versions
14 of events that are provided, under penalty of
15 perjury, in the U.K. litigation and in the U.S.
16 litigation. And so, these statements appear in
17 the context of all of that, and they are going to
18 be understood by readers in the context of all of
19 that.

20 And so, Your Honor, what we have here
21 are basically allegations, as framed by the
22 counterclaim plaintiff. Allegations that

1 Ms. Heard committed a hoax. That's kind of what
2 the overarching theme of each of these articles --
3 each of these statements seems to be. And I think
4 it's important for the Court to note that an
5 explicit allegation that somebody is lying can be
6 defamatory, of course, but it's not always
7 defamatory. And the exact same words, in the
8 exact same order may be defamatory in one context
9 and not defamatory in another. And that was the
10 finding of the Virginia Supreme Court in affirming
11 summary judgment in the Shaker case, cited in our
12 papers, with respect to the allegation that the
13 plaintiff in that case was "lying and manipulating
14 facts."

15 And similarly, in the Shanair
16 (phonetic) case, also cited in our papers, the
17 Fourth Circuit concluded, this time at the motion
18 to dismiss stage, than an accusation that a
19 plaintiff's sworn affidavit had contained "60
20 pages of facts and fiction, innuendo, half truths,
21 exaggerations, and fabrications" was, when read in
22 the appropriate context, protected opinion.

1 So, there is no, per se, rule that the
2 use of a particular word or a particular phrase,
3 or even a particular type of allegation, is
4 defamatory or actionable. Context is everything,
5 and the cases all make that clear. Context is
6 everything.

7 So the Court has to consider the
8 totality of the circumstance with an eye toward
9 determining whether a reasonable listener would
10 interpret the statements at issue as expressing a
11 conclusion about facts, a suggested opinion about
12 facts, or a fact itself.

13 Now, here, Your Honor, it's undisputed
14 that Mr. Waldman's statements were made in the
15 context of ongoing, high-profile, hotly contested
16 litigations that were spanning two continents and
17 generating any number of headlines. That broad
18 context should immediately signal, to any
19 reasonable reader, that there are differences of
20 opinion, that the facts are disputed, and that the
21 statements by one side, the Depp side, are
22 violently disagreed with by the other side, the

1 Heard side. Nobody is going to be expecting one
2 side or the other to be providing, to the press, a
3 dispassionate, objective statement of events.

4 It's just always going to be advocacy. If you're
5 getting a statement for Depp or from Heard, it's
6 going to be advocacy.

7 Now, courts have consistently
8 recognized that in the context of controversy,
9 statements are going to generally be recognized as
10 opinions, not facts. Moreover, and I'll cite Your
11 Honor to the Naveena case, this is the Third
12 Circuit, "Statements surrounded by other
13 statements of opinion, such as a debate on a
14 controversial topic, are also likely to be
15 understood as opinions."

16 Now, I think it's important to note
17 here, also, Your Honor, that Mr. Waldman's
18 statements appear in articles presenting, very
19 clearly, that there are two starkly different
20 versions of events here. I think it's worth
21 noting, for example, that none of these articles
22 carries the headline Amber Heard committed a hoax.

1 They all very clearly describe the fact that Amber
2 Heard and Mr. Depp are setting forth two
3 diametrically opposed versions of events.

4 So, Mr. Waldman's statements are
5 presented as being given by one version of -- by
6 one side about the other side. They're presented
7 as one version of events, and importantly, not the
8 definitive version, not the only version, just one
9 side's version. Moreover, Mr. Waldman is
10 explicitly identified in each of the articles as
11 an attorney associated with Mr. Depp, and that's
12 important for a couple of reasons, Your Honor.
13 First, most basically, any person reading an
14 article is going to recognize that Mr. Depp's
15 attorney is going to have an obvious bias. And
16 Mr. Waldman's bias is clear on the face of the
17 articles. It's universal knowledge that attorneys
18 are advocates, they're not impartial reporters.
19 And, in fact, an attorney representing Mr. Depp
20 would probably be ethically precluded from doing
21 anything other than challenging Ms. Heard's
22 statements. And there's abundant case authority

1 for the proposition, Your Honor, that where a
2 speaker's bias is accounted, a reasonable listener
3 will recognize the person's statements and will
4 discount it, accordingly, as opinion. And I will
5 cite Your Honor to the Chavez case, which involved
6 an allegation by a medical professional that
7 another medical professional was overcharging for
8 services, where the Court concluded that "The most
9 unsophisticated recipient of such a claim made by
10 one competitor against another could only regard
11 it as a relative statement of opinion rounded upon
12 the speaker's obvious bias."

13 The Courts also need to consider
14 whether there's any claim, at all here, that the
15 statements are being made based on Mr. Waldman's
16 personal knowledge. And the answer to that
17 question is, no. Nowhere does Mr. Waldman claim
18 that he actually was there. And nowhere does the
19 article suggest that he was there or has direct,
20 firsthand knowledge. What's presented, therefore,
21 is an interpretation made by an attorney, drawn
22 from facts without any claim to unique personal

1 knowledge. And, again, that's also significant, I
2 would cite Your Honor to the BioSpherix case, also
3 cited in our papers, as finding no liability where
4 "there was no claim to firsthand knowledge of
5 facts."

6 Mr. Waldman doesn't claim firsthand
7 knowledge. The statements are presented as those
8 of an attorney weighing in, after the fact, on
9 evidence and case developments, and discussing,
10 for example, the inferences he's drawing from the
11 fact that Ms. Heard has one account and two police
12 officers showed up and didn't see an injury. Or
13 the inferences he draws, for example, from the
14 fact that Ms. Heard's friend, Amanda de Cadenet,
15 who had formerly supported her, then withdrew her
16 support after listening to some recordings of
17 Mr. Depp and Ms. Heard. There's not a sentence in
18 any of these articles, Your Honor, that suggest
19 that Mr. Waldman was there, that he knows what
20 happened. These are all statements expressing his
21 inferences about what happened.

22 This is, I think, maybe the most

1 important point, Your Honor. The case
2 authorities, what emerges from the case
3 authorities, on my reading, is that a really
4 important inquiry is whether the listener has the
5 ability and the opportunity to make up his or her
6 own mind about what happened, or whether the
7 listener is, essentially, being presented with a
8 fact as a fact, as this is the only way you can
9 read any of this evidence. And the courts that
10 have evaluated these questions look to issues,
11 even if a statement implies a fact, courts will
12 still find that it's protected opinion where, for
13 example, both sides of the issue are presented so
14 that the listener has the opportunity to make up
15 his or her own mind, or whether the factual basis
16 of the opinion are sufficiently stated so that any
17 person will understand that it's opinion and will
18 be able to draw his or her own inferences.

19 And, again, Your Honor, the fact that
20 there's a disputed fact about what happened
21 between these two individuals is all over these
22 articles, and it's implicit in every word that

1 comes out of Adam Waldman's mouth. He's
2 addressing, specifically, that factual
3 disagreement.

4 And so, I think, You Honor, you know,
5 this is, I think, well-framed by the papers, and I
6 think that the case authorities make this clear
7 that this is an issue of constitutional force.
8 That the Constitution, the First Amendment
9 provides the parties have the ability to draw
10 inferences and propose interpretations of
11 inherently ambiguous events. There's never going
12 to be universal agreement, Your Honor, about what
13 happened between Johnny Depp and Amber Heard.
14 There are always going to be people out there who
15 are convinced that Johnny Depp beat her, and there
16 are always going to be people who are convinced
17 that she lied. There's never going to be
18 universal agreement. And I think the Lane case,
19 also cited in our papers, kind of gets to that
20 issue. That case involved an accusation that
21 somebody had misled the American people about the
22 Kennedy assassination. The Court pointed out

1 that, at the end of the day, there's never going
2 to be complete agreement and there has to be
3 latitude for people to propose interpretations of
4 events that nobody can ever know, for sure, what
5 happened.

6 And so, in the broad context here, Your
7 Honor, these are opinions, and I think that's the
8 only conclusion that can really be drawn from
9 them. Nobody can read these articles and come
10 away with an opinion that has been established by
11 anything Adam Waldman said, that Amber Heard
12 committed a hoax. That's purely opinion.

13 As far as the remainder of the issue,
14 Your Honor, and I will try to make this very
15 brief, that's the one legal hurdle, the opinion.
16 As far as direct liability, again, Your Honor,
17 there is no indication, anywhere, that Mr. Depp
18 knew these statements had been made or that he
19 made them himself. As for vicarious liability,
20 you have to show malice in order to show that Adam
21 Waldman defamed her. If you can't show that he
22 defamed her, you can't hold Mr. Depp accountable

1 for that on a vicarious liability theory. And,
2 so, the question, then, becomes, where is the
3 evidence, in this record, of actual malice on the
4 part of Mr. Waldman? And I would cite Your Honor
5 to our papers, where we lay out, I think pretty
6 clearly, the import of the Jackson v. Hartig case,
7 which is the Virginia Supreme Court finding it
8 appropriate to grant summary judgment on a
9 defamation case on the basis of lack of actual
10 malice.

11 And I will reserve the rest of my time.

12 MS. BREDEHOFT: Thank you, Your Honor.
13 Let me just answer a couple of the issues that
14 were raised here. And I think I understand where
15 Your Honor is on a number of things, so I'll try
16 to make this brief. And I do think that our brief
17 really set out a lot, and our attachment set out a
18 tremendous amount here.

19 The last question that was asked is,
20 where is the evidence of actual malice of Adam
21 Waldman? And the answer is, pages 4 through 8 and
22 10 through 12 of our brief. We set out extensive

1 evidence of Adam Waldman's malice, from the
2 coercing witnesses with obtaining declarations,
3 with a header from this Court, Your Honor, that
4 had never been shed on this Court, never filed
5 with this Court, and not produced to us. Coercing
6 individuals, making statements about how he and
7 Depp have -- that Depp told him that this is all a
8 hoax, et cetera. Mr. Depp's counsel brought up
9 Amanda de Cadenet, that she changed her mind after
10 the tapes. Those were released partial, they were
11 not in full context, by Adam Waldman. He
12 testified, and we attached that as well, that
13 Mr. Depp was with him when he met with the Daily
14 Mail and leaked those partial tapes, not the full
15 tapes, to try to take out of context what was
16 going on.

17 And we have extensive evidence of him
18 contacting different individuals. We have
19 statements, and I think one of the most
20 significant, he wrote to one witness "Johnny
21 Depp's lawyer Adam Waldman here. I know from
22 Johnny, as with other hoax claims where we have

1 multiple eyewitness, that it was Amanda who
2 assaulted Johnny." That is attachment 12.
3 There's ample evidence.

4 But the other thing, Your Honor, that's
5 interesting here is there's no cases cited by
6 Mr. Depp's counsel that stand for the proposition
7 that the actual malice has to be Mr. Waldman's, as
8 opposed to Mr. Depp's. We, in our brief, address
9 both and provide extensive evidence for both
10 actual malice by Mr. Depp, as well as Mr. Waldman,
11 but we believe that the agency relationship, and
12 I'll cite a couple of those cases here, just to
13 remind the Court, but we believe that it's
14 Mr. Depp's malice that will ultimately be at issue
15 here. But I completely agree with Your Honor that
16 actual malice is a question of fact for the jury.
17 The only case that Mr. Depp's counsel continues to
18 cite here is the Hartig case, Jackson v. Hartig,
19 which was a 2007 Virginia Supreme Court case with
20 very, very different facts, very, very different
21 issues there. It was a media defendant, and what
22 they said there was the issue was whether there

1 was -- whether its failure to investigate the
2 accuracy rose to the level of high degree of
3 awareness of its probable falsity, which is a very
4 different standard with a very different set of
5 circumstances. It doesn't apply here, and,
6 certainly, wouldn't justify granting summary
7 judgment and taking away from the jury the
8 determination of actual malice.

9 Other than that, Your Honor, I'm just
10 going to take the Court just through a few summary
11 points, and I will rely heavily on the brief ...
12 because I think it was immensely detailed and set
13 all these things out. But as Your Honor's already
14 noted, and, therefore, I will not cite the six
15 different Supreme Court decisions we cited, that
16 summary judgment is clearly disfavored, and if
17 there is genuine issues of material fact, it needs
18 to go to the jury.

19 With respect to the agency, I think
20 Your Honor is also completely understanding the
21 arguments. We cite *Fuste v. Riverside Healthcare*,
22 which was a 2003 Virginia Supreme Court case. And

1 interesting, what they said there was if they're
2 acting within the scope of their employment or as
3 agents of the named defendant, the principle can
4 be liable. That's all it takes. And what we
5 have -- we have Mr. Waldman, he did admit that he
6 made the three statements, he did admit that he
7 represented Mr. Depp during this time frame.
8 Mr. Depp also represented that and called him his
9 trusted advisor. The law in Virginia, agency
10 places Waldman squarely within it, and Your Honor
11 is also correct with respect to that it's usually
12 agencies, usually proven by inferences. The
13 *Tingler v. Graystone Homes* said that this is
14 something that a fiduciary relationship arises
15 from manifestation of consent by one person to
16 another that the other shall act on his behalf and
17 subject to his control, and the agreement of the
18 other so to act.

19 Then the *Transparent GMU v. George*
20 *Mason University* case, 2019 Virginia Supreme Court
21 case, says agency may be inferred from the conduct
22 of the parties and from the surrounding facts and

1 circumstances.

2 Then we cited Royal Indemnity Company
3 v. Hook, which is also a Virginia Supreme Court
4 case, 1931. Agency may be proven in many ways.
5 Frequently, it's established and has, of
6 necessity, to be established by circumstantial
7 evidence. We have, and we cited in there, Your
8 Honor, statements made by Mr. Depp, publicly,
9 praising Mr. Waldman for all he's doing for him
10 and publishing all of these different statements.
11 And I'm not going to repeat it, because it was
12 mostly laced with profanity, but we did cite it,
13 very specifically, in our brief, and we attached
14 the different parts of it.

15 We also have Robin Baum, Mr. Depp's
16 publicist, taking Mr. Waldman's statement and
17 forwarding them to the press. And that would be
18 on behalf of Mr. Depp.

19 And what the Drake v. Livesay Virginia
20 Supreme Court case says, in 1986, unless the
21 existence of agency relationship depends on
22 unambiguous documents or undisputed facts, the

1 question of agency vel non is one of fact for the
2 jury.

3 Your Honor also observed, and they did
4 invoke the attorney-client privilege, but the
5 significance of how many different ways they
6 invoked the attorney-client privilege to the
7 questions that we pose to them, why did you make
8 the statement? Were you representing Mr. Depp at
9 the time you made the statement? Did you discuss
10 the statement with Mr. Depp before making the
11 statement? Did you discuss the statement with
12 Mr. Depp after making the statement? Was Mr. Depp
13 aware, either before or after, that you were
14 making this statement? Did you make this
15 statement with Mr. Depp's authorization or
16 agreement? Was Mr. Depp aware that you were
17 speaking with the press? Did Mr. Depp ever ask
18 you to retract or correct the statement? Did you
19 rely upon any statements or evidence from Mr. Depp
20 making the statement? That's attachment 7, Your
21 Honor. They invoke the attorney-client privilege
22 on every single one of those and instructed him

1 not to answer. Likewise, with Mr. Depp, and I
2 asked that in two different sessions with
3 Mr. Depp, both the one in 2020 and the one in
4 2021, and those are attachment 8, Your Honor. On
5 each of those, he refused to answer on the basis
6 of attorney-client privilege.

7 Now, the significance of that, Your
8 Honor, is that they cannot come into trial and now
9 deny they've invoked it. They can't use it as a
10 sword and a shield here. So they can't come in
11 and take the stand and say, nope, nope, and now
12 they're going to answer the questions they refused
13 to answer before. And we have that, also, as a
14 motion in limine, Your Honor, because that happens
15 quite a bit in a number of different occasions and
16 different contexts.

17 Now, I don't think I'm going to -- I
18 think Your Honor understands, and I'm not going to
19 go through all of the -- because I also cited you
20 ones, so I'm not going to take you through all the
21 different pieces of evidence. Although,
22 attachment 26, I think, is particularly

1 significant on Mr. Depp making specific statements
2 about how proud he is of what Adam Waldman is
3 doing for him.

4 I'm going to try to shorten this.
5 Let's go to the opinion, Your Honor.

6 I think it's important to actually say,
7 and I know Your Honor has already made the point,
8 and we've, obviously, made the point as well,
9 Judge White has already looked at this and made
10 the determinations that these are questions of
11 fact, but I do think it is worth repeating the
12 three statements because I think it's real
13 important to go back to them in context.

14 April 8, 2020, to the Daily Mail,
15 Mr. Depp stated, through Mr. Waldman, that
16 Ms. Heard was committing perjury when he stated
17 "Amber Heard and her friends in the media use fake
18 sexual violence allegations as both the sword and
19 shield, depending on their needs. They have
20 selected some of her sexual violence hoax 'facts'
21 as the sword, inflicting them on the public and
22 Mr. Depp." The article attributed the quote to

1 Adam Waldman, Depp's lawyer.

2 Then on April 27, 2020, Mr. Depp,
3 again, using Mr. Waldman as his conduit, told the
4 Daily Mail that "Quite simply, this was an ambush,
5 a hoax. They set Mr. Depp up by calling the cops,
6 but the first attempt didn't do the trick. The
7 officers came to the penthouses, thoroughly
8 searched and interviewed, and left after seeing no
9 damage to face or property. So Amber and her
10 friend spilled a little wine, roughed the place
11 up, got their stories straight under the direction
12 of a lawyer and publicist, and then placed a
13 second call to 911." The quote was attributed to
14 Depp's lawyer, Adam Waldman. You know, just
15 looking at that one, Your Honor, there are so many
16 ways to prove that's false. So many ways to prove
17 whether that's true or false. And in fact, we
18 believe we will be showing that to the jury in
19 extensive evidence.

20 The third one, on June 24, 2020, he
21 again falsely accuses her of an abuse hoax. Now,
22 all of these statements suggest that Amber Heard

1 has committed perjury, that she is reporting false
2 crimes to the court, and it's defamation per se as
3 well.

4 But as the Virginia Supreme Court held
5 in Tronfeld v. Nationwide Mutual Insurance, in
6 2006, this statement that plaintiff just takes
7 people's money is capable of disproof by evidence,
8 and if adduced, the plaintiff's clients receive
9 monetary or other relief as a result of his legal
10 services. This is no different, in fact, this one
11 is much more stark than that, but that's a great
12 example of how the Virginia Supreme Court sees
13 these.

14 Now, Mr. Depp has cited a few cases,
15 and I just want to take Your Honor through those
16 to make sure that we've got them covered.

17 Schaecher v. Bouffault, in that one, it
18 was an email that only went to the two people who
19 were most knowledgeable about the circumstances.
20 It was in the context of the public planning
21 commission, the director of the planning
22 commission. And in that case, it was a very

1 different situation because they concluded that
2 the two recipients were quite knowledgeable about
3 the subject matter, and, so, the context was quite
4 different.

5 In Spencer v. American International
6 Group, this was one where the person told -- said
7 that Gotchell and McGuireWoods were not defendants
8 because he and AIG had insufficient information to
9 support the claim. It went on and said we have to
10 investigate, might be putting them in, we have to
11 investigate, but it never quite said that there
12 was anything that they had committed.

13 And Safex Found v. Safeth, they didn't
14 dispute that the factual statements were true.
15 Quite different than this situation.

16 In McKee v. Cosby, the lawyer accused
17 the plaintiff of not being credible, but he didn't
18 describe what the facts were that made him not
19 credible or what the issue was that made him not
20 credible, and that was a different situation.

21 Your Honor, I would cite the case of
22 Green v. Cosby, 183 F. Supp. 3d. 114, District of

1 Massachusetts, 2015, where the Court allowed the
2 defamation case to go forward against Bill Cosby
3 based on statements by his agents against the
4 accusers of sexual assault. And the Court held
5 there because "the statement is capable of being
6 understood as asserting not just that the
7 allegations made during the previous two weeks
8 were unsubstantiated, but also implying they were
9 false and entirely without merit." That would
10 certainly be the case here.

11 Last point I would just make, Your
12 Honor, is that Amber Heard has certainly suffered
13 significant damages as a result of the defamation.
14 Now, the plaintiff abandoned that in their reply
15 brief and they didn't argue it here, so I don't
16 know whether they determined. But, not only has
17 she pleaded significant emotional distress and
18 reputational damages, but because she's being
19 accused of crimes in there, a crime of perjury,
20 falsifying a criminal report, it's defamation per
21 se. And as we cited in the case law, and it's
22 also in the jury instructions, the way you have

1 defamation per se, damage to the personal and
2 professional reputation, as well as humiliation
3 and embarrassment, are presumed and no proof is
4 required.

5 We believe, Your Honor, that there's
6 ample evidence to go to the jury in this case, and
7 the motion for summary judgment should be denied.

8 THE COURT: Thank you.

9 Yes, sir.

10 MR. MONIZ: Thank you, Your Honor.

11 I'll be very brief. First of all, Counsel has not
12 quite correctly, I think, stated the issues on
13 actual malice. Most of the evidence that is
14 submitted with defendant's -- with Ms. Heard's
15 papers is really irrelevant to the issue of malice
16 because the issues of malice is very simple here.
17 It's not about whether Mr. Adam Waldman has any
18 particular animosity or hostility toward
19 Ms. Heard. It's not about whether Mr. Waldman has
20 done things he shouldn't have. It's not about --
21 I mean, for purposes of this motion, it wouldn't
22 matter if we agreed that Mr. Waldman had done

1 everything wrong in the world; that's not the
2 issue. The issue is, did he know that what he was
3 saying was false or did he believe what he was
4 saying was probably false? And, again, Your
5 Honor, there is nothing in the records to suggest
6 that either of those is true. And as the Jackson
7 v. Hartig case, as well as the other cases cited
8 in our papers, make clear, that is appropriately
9 resolved on summary judgment. To allow this case
10 to proceed to trial, there has to be evidence from
11 which a reasonable fact finder can find, by clear
12 and convincing evidence, that Mr. Waldman either
13 knew his statements were false or believed that
14 they were probably false.

15 As far as damages go, we obviously
16 dispute that Ms. Heard suffered damages from
17 these, but that's not the basis of the motion for
18 summary judgment, and, so, I won't address that
19 here. Because Counsel specifically identified
20 attachment 26, I will just briefly note that that
21 attachment is dated March 8th, 2019, more than a
22 year before these counterclaim statements were

1 issued, and about a week after this complaint was
2 filed. So, I have no idea on what basis Counsel
3 thinks that has to do with the counterclaim
4 statements, but I will disagree that that's a
5 reasonable inference to be drawn.

6 As far as the assertion of the
7 privilege goes, Your Honor, again, as indicated
8 previously, there's no adverse inference that
9 arises from asserting a privilege. Whether the
10 privilege was asserted more aggressively than it
11 should have, that's a question to be resolved on a
12 motion for -- on a motion to compel, not a trial
13 motion.

14 And finally, Your Honor, to the point
15 that Ms. Bredehoft raised, that the statements are
16 acceptable of being true or false, even if that
17 were true, Your Honor, even if it's true that it's
18 acceptable to being proven true or false whether
19 or not Ms. Heard, for example, spilled wine or
20 whatever else, that's not the end of the analysis
21 here. That's the key point, I think, as far as
22 the opinion piece of this motion goes, Your Honor.

1 Because, and I'll cite Your Honor to the Riley v.
2 Harr case, which is recited in our reply paper, I
3 think. Which is that "even a provably false
4 statement is not actionable if it is plain that
5 the speaker is expressing a subjective view, an
6 interpretation, a theory, conjecture, or surmise,
7 rather than claiming to be in possession of
8 objectively verifiable facts."

9 What the Court found significant in
10 that case was the question of whether the
11 challenged statements implicitly signaled to
12 readers that "only one conclusion was possible
13 and, therefore, do not qualify as protected
14 opinion or whether readers were implicitly invited
15 to draw their own conclusions from the mixed
16 information provided."

17 And the issue on opinion, I would say,
18 Your Honor, is that anybody hearing these
19 statements from Mr. Waldman, in this context,
20 would recognize that these statements are not
21 objective statements of fact that can be accepted
22 at face value, they're a partisan expression of

1 one side's opinion in a two-sided debate and,
2 therefore, have to be viewed as such, and would be
3 viewed as such by any reasonable reader.

4 And on that basis, summary motion is
5 appropriate, Your Honor.

6 THE COURT: Thank you, sir.

7 All right. As to the motion for
8 summary judgment with the counterclaims of
9 Ms. Heard, again, just for the record, the summary
10 judgment should not be entered if any material
11 fact is generally in dispute, which we heard a lot
12 of facts in dispute in the past half hour. So,
13 granting summary judgment is viewed as a drastic
14 remedy. The Virginia Supreme Court is cautioned
15 that discovery should not supplant the taking of
16 evidence at trial, and that a trial court
17 considering a motion for summary judgment must
18 accept, as true, the inferences from the facts
19 that are most favorable to the nonmoving party,
20 again, unless those inferences are forced, or
21 strained contrary to reason.

22 Just going, first, to Mr. Depp's

1 liability for statements of Mr. Waldman. There is
2 arguments about vicarious liability, which is the
3 liability for the tort of another person. In this
4 matter, there is going to be evidence of agency,
5 and agency can be proven many ways. As stated,
6 it, most usually, is established by circumstantial
7 evidence. And unless the existence of an agency
8 relationship is -- is a fact for the jury, purview
9 of the jury, unless there's no undisputed facts,
10 which, clearly, here, there are disputed facts.
11 It wasn't mentioned in oral arguments, but since
12 it was in the brief, I just want to state that
13 plaintiff maintains that summary judgment is
14 appropriate, partly because the defendant has not
15 supplanted an interrogatory which asks for facts
16 supporting her claim that plaintiff was
17 responsible for any damages allegedly caused by
18 Mr. Waldman.

19 The defendant mentioned it in her oral
20 argument, but I just want to say that in tort
21 actions, the party leveling allegations has no
22 duty, at summary judgment stage, to fully develop

1 their claims during discovery. But, again, there
2 are material issues in dispute. A reasonable fact
3 finder could conclude that Mr. Waldman did not
4 know that the counterclaim statements were false
5 or that he entertained serious doubts about the
6 falsity of the counterclaim statements due to lack
7 of evidence supplanting the fifth interrogatories.
8 But, also, a reasonable fact finder could conclude
9 that Mr. Waldman was Mr. Depp's agent and made the
10 statements at Mr. Depp's direction. Mr. Waldman
11 and Mr. Depp could have been working in an agency
12 relationship at the time. There are more than
13 enough facts to dispute regarding the agency
14 relationship, which indicates this is a matter
15 that should go to the jury, and granting summary
16 judgment would improperly short-circuit the
17 litigation at this point.

18 In addition, as far as the question of
19 malice, it should not be decided at summary
20 judgment stage, unless it is extremely clear about
21 the malice issue. And in this case, that's just
22 not where we're at, and we'll have to get a fact

1 finder to assess whether an alleged defamatory
2 statement was made with malice. In this case,
3 Mr. Depp claims that the factually empty responses
4 to the fifth interrogatory speaks for itself, but
5 one reasonable fact finder could conclude that
6 there was no malice, another could reasonably
7 conclude that Mr. Waldman made the statements with
8 malice because Mr. Waldman has no personal
9 knowledge of the parties' marriage and still made
10 the statements at issue. So that just leaves --
11 it has to be a reasonable fact finder to decide if
12 malice existed or not and cannot be part of a
13 summary judgment motion.

14 As far as protected opinion, on this
15 matter, Judge White did hold that the counterclaim
16 statements that are still standing are not
17 opinion. But even as this court takes a look at
18 the statements, a new of that, if you wish, the
19 counterclaim statements that accuse Ms. Heard of
20 committing perjury, fabricating evidence of
21 domestic violence, and fabricating all the
22 underlying instances of alleged abuse, all the

1 standing statements that are left can be proven
2 either false or true. In addition, they can be
3 taken at face value to be true. Therefore, they
4 can't be considered as opinion.

5 Based on that, I'm going to deny the
6 motion for summary judgment to the counterclaim
7 statements. All right.

8 MR. CHEW: Thank you very much, Your
9 Honor.

10 THE COURT: I assume we can get an
11 order on that?

12 MS. BREDEHOFT: Right here.

13 THE COURT: Oh, fantastic.

14 MR. CHEW: Do we have a black pen?

15 THE COURT: A breath of fresh air.

16 Here I have one.

17 MS. BREDEHOFT: Do you want me to write
18 over it?

19 THE COURT: If you can.

20 MR. CHEW: Thank you, Your Honor.

21 THE COURT: All right. Thank you.

22 Do you want copies of these today?

1 MS. BREDEHOFT: We can get them.
2 May we approach very quickly for
3 something?

4 THE COURT: Yeah, sure.

5 MS. BREDEHOFT: Your Honor may recall
6 talking about the BBC and the understanding by the
7 Court that the BBC was working with both sides on
8 a documentary.

9 THE COURT: Yes.

10 MS. BREDEHOFT: And, therefore, the BBC
11 was going to run the cameras.

12 THE COURT: Yes.

13 MS. BREDEHOFT: We've conducted an
14 investigation. Nobody on our side is working with
15 them. I just wanted the Court to know that.

16 THE COURT: All right. That's fine.
17 Turns out now that Court TV is going to probably
18 do it.

19 MS. BREDEHOFT: Okay.

20 THE COURT: Because they have much
21 better equipment and know what they're doing.

22 MS. BREDEHOFT: And is it going to be

1 live feed?

2 THE COURT: It sounds like it. I don't
3 know. They're having a meeting. I think IT is
4 meeting tomorrow with Ms. Wong, I think, who is
5 going to be -- who's done other trials before, and
6 I think she's coming to look at the courtroom
7 tomorrow.

8 MS. BREDEHOFT: Okay.

9 THE COURT: So we will have more
10 information but that will put you at ease.

11 MS. BREDEHOFT: That will.

12 THE COURT: See you on Wednesday.

13 MR. CHEW: The 30th.

14 MS. BREDEHOFT: Wednesday, Thursday,
15 Friday. Then you're going to be sick of us.

16 THE COURT: Have a good day.

17 MS. BREDEHOFT: Thank you, Your Honor.

18 (The hearing was adjourned at 11:17
19 a.m.)

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CERTIFICATE OF SHORTHAND REPORTER

I, JUDITH E. BELLINGER, RPR, CRR, the court reporter before whom the foregoing hearing was taken, do hereby certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my direction; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 25th day of March, 2022.

My Commission Expires: September 30, 2024

Judith E. Bellinger

NOTARY PUBLIC IN AND FOR
THE COMMONWEALTH OF VIRGINIA