IN THE

Court of Appeals of Virginia

RECORD NO. 1062-22-4

AMBER LAURA HEARD,
Appellant,

V.

JOHN C. DEPP, II,
Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In 2016, Appellant Amber Heard obtained a domestic violence temporary restraining order against her then-husband, Appellee John C. Depp, II. Two years later, Heard authored an opinion piece ultimately published by the *Washington Post* in which she discussed the public backlash she had experienced after that legal proceeding and advocated for policy changes to support women who report gender-based violence. Heard took great care not to mention Depp or to repeat her prior allegations of abuse by him. But Depp sued Heard for defamation, claiming she had "revived" her 2016 allegations merely by describing the reaction to them.

Instead of suing Heard in California, where both parties lived and where Depp claimed to have suffered reputational harm, Depp sued in Virginia, a wholly inconvenient forum with no connection to Depp or any meaningful connection to his claims. The trial court erroneously refused to dismiss this action on the ground of *forum non conveniens*, based on its mistaken conclusion that Depp's claims arose in Virginia because the *Washington Post*'s servers are located here.

The trial court also erred in overruling Heard's demurrer, in which she argued that the challenged statements are non-actionable expressions of opinion and are not reasonably capable of conveying the alleged defamatory implication. That holding, if allowed to stand, undoubtedly will have a chilling effect on other women who wish to speak about abuse involving powerful men.

This case also should never have gone to trial because another court had already concluded that Depp abused Heard on multiple occasions. After Depp filed this case, the United Kingdom High Court of Justice ruled in a separate defamation action brought by Depp that Heard's abuse allegations were true. The trial court should have given preclusive effect to that 129-page decision, which followed a three-week trial at which Depp, Heard, and 24 other witnesses testified.

Once this case did go to trial, Depp failed as a matter of law to meet his burden to prove actual malice by clear and convincing evidence in two ways. First, he did not demonstrate that Heard was aware of and intended to communicate the alleged defamatory implication that he had abused her. Second, he did not establish that Heard knew the alleged implication was false or subjectively entertained serious doubts about its truth. The trial court erred in declining to set aside the jury verdict and enter judgment in Heard's favor.

As the six-week trial unfolded, the trial court made numerous evidentiary errors that severely prejudiced Heard, both by excluding highly probative evidence and by admitting irrelevant and prejudicial evidence. The trial court further erred by not dismissing one of the challenged statements because the undisputed evidence showed that Heard simply did not publish it.

The trial court then refused Heard's proposed jury instruction on the "communicative intent" prong of actual malice. Consequently, the jury instructions were missing a key requirement for establishing a defamation-by-implication claim.

In addition, the resulting jury verdict against Heard on all of Depp's claims cannot be reconciled with the jury verdict against Depp on Heard's counterclaim. To find in favor of Depp, the jury must have concluded that Depp did not abuse Heard and that Heard knowingly lied in accusing him of abuse. But, to find in favor of Heard, the jury must have concluded that Heard told the truth about being a victim of domestic abuse by Depp. Accordingly, the verdict against Heard cannot stand.

Finally, even if this Court were to disagree with all of the foregoing, the jury's award to Depp of $10 million in compensatory damages and $5 million in punitive damages (statutorily reduced to $350,000) clearly is excessive given the narrow time-frame for which Depp could recover.

ASSIGNMENTS OF ERROR

1. The trial court erred in declining to dismiss the action on the ground of *forum non conveniens*. (Preserved at R77-90, R778-83, R847-57, R874-78.)

2. The trial court erred in denying the supplemental plea in bar and in ruling that the November 2, 2020 judgment of the United Kingdom High Court of Justice, Queen's Bench Division in *Depp v. News Group Newspapers, Ltd., et al.*, Case No. QB-2018-006323, does not foreclose Depp's claims. (Preserved at R10709-41, R11121-33, R23645-64, R23671-77.)

3. The trial court erred in denying the demurrer and plea in bar and in ruling as a matter of law that the three allegedly defamatory statements in the challenged op-ed are (a) actionable as statements of fact rather than non-actionable

expressions of opinion, and (b) actionable as defamation by implication. (Preserved at R1233-42, R3902-06, R23042-48.)

4. The trial court erred in excluding from evidence at trial the November 2, 2020 judgment of the United Kingdom High Court of Justice, Queen's Bench Division in *Depp v. News Group Newspapers, Ltd., et al.*, Case No. QB-2018-006323. (Preserved at R17257-61, R21873-74, R26153-57.)

5. The trial court erred in excluding from evidence at trial (a) medical records reflecting Heard's contemporaneous communications with medical providers such as Dr. Laura Anderson, Dr. David Kipper, Debbie Lloyd, Erin Falati, Dr. Amy Banks, Dr. Connell Cowan, and Dr. Bonnie Jacobs, and (b) Heard's contemporaneous communications with several third parties, including Depp's employees and Heard's employees, friends, and family, about interactions with Depp, including reports of drug use, aggressive and abusive conduct, physical and sexual abuse, and her fear for her safety. (Preserved at R28192-94, R26819-20, R28549.)

6. The trial court erred in admitting irrelevant and unduly prejudicial evidence at trial related to Heard's pledge to donate money to charity and evidence related to Heard's alleged abuse of third parties. (Preserved at R15824-30, R28297-99.)

7. The trial court erred in excluding evidence at trial of Depp's reputation as it existed prior to publication of the challenged op-ed and after the op-ed was published. (Preserved at R25556-60, R26360-61.)

8. The trial court erred in sustaining an objection during the cross-examination of Depp to a question about the truth of one of the allegedly defamatory statements on the ground that it called for a legal conclusion. (Preserved at R25562.)

9. The trial court erred in allowing Depp to argue or suggest at trial that the jury could award damages based on statements or conduct occurring prior to the publication of the challenged op-ed. (Preserved at R15887, R21868-79.)

10. The trial court erred in allowing Depp to argue or suggest at trial, and the jury to consider, whether the allegedly defamatory statements in the challenged op-ed were republications of statements Heard made in 2016 in connection with a domestic violence temporary restraining order she obtained against Depp. (Preserved at R21897-98.)

11. The trial court, which rejected Proposed Jury Instruction CC, improperly instructed the jury on actual malice. (Preserved at R22549, R27776-78.)

12. The trial court erred in denying the motions to strike and to set aside the jury's verdict with regard to Depp's failure to prove publication by Heard of the statement, "I spoke up against sexual violence—and faced our culture's wrath. That has to change." (Preserved at R21885-89, R22135-36, R26508-10, R26516.)

13. The trial court erred in denying the motion to set aside the jury's verdict with regard to Depp's failure to prove that the allegedly defamatory statements in the challenged op-ed each conveyed a defamatory meaning about him by implication and that any such implication was both designed and intended by Heard. (Preserved at R21880-85, R21893-98.)

14. The trial court erred in denying the motions to strike and to set aside the jury's verdict with regard to Depp's failure to prove actual malice by clear and convincing evidence. (Preserved at R21889-93, R22136-37, R26506-10, R26516.)

15. The trial court erred in denying the motion to set aside the jury's verdict and ruling that the jury's verdicts in favor of Depp on his claims against Heard and in favor of Heard on her claims against Depp were not inherently and irreconcilably inconsistent. (Preserved at R21878-80.)

16. The trial court erred in denying the motion to set aside the jury's verdict and upholding the amount of the jury's damages award in light of (a) Depp's failure to prove pecuniary damages, and (b) the excessiveness of the compensatory and punitive damages awards. (Preserved at R21862-78.)

STATEMENT OF FACTS

I. The 2016 Domestic Violence Proceeding

Depp and Heard are actors who first met in 2009. R25112. They married in 2015, R25324, but their marriage was short-lived. In May 2016, Heard filed for divorce and for a domestic violence temporary restraining order against Depp in Los Angeles Superior Court. R248-74. In support, she submitted a declaration describing Depp's temper, paranoia, and substance abuse issues. R254-57. Heard also alleged

that Depp grabbed and pushed her, threw a cell phone at her face, pulled her hair, smashed wine bottles in her vicinity, destroyed her personal property, and threatened her. *Id.* After a hearing, the court granted the restraining order. R276-84.

According to Depp, he lost "[n]othing less than everything" from "the second" Heard applied for the restraining order in 2016. R25222. The accusations were widely reported in the media, and Depp quickly "became associated" with them. R25560-61. Once the divorce became final in January 2017, the parties issued a joint statement confirming, "Neither party has made false accusations for financial gain." R25220.

II. Depp's Lawsuit Against *The Sun*

A British newspaper, *The Sun*, published an article on April 27, 2018, that referred to Depp as a "wife beater" (the "*Sun* Article"). R9938, R10081. On June 13, 2018, Depp sued *The Sun* for libel in the United Kingdom. *Depp v. News Grp. Newspapers*, No. QB-2018-006323 (the "UK Proceeding"). R9937-48. He alleged that the *Sun* Article had "caused serious harm" to his "personal and professional reputation." R9945. *The Sun* asserted the defense of truth, contending that Depp had beaten Heard. R9957.

The parties to the UK Proceeding engaged in full discovery, culminating in a three-week trial with 26 witnesses in July 2020. R9958-60, R9978-80. Although not a party, Heard was an active participant, providing evidence and seven witness

statements, and testifying for four days at trial. R9980, R10002, R11128. Depp had access to 16 months of discovery in this litigation, which he used in the UK Proceeding. R9958-59. On November 2, 2020, the UK court issued a 129-page judgment dismissing Depp's claims against *The Sun* on the basis that Heard's prior allegations of abuse were true (the "UK Judgment"). R9955-10083. Specifically, the UK court found sufficient evidence to establish that at least twelve incidents of abuse had occurred. R10000-78. By March 31, 2021, Depp had exhausted his appeals, leaving the UK Judgment in place. R10089-10105.

III. The Op-Ed

In late 2018, while the UK Proceeding was pending, the American Civil Liberties Union ("ACLU") invited Heard to serve as an ambassador on women's rights and proposed that she author an op-ed advocating for policy changes to protect victims of gender-based violence (the "Op-Ed"). R26004-05, R26018-19, R27009-10. The *Washington Post* published the Op-Ed on its website on December 18, 2018, R32-35, and in print on December 19, R37-38. Heard then posted a link to the online version from her personal Twitter account. R40.

IV. Depp's Lawsuit Against Heard

On March 1, 2019, Depp filed this action, alleging that, although the Op-Ed "never identified him by name," it "revived" the domestic abuse allegations Heard had made in seeking the 2016 restraining order. R1, R3. Depp based his claims on three statements: (1) the headline for the online version, "Amber Heard: I spoke up

against sexual violence—and faced our culture's wrath. That has to change."[1]; (2) "Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out."; and (3) "I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse." R22, R24-25, R27, R32-35.[2]

V. Relevant Pre-Trial Proceedings

Heard initially moved to dismiss on the ground of *forum non conveniens*, which the trial court denied. R65-67, R77-90, R828-38. Heard then filed a demurrer seeking dismissal of all claims, arguing that the challenged statements were not actionable as defamation by implication and that all but one were expressions of non-actionable opinion. R1190-1245. The trial court overruled the demurrer in relevant part. R4501-10.

On August 10, 2020, Heard filed counterclaims against Depp, including defamation claims arising from three statements made by Depp's attorney. R5147, R5194, R5208-09, R5223.

On April 13, 2021, while the parties were engaged in discovery, Heard filed a supplemental plea in bar after the UK Judgment had become final, arguing that

[1] The print version of the Op-Ed had a different headline—"A transformative moment for women"—which Depp did not challenge. R24-25, R38.

[2] Depp originally challenged a fourth statement, R22, which the trial court held was not actionable, R4508, R4510.

Depp should be precluded from re-litigating the UK court's finding that her domestic abuse accusations were true. R9931-35, R9949-10105, R10709-41. The trial court overruled the supplemental plea in bar. R11306-16.

VI. The Trial

On April 11, 2022, the case proceeded to a six-week trial. R24278-28798. Notwithstanding that Depp focused on attacking Heard's credibility and portraying her as a liar, *e.g.*, R24420, the court precluded Heard from introducing documents and other evidence corroborating her accusations, and allowed Depp to admit irrelevant and unduly prejudicial evidence that he further used to attack Heard's character, *e.g.*, R15824-30, R28192-94, R28297-99. At the close of Depp's case, Heard filed a motion to strike the evidence on multiple grounds, which the trial court denied. R22132-38, R26517, R27233.

On June 1, the jury returned a verdict in favor of Depp on all of his claims and in favor of Heard on one of her counterclaims. R21807-19, R28787-89. The jury awarded to Depp $10 million in compensatory damages and $5 million in punitive damages, which the trial court reduced to the statutory cap of $350,000 pursuant to Code § 8.01-38.1, and awarded to Heard $2 million in compensatory damages. R21807.

On July 1, Heard filed post-trial motions on a number of grounds, R21852-21901, which the trial court denied without argument or opinion. R22262-64.

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT DISMISSING DEPP'S CLAIMS PRIOR TO TRIAL

For each of four independent reasons, the trial court should have dismissed this action prior to trial.

A. The Trial Court Should Have Dismissed Depp's Claims On The Ground Of *Forum Non Conveniens* (AOE 1)

This case should never have been tried in Virginia. The record overwhelmingly demonstrated that Virginia had no meaningful connection to Depp's claims and that California was the only appropriate venue.[3] The trial court therefore erred in denying Heard's motion to dismiss the action for *forum non conveniens*, R828-38, and Depp's claims should now be dismissed without prejudice for this reason.

Virginia's *forum non conveniens* statute permits a trial court, "for good cause shown," to

> dismiss an action brought by a person who is not a resident of the Commonwealth without prejudice . . . if the cause of action arose outside of the Commonwealth and if the court determines that a more convenient forum which has jurisdiction over all parties is available in a jurisdiction other than the Commonwealth.

Code § 8.01-265. The trial court's decision is reviewed for abuse of discretion.

[3] By filing in Virginia, Depp presumably sought to avoid California's strong anti-SLAPP law, Cal. Code Civ. Proc. § 425.16, which "has given rise to an early motion practice in California defamation suits that provides a potentially potent weapon for defendants." *Sack on Defamation* § 16:2.3[A].

RMBS Recovery Holdings, I v. HSBC Bank USA, 297 Va. 327, 341 (2019). A court abuses its discretion when it makes an error of law. *Davenport v. Util. Trailer Mfg.*, 74 Va. App. 181, 206 (2022).

Here, the trial court made an error of law in concluding that Depp's defamation claims arose in Virginia rather than "outside of the Commonwealth." R835-36. Had the trial court correctly applied the law in this regard, it then would have been required to consider whether a "more convenient forum" with jurisdiction over both parties was available. Code § 8.01-265. The evidence before the trial court clearly demonstrated that California was such a jurisdiction. But, because of its erroneous legal conclusion, the trial court never even considered the substantial inconvenience and prejudice that litigating in Virginia would impose on Heard. R832-37.

1. Depp's defamation claims arose outside of Virginia

The trial court ruled that Depp's defamation claims arose in Virginia solely because the *Washington Post* uploaded the Op-Ed to the internet via computer servers located in Springfield, Virginia. R835-36. That ruling is inconsistent with Virginia law as applied to internet publications, which dictates that Depp's claims arose in California.

Virginia adheres to the rule of *lex loci delecti*, or "place of the wrong," to determine where a tort cause of action arises. *Gilmore v. Jones*, 370 F. Supp. 3d 630,

644 (W.D. Va. 2019) (citing *Dreher v. Budget Rent-A-Car Sys.*, 272 Va. 390, 395 (2006)). For defamation claims, Virginia courts have defined the place of the wrong "as the state where the content at issue was published." *Id.* Neither the Virginia Supreme Court nor this Court, however, has addressed how that rule applies to defamation claims based on internet publications, which reach an audience in multiple states simultaneously. *Id.*

The trial court incorrectly concluded that publication for purposes of "online, multi-jurisdictional cases occurs when the defamatory statement is uploaded to the internet." R835. To the contrary, "[u]nder Virginia law, a statement is not considered to be published until it is seen or heard by a third party." *Nunes v. CNN*, 31 F.4th 135, 141-42 (2d Cir. 2022) (collecting cases); *see also Food Lion v. Melton*, 250 Va. 144, 150-51 (1995). "[U]ploading content to the internet is not enough to constitute the completed tort of defamation; instead, a third party must also receive and understand the content." *Nunes*, 31 F.4th at 143 n.3. Because the Op-Ed reached readers everywhere at once, the trial court had no basis to find it was published in Virginia rather than in California or elsewhere.

Numerous courts interpreting Virginia law have concluded that the place of the wrong for internet defamation claims is where "plaintiff incurs the greatest reputational injury," which typically is their "home state." *Nunes*, 31 F.4th at 143; *see also Nunes v. WP Co.*, 2021 U.S. Dist. LEXIS 150498, at *19-22 (D.D.C. Aug.

11, 2021); *Gilmore*, 370 F. Supp. 3d at 664-66; *Hatfill v. Foster*, 415 F. Supp. 2d 353, 364-65 (S.D.N.Y. 2006). Here, that state was California, Depp's home, R3,[4] and the trial court abused its discretion in holding that his claims arose in Virginia.

2. Virginia was a completely inconvenient forum

Because the trial court erroneously concluded that Depp's claims arose in Virginia and Heard therefore had not met "the prerequisite to dismiss the case based on *forum non conveniens*," R836, it did not consider whether there was "good cause" to dismiss the action. Good cause includes, but is not limited to, "the avoidance of substantial inconvenience to the parties or the witnesses." Code § 8.01-265.

Had the court analyzed "good cause," it necessarily would have concluded that Virginia was a completely inconvenient forum for this case. None of the conduct relevant to Depp's defamation claims occurred in Virginia. Depp is a resident of California. R3. The incidents that led to Heard obtaining the restraining order took place in California, not Virginia. R93-106. Heard wrote the Op-Ed in California and then sent it to the ACLU in New York. R106. The ACLU provided the Op-Ed to the *Washington Post*, which published it online. *Id.* Heard had no contact with any *Washington Post* employee. *Id.* To the best of her knowledge, Heard had never set foot in Virginia prior to this lawsuit. *Id.* In short, the *Washington Post*'s computer

[4] Indeed, to the extent Depp incurred any reputational injury, that harm occurred in California, not in Virginia. *See, e.g.*, R26360, 26372-74.

server's presence in Springfield is the *only* connection between these claims and Virginia, which means Depp's choice of forum is entitled to little weight. *Norfolk & W. Ry. v. Williams*, 239 Va. 390, 394 (1990). In contrast, both parties and most of the fact witnesses were located in California, with *none* of them located in Virginia. R3-4, R24454, R24571, R24940, R24984, R25076, R26033, R26066, R26337, R26347, R28125, R28166.

Because of this error, Heard suffered substantial prejudice in two ways. First and most significantly, Heard was unable to subpoena any witnesses for the six-week trial and was forced to rely almost exclusively on deposition designations to defend herself. *See RMBS*, 297 Va. at 345 (*forum non conveniens* considerations include "availability of compulsory process for attendance of unwilling witnesses"); *Norfolk*, 239 Va. at 395 (describing "the presentation of deposition testimony" at trial as "a less desirable procedure which deprives the trial judge and jury of the ability to evaluate the witnesses in person"). The lack of compulsory process meant, first, that the only live fact witness Heard was able to call in her defense was her own sister. R27390. Depp, who has considerable resources from his decades as a movie star, was able to call more than fifteen live fact witnesses who voluntarily traveled to Virginia from another jurisdiction or appeared by Webex, many of whom are employed by or otherwise financially linked to Depp. R24454, R24456, R24571-74, R24940-43, R24984, R25076-77, R25588, R25698, R26033-34, R26048-49,

R26066, R26337, R26347-48, R28125-26, R28166-67, R28303, R28386-87. Depp capitalized on that disparity, arguing to the jury: "You may have noticed that no one showed up for Ms. Heard in this courtroom other than her sister. Other than a witness who traveled to Virginia for her as a paid expert. This is a woman who burns bridges. Her close friends don't show up for her." R28683.

Second, the lack of compulsory process prevented Heard from responding as Depp shifted his case. While Depp was able to redirect witnesses and call new, previously undisclosed witnesses in rebuttal, Heard was reliant on video deposition testimony. *E.g.*, R24570, R28107-16.

This is precisely the kind of disadvantage the doctrine of *forum non conveniens* was designed to prevent. *See Norfolk*, 239 Va. at 392. The trial court abused its discretion in denying Heard's motion to dismiss, and this Court should now reverse and dismiss this action without prejudice.

B. The Trial Court Should Have Dismissed Depp's Claims Because The Challenged Statements Are Non-Actionable Expressions Of Opinion (AOE 3(a))

"Expressions of opinion" are "constitutionally protected and are not actionable as defamation." *Hyland v. Raytheon Tech. Servs.*, 277 Va. 40, 47 (2009). Statements that lack a "provably false factual connotation," or "are relative in nature and depend largely upon the speaker's viewpoint are expressions of opinion." *Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 132 (2003). "Whether a statement is an

expression of opinion is a question of law" that is reviewed *de novo*. *Sroufe v. Waldron*, 297 Va. 396, 398 (2019).

The three challenged statements (with the exception of the portion of the headline stating, "I spoke up against sexual violence," which obviously is true) are protected opinion. R21502-04. There is no objective basis for assessing the truth or falsity of whether Heard "felt" or "faced our culture's wrath," whether she is a "public figure representing domestic abuse," or whether she saw "institutions protect men." These statements are relative in nature and reflect Heard's subjective viewpoints. The trial court "violated its essential gatekeeping function" by allowing the jury to consider these "nonactionable opinion statements." *Handberg v. Goldberg*, 297 Va. 660, 671 (2019) (cleaned up).

C. The Trial Court Should Have Dismissed Depp's Claims Because The Challenged Statements Are Not Reasonably Capable of Conveying A Defamatory Implication As A Matter of Law (AOE 3(b), 13)

When a defamation claim is based on the allegation that an otherwise non-actionable statement conveys an actionable implication, "the alleged implication must be reasonably drawn from the words actually used." *Webb v. Virginian-Pilot Media Cos.*, 287 Va. 84, 89 (2014). A plaintiff may plead innuendo to "show how the words used are defamatory, and how they relate to the plaintiff," *id.*, but innuendo cannot "introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain." *Id.* at 89-90; *see also Guide Publ'g*

v. Futrell, 175 Va. 77, 87-88 (1940) ("It is not the province of an innuendo to enlarge the meaning of the alleged slanderous words. Its use is to explain matters already expressly alleged."). Whether a statement is reasonably capable of a defamatory meaning ascribed to it by innuendo is a question of law reviewed *de novo*. *Webb*, 287 Va. at 88-90.

It is undisputed that the Op-Ed does not mention Depp's name or the parties' prior relationship, describe the 2016 restraining order, or discuss Heard's statements or evidence in that proceeding. Rather, the Op-Ed advocates for "changes to laws and rules and social norms" regarding domestic violence and sexual assault, so that "women who come forward to talk about violence receive more support." R38.

Notwithstanding the absence of any express reference to the allegations underlying the 2016 proceeding, Depp's position is that the Op-Ed implies he abused Heard because reasonable readers would understand the words "two years ago, I became a public figure representing domestic abuse" to refer to that proceeding. R1-2, R24420, R24422. Depp contends, in other words, that Heard "revived" her 2016 allegations simply by describing in the Op-Ed *the public backlash she faced* after obtaining the restraining order. R1, R3, R20-21.

Depp's theory of liability "extend[s] the meaning of the words used" beyond recognition. *Webb*, 287 Va. at 90. The reasoning in *Fairfax v. CBS*, 534 F. Supp. 3d 581 (E.D. Va. 2020), *aff'd*, 2 F.4th 286 (4th Cir. 2021), is illustrative. There, the

court considered whether the hosts of a television news program defamed former Lt. Gov. Justin Fairfax while interviewing two women who had accused Fairfax of sexual assault. *Id.* at 584, 592-95. The court concluded that Fairfax had failed to plead defamation by implication because the hosts had not stated that Fairfax "did in fact commit the alleged sexual assaults," and the challenged commentary did "not ascribe to any particular view of the underlying events, but rather" focused "on how persons who believe they are victims of sexual abuse are affected." *Id.* at 593-94.

Similarly, in the Op-Ed, Heard did not recount the events underlying the domestic violence proceeding. Rather, she discussed how women who *allege* domestic violence are treated by society, and she advocated for changes to relevant laws and social norms. To accept, as the trial court did, Depp's assertion that a reasonable reader could understand the Op-Ed to imply that he abused her merely by describing the public reaction to her allegations, would be to create a rule preventing *any* abused person from addressing the societal implications of speaking out about abuse. If that were the law, then it would be actionable in defamation to say, "Four years ago, Christine Blasey Ford became a public figure representing sexual assault." That plainly is not the law.

The trial court's ruling also contravenes the doctrine of judicial privilege. The statements Heard made in the course of obtaining the restraining order were absolutely privileged. *Bryant-Shannon v. Hampton Roads Cmty. Action Program*,

299 Va. 579, 590 (2021). Permitting a claim for defamation by implication premised on a person's published statement about her experiences in the aftermath of a judicial proceeding would substantially undercut the public policy served by the judicial privilege. *See Donohoe Constr. v. Mount Vernon Assocs.*, 235 Va. 531, 537 (1988).

In overruling Heard's demurrer on this issue, the trial court relied primarily on *Pendleton v. Newsome*, 290 Va. 162 (2015), a defamation action brought by the mother of a student who died at school from a peanut allergy. R4501-07. The mother alleged that school officials had made statements to the public and the press in response to the incident implying she was to blame for her child's death. *Pendleton*, 290 Va. at 166-67. For example, an official said that the school's "trained professionals . . . can only be effective if a parent provides information, doctor prescribed health plans and the medicines necessary to carry out those plans. Unfortunately, this does not always occur." *Id.* at 170. The Supreme Court held that these statements were reasonably capable of conveying the defamatory implication the mother alleged. *Id.* at 174-75.

Unlike here, the statements at issue in *Pendleton* were in direct response to questions about the child's death and asserted that a parent's failure to communicate key information about an allergy impedes treatment of allergic reactions. *Id.* at 168-70. Thus, the words used by the defendants readily implied a causal relationship between the child's death and her mother's actions (or inactions). In stark contrast,

the Op-Ed does not refer to Depp or say anything at all about Heard's abuse accusations or the judicial proceeding in which she obtained the restraining order. The trial court improperly allowed Depp to use innuendo "to enlarge the meaning of the alleged slanderous words" in the Op-Ed. *Guide Publ'g*, 175 Va. at 87-88.

In post-trial motions Heard made, R21880-85, and the trial court erroneously rejected, R22262, a related point: The trial court should have held that a plaintiff cannot recover for defamation by implication where the alleged implication is based on statements that are true on their face and involve a public figure or a matter of public concern. *See, e.g.*, *Johnson v. Purpera*, 320 So. 3d 374, 389 (La. 2021) (defamation by implication or innuendo "is actionable only if the statements regard a private individual and private affairs"); *MacDonald v. Brodkorb*, 939 N.W.2d 468, 480-81 (Minn. Ct. App. 2020) (statement about public figure that is true on its face cannot support claim for defamation by implication); *Andrews v. Stallings*, 892 P.2d 611, 618 (N.M. Ct. App. 1995) (same); *Pietrafeso v. D.P.I., Inc.*, 757 P.2d 1113, 1116 (Colo. App. 1988) (same); *De Falco v. Anderson*, 506 A.2d 1280, 1284 (N.J. App. Super. Ct. Div. 1986) (same).[5] This Court should adopt the same rule here, to

[5] Courts in other states have similarly limited claims for defamation by implication by a public figure where the defamatory inference arises from the omission of material facts in the challenged communication. *See Strada v. Conn. Newspapers*, 477 A.2d 1005, 1010-12 (Conn. 1984); *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112, 126 (Mich. 1991).

further the public interest in speech on matters of public concern, including speech about how segments of the public react after someone makes allegations of abuse, and hold that Depp failed to prove defamation by implication because he did not prove that the statements are false on their face.

"[E]nsuring that defamation suits proceed only upon statements which actually may defame a plaintiff, rather than those which merely may inflame a jury to an award of damages, is an essential gatekeeping function of the court." *Sroufe*, 297 Va. at 398. The trial court failed to fulfill that role, and this Court should reverse and dismiss the claims because Depp cannot make out a claim for defamation by implication as a matter of law.

D. The Trial Court Should Have Dismissed Depp's Claims Because The Doctrine Of Issue Preclusion Prevents Re-Litigation Of The UK Court's Ruling that Heard's Abuse Accusations Are Substantially True (AOE 2)

Issue preclusion "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Lee v. Spoden*, 290 Va. 235, 246 (2015) (cleaned up). The public policy underlying the doctrine is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Funny Guy v. Lecego*, 293 Va. 135, 142 n.7 (2017). Put differently, "one adverse

litigative adventure on any one issue is enough for any one litigant." *Lober v. Moore*, 417 F.2d 714, 719 (D.C. Cir. 1969).

To establish issue preclusion, a party must show that the relevant factual issue was "actually litigated in the prior proceeding," that it was "essential to the prior judgment," and that the prior proceeding "resulted in a valid, final judgment against the party against whom the doctrine is sought to be applied." *Lane v. Bayview Loan Servicing*, 297 Va. 645, 654-55 (2019).

In certain circumstances, the party asserting issue preclusion also must show "mutuality," *i.e.*, that the parties to the two proceedings are the same or in privity. *Bates v. Devers*, 214 Va. 667, 671 n.7 (1974). The Virginia Supreme Court has recognized that "the mutuality doctrine should not be mechanistically applied when it is compellingly clear from the prior record that the party in the subsequent civil action against whom collateral estoppel is asserted has fully and fairly litigated and lost an issue of fact which was essential to the prior judgment." *Id.*

The traditional rationale for mutuality does not apply when issue preclusion is asserted defensively, that is, when "the defendant, a stranger to the prior proceeding, attempts to preclude the plaintiff, a party to the former proceeding, from relitigating an issue plaintiff lost in the earlier case." *Norfolk & W. Ry. v. Bailey Lumber*, 221 Va. 638, 641 (1980). Where the plaintiff has already "had his day in court, with the opportunity to produce his witnesses, to examine and cross-examine

the witnesses for the [other side], and to appeal from the judgment," there is no sound reason to allow him a second bite at the apple. *Eagle, Star & British Dominions Ins. v. Heller*, 149 Va. 82, 89 (1927); *see also Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 325 (1971); *Graves v. Associated Transport*, 344 F.2d 894, 901-02 (4th Cir. 1965).

Whether an "issue is precluded by a prior judgment is a question of law" for the appellate court to decide *de novo*. *Lane*, 297 Va. at 653. The UK Judgment meets all of the requirements for non-mutual defensive issue preclusion against Depp, yet the trial court erroneously required mutuality. R11309-12.

There is no dispute that the truth of Heard's abuse allegations was "actually litigated" and "essential to the prior judgment" in the UK Proceeding. *Lane*, 297 Va. at 655. *The Sun* published an article calling Depp a "wife beater," and Depp sued *The Sun* alleging that it defamed him because the abuse allegations were false. R9937-48. In rejecting Depp's claim, the UK court found—based on much of the same evidence presented in this case (*e.g.*, Depp's and Heard's testimony)—that Depp had engaged in at least twelve acts of domestic violence against Heard, causing her to fear for her life. R10000-80. The UK court therefore concluded that the defendants had proved *The Sun*'s description of Depp as a "wife beater" was substantially true. R10078.

There is no question that Depp had a full and fair opportunity to litigate this issue. Depp chose to file a libel suit in the UK predicated on the same abuse allegations that he contends were "revived" by Heard's Op-Ed. R3. Indeed, Depp's UK counsel asserted prior to trial that his client could only be vindicated by a "clear and reasoned judgment" from the UK court. R11179-81. The parties to the UK Proceeding engaged in extensive discovery and motions practice, and Depp also had access to the discovery conducted in this case for 16 months prior to the UK trial. R9958-60. The UK trial included four days each of testimony by Depp and Heard, as well as 24 other witnesses. R9978-80. And, under UK law, Depp faced a much lighter burden of proof on his claims than he did in Virginia: In the UK, the defendants bore the burden of proving the substantial truth of the statements, rather than Depp having the burden of proving them false. R9957, R9960. Yet Depp still lost and then exhausted his appeals. R10085-87, R10089-10105.[6]

In short, Depp "had his day in court" in the UK Proceeding, *Eagle*, 149 Va. at 89, and he should have been precluded from re-litigating the exact same factual issue

[6] The UK Judgment is entitled to comity for purposes of issue preclusion. *See Am. Online v. Nam Tai Elecs.*, 264 Va. 583, 591-92 (2002). UK law is "reasonably comparable" to Virginia law, *Oehl v. Oehl*, 221 Va. 618, 623 (1980)—indeed, as noted, it is more favorable to Depp because he had no burden to prove falsity. Having voluntarily filed suit in a UK court, Depp has no basis to argue that the judgment is not deserving of recognition.

that was decided against him in that action.[7] Accordingly, this Court should reverse and dismiss Depp's claims.

II. THE TRIAL COURT ERRED IN DENYING HEARD'S MOTION TO SET ASIDE THE JURY'S VERDICT BASED ON DEPP'S FAILURE TO PROVE ACTUAL MALICE (AOE 13, 14)

Both under the First Amendment and as a matter of Virginia state law, Depp, as a public figure challenging statements to the public on a matter of public concern, was required to prove by clear and convincing evidence that Heard made each of the challenged statements with "actual malice." *E.g.*, *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 659 (1989); *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); Code § 8.01-223.2. Actual malice is a term of art that means that the defendant either knew her statement was false at the time she published it, or published it with reckless disregard as to its truth—*i.e.*, that she "subjectively entertained serious doubt" regarding its truth but published it anyway. *E.g.*, *Jackson v. Hartig*, 274 Va. 219, 228 (2007).

In defamation-by-implication cases such as this one, establishing actual malice requires making a second showing. Not only was Depp required to show

[7] The trial court also erred in holding that Heard was not in privity with *The Sun* with respect to the factual issue of the truth of her abuse accusations. "[P]rivity exists where a party's interest is so identical with another that representation by one party is representation of the other's legal right." *Lane*, 297 Va. at 655 (cleaned up). During the UK Proceeding, Depp argued that his "effective opponent was Ms. Heard." R10078.

"knowledge of, or recklessness in regard to, the *falsity* of the statement's defamatory meaning," he also was required to demonstrate that "either the defendant intended to communicate the defamatory meaning or knew of the defamatory meaning and was reckless in regard to it." *Kendall v. Daily News Publ'g*, 716 F.3d 82, 90 (3d Cir. 2013).[8] Without this requirement, a defendant could be held liable "for what was not intended to be said," which would "eviscerate[] the First Amendment protections" recognized by the U.S. Supreme Court. *Newton*, 930 F.2d at 681; *see also Saenz*, 841 F.2d at 1318 ("Simply because a statement reasonably can be read to contain a defamatory inference does not mean . . . that the publisher of the statement either intended the statement to contain such a defamatory implication or even knew that the readers could reasonably interpret the statements to contain the defamatory implication . . . .").

Whether the trial record "is sufficient to support a finding of actual malice is a question of law," *Harte-Hanks*, 491 U.S. at 685, and this Court "must make an independent review of the record," *Jordan v. Kollman*, 269 Va. 569, 577 (2005)*; see also Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 (1984) ("Judges . . . must independently decide whether the evidence . . . is sufficient to cross the constitutional

[8] *See also, e.g.*, *Compuware Corp. v. Moody's Invs. Servs.*, 499 F.3d 520, 528 (6th Cir. 2007); *Howard v. Antilla*, 294 F.3d 244, 252 (1st Cir. 2002); *Newton v. NBC*, 930 F.2d 662, 681 (9th Cir. 1990); *Saenz v. Playboy Enters.*, 841 F.2d 1309, 1318 (7th Cir. 1988).

threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'"). Significantly, in deciding this issue, this Court must evaluate the record in light of Depp's burden to prove the two prongs of actual malice by clear and convincing evidence. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986); *Jordan*, 269 Va. at 577. Depp failed to meet that burden, and therefore this Court should reverse and enter judgment for Heard.

A. Depp Failed To Prove By Clear And Convincing Evidence That Heard Was Aware Of And Intended To Communicate The Alleged Defamatory Implications

A person cannot knowingly or recklessly tell a falsehood if she did not intend to, and was not aware that the words she used would be understood to, communicate such a falsehood. The evidence at trial fell far short of establishing by clear and convincing evidence that Heard had the "communicative intent" to accuse Depp of domestic abuse in the Op-Ed. *Kendall*, 716 F.3d at 90. The undisputed evidence showed that the ACLU proposed that Heard author an Op-Ed on "the ways in which survivors of gender-based violence have been made less safe" under the former presidential administration. R26018-19. The ACLU then prepared the initial draft of the Op-Ed. R26019-20, R27010. Heard engaged her attorneys and, based on their advice, made "significant efforts" to remove all references to Depp and their marriage from the draft. R26025; *see also* 26023, R27010-11. As Heard explained, the purpose of the Op-Ed was not to discuss Depp or the particular allegations she

raised in 2016, but, rather, to discuss what happened to her in the public arena *after* she spoke out. R27012-13, R27197-99.

In sum, Depp presented no evidence, much less clear and convincing evidence, that Heard either "intended to communicate" through the Op-Ed that Depp had abused her, "or knew of the defamatory meaning and was reckless in regard to it." *Kendall*, 716 F.3d at 90.[9] Indeed, just the opposite was true. On this basis alone, the jury's verdict cannot stand.

B. Depp Failed To Prove By Clear And Convincing Evidence That Heard Either Knew The Alleged Implication That He Had Abused Her Was False or Subjectively Entertained Serious Doubts About Its Truth

Even if this Court concludes that the record contained clear and convincing evidence that Heard knew, at the time of publication, that the Op-Ed communicated to readers the implication that she was asserting that Depp had abused her, the record contains no evidence that she knew or thought it likely that such a statement was false. Depp failed to carry his burden on actual malice for this separate reason.

[9] For the same reasons, Depp failed to meet his burden of proving at common law that Heard "designed and intended" the alleged implication that he had abused her. *Pendleton*, 290 Va. at 175; Code § 8.01-680 (judgment that is plainly wrong or without evidentiary support must be set aside). Additionally, while Depp argued the Op-Ed referenced the day Heard obtained a restraining order by stating she became a "public figure" two years ago, he failed to prove any implication that he abused her was "reasonably drawn from the words actually used." *Webb*, 287 Va. at 89.

In this regard, it bears emphasis, "there is a significant difference between proof of actual malice and mere proof of falsity." *Bose*, 466 U.S. at 511. Depp cannot prevail merely by proving that the abuse did not occur. Rather, to establish actual malice by clear and convincing evidence, he was required to offer "affirmative evidence" that Heard did not believe he had abused her or entertained serious doubts about whether he had done so. *Anderson*, 477 U.S. at 257; *see also Palin v. N.Y. Times*, 588 F. Supp. 3d 375, 401 (S.D.N.Y. 2022). There is no such evidence.

Depp alleged that the Op-Ed falsely implied that Heard was a victim of "domestic abuse" by him. *E.g.*, R19-20; *see also* R4505 (trial court's identification of alleged defamatory meaning as "Mr. Depp abused Ms. Heard"). Because actual malice is a subjective standard, whether Heard believed Depp abused her must be judged by her own state of mind. *See Harte-Hanks*, 491 U.S. at 688; *Bose*, 466 U.S. at 511 n.30; *Gertz v. Robert Welch*, 418 U.S. 323, 334 n.6 (1974).

Heard testified unequivocally that she believed Depp had abused her physically, verbally, emotionally, and psychologically. *See, e.g.*, R28530. Depp and his expert witness conceded that abuse can take many forms, including verbal, emotional, and psychological. *See* R25291, R25543, R25714, R25737. And the trial

record contains considerable undisputed evidence supporting the proposition that Heard, at the time of publication, believed that Depp had abused her.[10] For example:

- Depp demanded that Heard cut him with a knife and threatened to cut himself in her presence when she refused to comply. R25360-61, Def. Ex. 586A.
- Depp engaged in violent behavior in Heard's vicinity on multiple occasions, including kicking cabinets and doors, smashing glasses, punching a light fixture, and toppling racks of clothing in her closet and throwing one rack down a staircase. R25316, R25351-52, R26341, R46422-26, Def. Ex. 638.
- Depp exhibited jealous and controlling behavior toward Heard, such as accusing her of infidelity and promiscuity (including in messages written around the house with his own blood) and forbidding her from acting in movies or having meetings. R25197, R25316, R25318, R25338, R25345, R46332, R46407.
- Depp admitted to head-butting Heard, though he claimed it was unintentional. R25347, Def. Ex. 587A.

[10] The record also contains many other examples of *disputed* evidence of abuse. But the Court need not even consider those to appropriately conclude that the trial court should have struck the jury verdict for Depp's failure to prove actual malice.

- Depp told Heard on one occasion, "I left last night, honestly, I swear to you, because I just couldn't take the idea of more physicality, more physical abuse on each other." R26682.

Importantly, even if the jury could properly have concluded that these undisputed facts *did not* constitute "abuse" (and a reasonable jury could not have done so), Depp presented no evidence that undercut Heard's testimony that she *believed* this conduct amounted to abuse. Consequently, Depp failed to meet his burden on the second prong of actual malice, and the Court should enter judgment in Heard's favor for this independent reason.

III. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL FOR MULTIPLE REASONS

For each of the several independent reasons set forth above, this Court should reverse the judgment in favor of Depp and either enter judgment in favor of Heard or dismiss Depp's claims without prejudice. If, however, this Court disagrees with all of the foregoing, then, at a minimum, this Court should reverse and remand for a new trial, again for multiple independent reasons.

A. The Trial Court Made Numerous Evidentiary Errors That Severely Prejudiced Heard At Trial

This Court reviews a trial court's admission or exclusion of evidence for abuse of discretion. *Norfolk & Portsmouth Belt Line R.R. v. Wilson*, 276 Va. 739, 743 (2008). The trial court's numerous erroneous evidentiary rulings prevented the jury from receiving evidence highly probative of the truth of the implication Depp alleged

the Op-Ed conveyed, and of Heard's lack of actual malice, while also permitting the jury to receive irrelevant and unduly prejudicial evidence used by Depp to attack Heard on purely collateral matters. Each of these evidentiary errors standing alone would warrant a new trial and, considered cumulatively, clearly mandate reversal. *See United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009) (explaining that two or more individually harmless errors have potential to prejudice defendant to same extent as single reversible error if multiple errors so fatally infect trial as to violate fundamental fairness).

1. The trial court erred by excluding evidence of Depp's abuse and Heard's state of mind (AOE 5)

Long before Heard sought a restraining order in 2016, Heard made numerous contemporaneous statements to third parties about Depp's abusive conduct. Instead of permitting the jury to consider this critical evidence, the court excluded it based on an erroneous application of Virginia hearsay law. Statements about Depp's abuse, made years prior to any potential litigation, were essential to the jury's consideration of the facts and Heard's credibility, especially given that Depp made Heard's credibility the linchpin of his case.

a. *Heard's reports of abuse to medical providers plainly were admissible*

From 2011 to 2016, Heard sought treatment from several medical professionals as the result of her volatile and violent relationship with Depp. A number of these professionals documented Heard's contemporaneous statements

about Depp's abuse in medical records. The trial court, however, excluded this evidence as hearsay, R28192-94, which Depp then used as both a shield and a sword. Not only did Depp convince the court to preclude Heard from presenting relevant, admissible evidence to corroborate her claims, but Depp then weaponized that exclusion, arguing to the jury that such evidence *did not exist*: "Ms. Heard has told you that she has mountains of evidence of abuse, but there are no medical records reflecting she sustained any injuries from this abuse she claims." *See* R28635. That statement is unequivocally false. The trial court had wrongly excluded those very "mountains" of medical records created from 2011 to 2016.

Virginia's hearsay rule precludes introduction of an out-of-court statement offered to prove the truth of the matter asserted *only if* the statement does not fall within one of the recognized exceptions to the rule. *See* Rule 2:801. One exception is for statements made for purposes of "medical diagnosis or treatment." Rule 2:803(4); *see also Curtis v. Stafford Cnty. Dep't of Soc. Servs.*, 2022 Va. App. LEXIS 467, at *21-22 (Ct. App. Sept. 27, 2022) (medical and psychological records that included victim's statements were properly admitted under this hearsay exception).[11] The trial court should have admitted Heard's statements to medical providers under this exception.

[11] Medical records are admissible under the business records exception to hearsay. *Arnold v. Wallace*, 283 Va. 709, 713 (2012) (referencing Rule 2:803(6)).

Separately, the trial court should have admitted Heard's prior statements about Depp's abuse as non-hearsay assertions offered to prove Heard's state of mind. It is black-letter law that statements admitted as evidence of an individual's state of mind are not hearsay. *See Pounds v. Bd. of Trs.*, 2000 U.S. App. LEXIS 11037, at *23 (4th Cir. May 12, 2000) ("A statement that is offered to prove state of mind is not hearsay" because it is not offered for its truth). Because of Depp's burden to prove actual malice, *see supra* Section II, Heard's subjective state of mind regarding whether abuse occurred was a primary issue in the case. Thus, evidence that she subjectively believed she was a victim of abuse was critical. *See, e.g.*, *Serv. Steel Erectors v. Int'l Union of Operating Eng'rs*, 219 Va. 227, 235-36 (1978) (finding error where excluded statements were offered to show state of mind); *Wright v. Commonwealth*, 2010 Va. App. LEXIS 108, at *12 (Ct. App. Mar. 23, 2010) (affirming admission of statements not offered for truth but to show defendant's state of mind).[12]

[12] The trial court also erred when it excluded a May 24, 2014 text exchange between Heard and her father in which Heard reported Depp's abusive conduct and asked for help. R26818. These messages were offered to show Heard's subjective belief that abuse had occurred. Additionally, the court erred by excluding Heard's statements to Katherine James, in which Heard reported that Depp "was worse than ever." *See* R26819-20. Heard sought the admission of this text to show her state of mind and to impeach James' deposition testimony that Depp played at trial. Rule 2:806. The trial court wrongly excluded it.

Here, the trial court improperly prevented the jury from considering several separate instances in which Heard reported Depp's abuse to a medical professional:

- From 2011 to 2014, Heard was treated by clinical psychologist Bonnie Jacobs. *See* R21186-21251. Dr. Jacobs' contemporaneous medical records show Heard repeatedly reported Depp's abuse. For example: (1) in August 2012, Heard reported Depp was in a rage, accused her of cheating, and threw a glass by her head, R21206; (2) in September 2012, Heard reported Depp was violent and "ripped her nightgown[,] threw her on bed. Tried to have sex but couldn't get erection. Became more angry [sic]," R21210; and (3) on November 15, 2012, Heard reported "sometimes J[ohnny] becomes verbally & sexually abusive after spending time w/father," R21213.
- From 2014 to 2016, Heard was treated by psychologist Connell Cowan. R20965. Dr. Cowan's records reflect that in December 2015, Heard reported that Depp was physically abusive and "that he started the physicality—pushed her down." R20972, R21098.
- From 2014 to 2016, Heard sought treatment from nurse Erin Falati for injuries caused by Depp. *See* R20785-20845. Falati's notes reflect that, on December 16, 2015, Heard reported that Depp head-butted her, R20811, and, on May 21, 2016, Heard reported that Depp hit her in the face, R20838.
- In 2015 and 2016, Heard and Depp saw Laurel Anderson, a clinical psychologist

who was treating them. *See* R20449-20527. During therapy sessions, Heard reported that Depp slapped her, hit her in the head, pulled her hair, and kicked her in the leg, causing her bruises. *See, e.g.*, *id*.

- In 2015 and 2016, Amy Banks, a clinical psychologist, treated Heard and Depp. R20942-44. In a joint session, Heard discussed Depp's violence, which he did not contradict. R20955.[13]

These statements, which were made long before Heard would have had any motive to fabricate allegations of abuse, each should have been admitted as statements made for the purpose of obtaining medical treatment for both emotional distress and physical injuries,[14] as well as statements showing Heard's state of mind.

Moreover, each of these statements about Depp's abuse, whether made to medical professionals, friends, or family, also should have been admitted for the independent reason that they are prior consistent statements. Rule 2:801(d)(2) ("[a]

[13] This statement should have been admitted for the independent reason that it constitutes Depp's admission by silence. "A declaration in the presence of a party to a cause becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth; for if he is silent when he ought to have denied, there is a presumption of acquiescence." *Sanders v. Newsome*, 179 Va. 582, 592 (1942).

[14] Dr. Kipper and Debbie Lloyd, Heard's and Depp's physician and nurse, also wrongfully were precluded from testifying that Depp worked himself up into a rage and tried to fight Heard while Depp was going through substance abuse withdrawal in August 2014. R20546, R20618, R41600, R41623. Heard also reported to Dr. Kipper that Depp pushed her. R20600.

prior statement that is consistent with the hearing testimony of the witness is admissible for purposes of rehabilitating the witness's credibility"); *Graham v. Danko*, 204 Va. 135, 138 (1963) ("Ordinarily, proof of statements made by a witness out of court cannot be received to corroborate his testimony [but] such statements may be admitted where the credibility of the witness has been assailed on the ground that his story is a recent fabrication or that he has some motive for testifying falsely."). Once Depp attacked Heard's credibility and accused her of fabricating her allegations of abuse, the trial court should have permitted Heard to introduce these prior consistent statements.

If not reversed, the trial court's exclusion of contemporaneous reports of domestic abuse to medical professionals will make it more difficult for other abuse victims to prove allegations of abuse, and likely deter them from coming forward.

b. *The trial court wrongly excluded corroborating testimony of Heard's allegations*

The court improperly excluded a text exchange in which Depp's agent, his personal assistant Stephen Deuters, corroborated Heard's allegations of abuse on a flight from Boston to Los Angeles. R27817-25. "[A] statement by the party's agent or employee, made during the term of the agency or employment, concerning a matter within the scope of such agency or employment," is an exception to the hearsay rule. Rule 2:803(0); *see also Davenport*, 74 Va. App. at 213 (exclusion of

statement made by employee "concerning a matter within the scope of his employment" was reversible error).

On May 25, 2014, Deuters sent a text message to Heard stating, "When I told [Depp] he kicked you he cried." R20448. Deuters sent Heard this message after Depp told Deuters to "smooth whatever issue" existed with Heard by texting Heard and telling her "whatever she needs to hear." R20415, R20416. The trial court should have admitted this evidence as a party-opponent admission because Deuters was an agent of Depp, and Depp specifically instructed Deuters to communicate with Heard regarding the altercation. Given Depp's attacks on Heard's credibility, this text message was critically important.

2. The trial court improperly excluded the UK Judgment (AOE 4)

Prior to trial, Heard opposed Depp's motion in limine to exclude the UK Judgment, R17258, and during trial, Heard sought to admit the Judgment after Depp opened the door to the evidence on numerous occasions. *See*, *e.g.*, R25095-96 ("I had to wait for my opportunity to address the charges . . . and, so, today is my . . . first opportunity that I've been able to speak about this case in full for the first time."). While the trial court allowed references to the UK Proceeding, it precluded the jury from learning about the outcome. *See, e.g.*, R22746, R26360-61. Admitting the UK Judgment would not have been unfairly prejudicial to Depp, but its exclusion unfairly prejudiced Heard in at least two ways.

First, the court's decision to allow Depp to refer to the UK Proceeding without explaining the outcome left the jury with the mistaken impression that the outcome of the trial was favorable to Depp when, in fact, the UK court found that Depp had abused Heard on at least twelve different occasions. *See supra* Section I.D. Depp promoted this misperception throughout the trial. While testifying, the court permitted Depp to read into the record the title of an article: "Johnny Depp was the victim of abuser Amber Heard, London's High Court told." R27205. Similarly, Depp's damages expert testified that Depp brought the UK Proceeding to clear his name, which served to mislead the jury about the outcome of that proceeding. R26379-80.

Second, as more fully described in Section III.5 below, the *Sun* Article that precipitated the UK Proceeding, Depp's decision to file the UK lawsuit, the trial and significant media attention, and the UK Judgment finding that Depp had in fact abused Heard undoubtedly negatively impacted Depp's reputation. Nonetheless, Heard was precluded from presenting the jury with this highly relevant evidence regarding damages. *See Weatherford v. Birchett*, 158 Va. 741, 747 (1932) (evidence of poor reputation is relevant to mitigate damages). Because of the prejudicial impact to Heard, and given Depp's false and misleading testimony, the trial court erred by excluding evidence of the UK Judgment.

3. The trial court erred when it precluded Depp from answering a question about the truth of one of the allegedly defamatory statements (AOE 8)

Depp alleged that Heard defamed him by falsely writing in the Op-Ed, "I became a public figure representing domestic abuse." R22. On cross-examination, Heard's counsel sought to ask Depp whether that specific statement was accurate. R25562. Despite the fact that Depp was required to prove the falsity of this statement as an essential element of his claim, *Jordan*, 269 Va. at 576, the trial court precluded him from answering the question on the ground that it called for a "legal conclusion." R25562. This was an abuse of discretion.

Rule 2:704(a) allows testimony on an ultimate issue unless the testimony calls for an opinion that constitutes a conclusion of law. Whether a statement of fact is true or false is not a conclusion of law. *Hyland v. Raytheon Tech. Servs.*, 277 Va. 40, 48 (2009) ("[W]hether an allegedly defamatory statement is false ordinarily presents a factual question to be resolved by a jury.").

Heard clearly was prejudiced by this error. Depp's testimony that this statement was accurate—*i.e.*, not false—would have required entry of judgment for Heard on that particular claim. *See Hatfill v. N.Y. Times*, 488 F. Supp. 2d 522, 533-34 (E.D. Va. 2007) (granting summary judgment to defendant newspaper because plaintiff failed to "carry his burden of proving the material falsity of any of these statements as a matter of law."), *aff'd*, 532 F.3d 312 (4th Cir. 2008); *Jordan*, 269

Va. at 576 ("the plaintiff in a defamation action has the burden of proving that the statement is false").

4. The trial court erroneously admitted irrelevant and prejudicial evidence (AOE 6)

In at least two instances, the trial court admitted irrelevant and unduly prejudicial evidence that had nothing to do with this case, but allowed Depp to attack Heard's character. Evidence that is "not relevant is not admissible." Rule 2:402; *see also Boggs v. Commonwealth*, 199 Va. 478, 486 (1957) ("[E]vidence must relate and be confined to matters in issue, and it must tend to prove or disprove these matters or be pertinent to them. . . . [E]vidence of collateral facts or those incapable of affording any reasonable presumption or inference . . . cannot be accepted in evidence."). In addition, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or its likelihood of confusing or misleading the trier of fact. Rule 2:403.

"[E]vidence regarding specific instances of conduct of a witness, when allowed, normally is limited to cross-examination for impeachment purposes; extrinsic evidence related to those acts is not allowed." *Commonwealth v. Durham*, 91 Va. Cir. 470, 477 (2016). "The reason underpinning this rule is that the admission of evidence of specific acts, and the rebuttal evidence which would follow, injects collateral issues into the case which would divert the jury's attention from the real issue . . . ." *Wynne v. Commonwealth*, 216 Va. 335, 356-57 (1975); *see also Lambert*

v. Commonwealth, 9 Va. App. 67, 71-72 (1989) (noting that the collateral issues rule precludes a party from calling witnesses to impeach a witness's character).

a. *The trial court committed reversible error when it admitted extrinsic evidence of Heard's pledge to donate money to charity*

The trial court committed reversible error when it admitted irrelevant and unfairly prejudicial evidence related to a purely collateral issue—Heard's pledge to donate proceeds of her divorce settlement to charity in 2016. R22735. While a party has significant flexibility to cross-examine a witness and impeach her, *Scott v. Commonwealth*, 18 Va. App. 692, 693-94 (1994), the Virginia Rules of Evidence limit a party's ability to introduce extrinsic evidence to attack a witness's credibility. *See* Rule 2:608(b) ("specific instances of the conduct of a witness may not be used to attack or support credibility; and . . . specific instances of the conduct of a witness may not be proved by extrinsic evidence.").

The trial court improperly permitted Depp to introduce extrinsic evidence about Heard's pledge to donate $7 million to the ACLU and the Children's Hospital to attack her character and integrity. R28190-91. The pledge, which was announced two years prior to the publication of the Op-Ed, was not relevant to Depp's defamation claims and was unduly prejudicial. Indeed, Depp not only used this evidence during cross-examination of Heard, but he introduced collateral evidence, including witness testimony from representatives of the ACLU and Children's Hospital about the pledge, for only one purpose—to prejudice the jury against Heard

and paint her as a liar who only wanted public praise. *See, e.g.*, R27047 ("And that's because you wanted the entire world to think that you were donating every penny of the $7 million divorce settlement as soon as you received it from Mr. Depp; isn't that right?"); R27053 ("So as of today, you have not donated, paid, $7 million of your divorce settlement to charity, right . . . [a]nd that's because you did want something . . . [y]ou wanted Mr. Depp's money."); R28633-34 ("Lies. That is Ms. Heard's narrative, lies upon lies."). The testimony created a mini-trial on what Heard donated, what her intent was, and whether she intends to fulfill the remaining pledge. Again, none of this related to the Op-Ed or whether Depp abused Heard. *See Va. Vermiculite v. W.R. Grace & Co.*, 2000 U.S. Dist. LEXIS 14273, at *32-33 (W.D. Va. Aug. 14, 2000) (excluding evidence of prior donation as "evidence could have an extremely unfair, prejudicial effect on" defendant).

b. ***The trial court committed reversible error when it admitted extrinsic evidence of Heard's alleged domestic abuse more than a decade earlier***

The trial court also allowed improper impeachment of Heard when, in rebuttal, Depp presented testimony of Beverly Leonard, a police officer purportedly present when Heard was arrested in 2009. R28297-99. The court clearly erred when it admitted this evidence on an entirely collateral issue. *See id.*, R22737.

During cross-examination, Depp asked Heard about domestic abuse he alleged she engaged in during a prior relationship. R27221. Heard denied the allegation. *Id.* That should have been the end of it. *See Lambert*, 9 Va. App. at 71-

72. However, the court permitted Depp to call Leonard, a former police officer, to testify that, in 2009, she saw Heard acting aggressively toward her then-partner, grabbing her partner and pulling her partner's necklace from her neck. R28386. Permitting extrinsic evidence of an incident that occurred nine years prior to the publication of the Op-Ed violated Rule 2:608(b) and allowed Depp to paint Heard as a bad person. *See United States v. Ling*, 581 F.2d 1118, 1122 (4th Cir. 1978) (holding that lower court committed reversible error when it allowed extrinsic evidence on collateral issue to impeach defendant's credibility).

The court's decision to admit Leonard's testimony regarding an incident that occurred nine years before publication of the Op-Ed served no legitimate purpose.

5. The trial court's evidentiary rulings encouraged the jury to award damages unrelated to the Op-Ed (AOE 7)

The trial court's erroneous evidentiary rulings also left the jury without crucial evidence regarding Depp's reputation, and therefore prevented the jury from accurately assessing any harm proximately caused by the Op-Ed. First, the trial court erroneously excluded as hearsay articles relevant to Depp's reputation prior to the publication of the Op-Ed, R25556-59. The articles, however, were not hearsay, as Heard sought to admit them not for the truth of the matters asserted in the articles, but to show the state of Depp's public *reputation* prior to the publication of the Op-Ed. R26360-61; *see Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d

1072, 1079 (3d Cir. 1985) (evidence of prior or contemporaneous publications is admissible to mitigate compensatory damages).[15]

Second, the trial court excluded relevant evidence related to the UK Proceeding, including the *Sun* Article and the UK Judgment. At a minimum, the jury should have been permitted to determine whether it was appropriate to apportion any claimed reputational damages between the Op-Ed and the *Sun* Article. *See id.*; *Hartman v. Am. News*, 171 F.2d 581, 585-86 (7th Cir. 1948) (upholding admission of prior and contemporaneous articles to mitigate damages because the defendant could not be held liable for injuries that it did not cause). Indeed, the trial court agreed that this evidence was relevant, R26155, but it nevertheless precluded Heard from introducing the *Sun* Article, the UK Judgment, and published media reports

[15] The headlines of these articles included, but were not limited to: "Johnny Depp: Friends And Family Seriously Concerned About Him. Here's Why," "Johnny Depp: A Star in Crisis and the Insane Story of His Missing Millions," "Johnny Depp reportedly drank heavily and was constantly late on the new 'Pirates' movie set," "Johnny Depp's Financial Woes Might Sink the *Next Pirates of the Caribbean*," "Where did it all go wrong for Johnny Depp? After a string of flops and a ton of bad press, Johnny Depp's star power looks as wobbly as Jack Sparrow on a plank," "Johnny Depp allegedly showed up drunk to movie premiere, reports say," "The Trouble with Johnny Depp: Multimillion-dollar lawsuits, a haze of booze and hash, a marriage gone very wrong, and a lifestyle he can't afford, inside the trials of Johnny Depp," "Vodka for breakfast, 72-hour drug binges and spending Sprees that beggar belief: ALLISON BOSHOFF reveals why Hollywood's reeling over what's being called 'Johnny Depp's career suicide note,'" and "How can JK Rowling be 'genuinely happy' casting wife beater Johnny Depp in the new Fantastic Beasts film." R25559-60, R26361.

regarding the UK Proceeding. R25543, R26360-61. Similarly, by precluding Heard from admitting the UK Judgment, the jury was left with a false impression about Depp's reputation. Because of the UK Proceeding and the significant corresponding media attention, by November 2, 2020, the world already saw him as a domestic abuser. Nonetheless, the trial court kept that critical information from the jury.

Given Depp's claim that the Op-Ed caused him significant reputational harm, it was critical that the jury hear relevant information regarding his baseline reputation. *See, e.g.*, *Poulston v. Rock*, 251 Va. 254, 262 (1996) ("We have said that one with an unblemished reputation is entitled to more damages when subjected to defamatory statements than one whose reputation is 'little hurt' by the statements"); *Stubbs v. Cowden*, 179 Va. 190, 200 (1942) ("The effect of bad reputation is to reduce the damage inflicted."). Because of the trial court's decisions, Heard was prevented from establishing that Depp could not have been harmed by publication of the Op-Ed because he already had a terrible reputation.

Thus, while the jury was allowed to hear testimony of Depp's harm as far back as 2016, the jury was not able to fully assess the reputational harm unrelated to Heard's Op-Ed or the impact of a judgment that found Depp to have committed acts of domestic abuse, including sexual violence. As discussed more fully below, *infra* Section III.E, the impact of this error was compounded by the separate error in permitting Depp to claim damages based on conduct unrelated to the Op-Ed,

including the 2016 restraining order. All of this resulted in an indefensible $10 million compensatory damage verdict and $5 million punitive damage verdict—a verdict that demands reversal.

B. The Trial Court Erred By Not Dismissing The Claim Based On The Headline For The Web Version of The Op-Ed Because The Evidence Established That Heard Did Not Publish It (AOE 12)

The trial court erred by not striking evidence or setting aside the jury's verdict based on Depp's failure to prove a required element of one of his claims—that Heard published the challenged headline of the online version of the Op-Ed: "I spoke up against sexual violence—and faced our culture's wrath. That has to change." R22262, R26517.[16]

Publication by the *defendant* is an essential element of a claim for defamation. *Pendleton*, 290 Va. at 175; *Schaecher v. Bouffault*, 290 Va. 83, 91 (2015). In reviewing a trial court's denial of a motion to strike evidence or set aside a jury verdict, this Court considers "whether the evidence presented, taken in the light most favorable to the plaintiff, was sufficient to support the jury verdict." *Parson v. Miller*, 296 Va. 509, 524 (2018).

The undisputed evidence established that the *Washington Post* drafted and posted the headline without Heard's knowledge. R26025, R27011. Heard testified

[16] The trial court denied Heard's motion in limine to exclude and redact the headline. R15822-24, R22734.

that she did not notice the headline when she tweeted a link to the Op-Ed. R27199-27200. Thus, there is no evidence that Heard published the headline. Indeed, Depp effectively conceded this, his theory being that Heard republished the headline when she later tweeted a hyperlink to the Op-Ed. R22207-10. But courts consistently have held that providing a hyperlink does not constitute republication, even in a tweet that favorably references the article. *See, e.g.*, *Lokhova v. Halper*, 995 F.3d 134, 143 (4th Cir. 2021) ("a mere hyperlink, without more, cannot constitute republication"); *In re Phila. Newspapers*, 690 F.3d 161, 175 (3d Cir. 2012) ("Publishing a favorable reference with a link on the Internet" does "not republish the article").[17] There is simply no evidence that Heard published or republished the headline.

Thus, the trial court erred in two ways. First, the trial court's refusal to exclude the headline from evidence led to the introduction of irrelevant and prejudicial evidence and arguments about whether Depp had committed "sexual violence" against Heard (a phrase that does not appear in the challenged portions of the Op-Ed

[17] *See also, e.g.*, *Clark v. Viacom Int'l*, 617 F. App'x 495, 506 (6th Cir. 2015) ("run-of-the-mill hyperlinks . . . typically demonstrate neither the intent nor the ability to garner a wider audience than the initial iteration of the online statement could reach"); *Landino v. Mass. Teachers Ass'n*, 2022 U.S. Dist. LEXIS 141278, at *13 n.2 (D. Mass. Aug. 9, 2022) ("the majority of courts that have squarely addressed whether a hyperlink constitutes republication have concluded that it does not"); *Crosswhite v. Reuters News & Media*, 2021 U.S. Dist. LEXIS 246628, at *9 (W.D. Va. Dec. 28, 2021) (tweet that "merely refers to the article" hyperlinked is not a republication).

authored by Heard), as opposed to other forms of "abuse" (the word that Heard did use), thus infecting the jury's verdict as a whole. *E.g.*, R26373, R27199, R28642, R28681-82. Second, because the jury awarded to Depp $10.35 million for all three challenged statements together, R21807-15, there is no way to know how much of the award is attributable to the headline that Heard did not publish.

The only remedy for these errors is to grant a new trial on both liability and damages. But, at a minimum, this second error requires a new trial on damages.

C. The Trial Court Improperly Instructed The Jury On Actual Malice (AOE 11)

The trial court refused Heard's Proposed Jury Instruction CC, which set forth the "communicative intent" prong of actual malice that Depp was required to prove by clear and convincing evidence for his defamation-by-implication claims. *Kendall*, 716 F.3d at 90; *see supra* Section II.A; R21405, R27776-78. As a result, the instructions given to the jury on actual malice were missing this crucial component of the standard, and a new trial on liability therefore is required.

The trial court gave two jury instructions defining actual malice. Instruction AA addressed only the falsity prong of actual malice. R21512. Instruction BB correctly clarified that actual malice is not established by "ill-will or hatred." R21513. Heard's Proposed Jury Instruction CC, which the trial court refused, addressed the "communicative intent" prong of actual malice that must be established when, as here, the claim is for defamation by implication: That is, the

jury should have been instructed that it also "must find by clear and convincing evidence that Ms. Heard either intended to communicate the defamatory implication or knew of the defamatory implication and was reckless in regard to it." R21405.

When considering whether a jury instruction was properly refused, the evidence is viewed in the light most favorable to the proponent of the instruction. *Hancock-Underwood v. Knight*, 277 Va. 127, 130 (2009). "If a proffered instruction finds any support in credible evidence, its refusal is reversible error." *Schlimmer v. Poverty Hunt Club*, 268 Va. 74, 78 (2004).

As explained above, *supra* Section II.A, Depp presented no evidence that Heard either "intended to communicate" through the Op-Ed that he had engaged in domestic abuse "or knew of the defamatory meaning and was reckless in regard to it." *Kendall*, 716 F.3d at 90. To the contrary, the evidence showed that Heard made "significant efforts" to eliminate any such innuendo. R26025. The trial court's improper refusal of Proposed Jury Instruction CC requires reversal of the judgment and remand for a new trial. *Schlimmer*, 268 Va. at 79-80.

D. The Jury Verdicts Are Inherently and Irreconcilably Inconsistent (AOE 15)

Jury verdicts that are "irreconcilably inconsistent . . . cannot stand." *Roanoke Hosp. Ass'n v. Doyle & Russell*, 215 Va. 796, 804 (1975). If there is no "reasonable way" to "harmonize" the verdicts based on the evidence presented at trial, a new trial

should be granted. *Zhao v. Am. Orient Grp.*, 2014 Va. Unpub. LEXIS 1, at *8 (Sup. Ct. Jan. 10, 2014).

To reach the verdict against Heard on Depp's claims, the jury necessarily found that Heard had not been abused by Depp and that she knowingly lied in stating that he had abused her. *See* R21812-15. Yet, at the same time, to reach the verdict in favor of Heard on one of her own defamation claims against Depp, the jury necessarily found that Heard did *not* lie about being a victim of domestic abuse at the hands of Depp, specifically during the May 21, 2016 incident preceding the restraining order. *See* R8389, R21817. As Depp argued prior to trial:

> [T]his case . . . involves two, essentially-mirror image defamation claims asserted against the only two people who truly know whether the statements at issue are true or false. If Mr. Depp did not abuse Ms. Heard, she indisputably knows her claim that he did is false. If Mr. Depp did abuse Ms. Heard during their brief marriage, he knows that Mr. Waldman's statements calling Ms. Heard a liar are false."

R15545. Thus, the trial court erred in declining to set aside the jury's verdict against Heard on the ground that it is inherently and irreconcilably inconsistent with the verdict against Depp. R21878-80, R22262. The judgment against Heard should be reversed and the case remanded for a new trial on Depp's claims for this reason. *Roanoke Hosp. Ass'n*, 215 Va. at 804.

E. The Jury's Damages Award Is Excessive (AOE 9, 10, 16)

The Virginia Supreme Court has instructed that "courts have the duty to correct a verdict that plainly appears to be unfair or would result in a miscarriage of

justice." *Poulston*, 251 Va. at 258. Setting aside a jury verdict is necessary when the award is "so excessive that it shocks the conscience . . . creating the impression that the jury was influenced by passion, corruption, or prejudice," when "the jury has misconceived or misunderstood the facts or the law," or when "the award is so out of proportion to the injuries suffered as to suggest that it is not the product of a fair and impartial decision." *Id.*; *see also Smithey v. Sinclair Refining*, 203 Va. 142, 147 (1961) ("If the size of the verdict bears no reasonable relation to the damages disclosed by the evidence, it is manifestly unfair."). A trial court's denial of a motion to set aside the verdict as excessive is subject to review for abuse of discretion. *Poulston*, 251 Va. at 258-59.

Depp's damages are limited to the narrow period between the publication of the Op-Ed and the issuance of the UK Judgment—December 18, 2018 to November 2, 2020. *See* R24844-45, R26158 (Depp represented he would not seek damages for after November 2, 2020). Depp failed to prove any pecuniary damages resulting from the Op-Ed during that time, and he did not seek emotional distress damages, leaving reputational harm as his only possible source of damages. The jury's verdict of $10 million in compensatory damages is grossly disproportionate to any reputational harm the Op-Ed could have caused during that small window.

First, there is no evidence upon which the jury could rely to determine that Depp suffered any pecuniary loss because of the Op-Ed. Depp principally claimed

that he lost a role in "Pirates of the Caribbean 6" ("Pirates 6") because of the Op-Ed, but the trial record does not support such a conclusion. As an initial matter, Depp failed to establish that he actually had the opportunity to act in Pirates 6 and then lost it. He did not have a written contract for the film. R26359, 26375. Even before the Op-Ed was published, the media reported that Depp would not be in the film, R25225, and his agent testified that Disney was "noncommittal" about giving Depp the role, R26359. At any rate, Depp testified that he would not have agreed to play a role in Pirates 6 even for "$300 million and a million alpacas." R25225-26.

Depp also did not prove that he lost the opportunity to appear in Pirates 6 because of the Op-Ed. Disney's corporate representative testified that no decision-maker within the company had ever said they would not cast Depp because of the Op-Ed. R27586. Nor did Depp present any evidence that he lost other opportunities because of the Op-Ed. For example, Depp still has an endorsement deal with Dior, which began in 2015. R26375.

Given that the jury could not have awarded Depp damages for any pecuniary losses based on the evidence at trial, and Depp never sought emotional distress damages, the only damages the jury could possibly have awarded were for general reputational harm. Even for non-pecuniary damages, however, a jury still must "award damages that resulted only from the defendant's wrong, and not from other causes." *Gazette v. Harris*, 229 Va. 1, 41 (1985).

The trial court improperly admitted evidence that encouraged the jury to award damages for conduct unrelated to Heard's Op-Ed, specifically evidence of reputational harm stemming from Heard's 2016 restraining order. *See* R22741-42. Depp's trial theme was a plea for the jury, through its verdict, to rectify the damage Depp suffered as a result of the restraining order:

> On May 27th, 2016, Ms. Heard walked into a courthouse in Los Angeles, California to get a no notice ex parte restraining order against Mr. Depp, and in doing so, ruined his life by falsely telling the world that she was a survivor of domestic abuse at the hands of Mr. Depp. Today, on May 27th, 2022, exactly six years later, we ask you to give Mr. Depp his life back by telling the world that Mr. Depp is not the abuser Ms. Heard said he is, and hold Ms. Heard accountable for her lies.

R28628. These sentiments permeated the entire trial. According to Depp, when Heard obtained the restraining order, he lost "[n]othing less than everything." R25222. He explained, "when the allegations were made, when the allegations were rapidly circling the globe, telling people that I was a drunken, cocaine-fueled menace who beat women, suddenly in my 50s, it's over. You know, you're done." *Id.*

In fact, Depp's testimony began with an explanation of why he brought this case: "About six years ago, Heard made some quite heinous and disturbing, brought these certain criminal acts against me that—that were not based in any species of truth." R25095. Depp also testified that after the public became aware of the restraining order, the bad news about him was "multiplying throughout media, throughout social media as well[.]" R25218. Even Depp's expert, Doug Bania, who

Depp retained to analyze the impact of the allegations on Depp's reputation, R26384, could not say that Depp's reputation or public image were affected by the Op-Ed as opposed to the events in 2016. R26391.

Because Depp improperly was allowed to suggest that the jury could award damages based on statements Heard made prior to the publication of the Op-Ed, and the jury was not informed of the outcome of the UK Proceeding, *supra* Section III.A.2, the jury's damage award is wholly out of proportion to the reputational damage Depp actually could have sustained as a result of the Op-Ed. *See Gazette*, 229 Va. at 48. It is clear from the size of the compensatory damages award that the jury intended to award damages not just for the Op-Ed, but for all of the negative publicity that Depp had received since Heard first accused him of abuse in 2016 and continuing after the UK Judgment. That is an impermissible basis for damages in this case. *See Webb*, 287 Va. at 90; *Thomas v. Psimas*, 101 Va. Cir. 455, 463-64 (Norfolk Cir. Ct. Jan. 17, 2019).

At a minimum, the jury's excessive damages verdict should be reversed and the case should be remanded for a new trial on damages.

CONCLUSION

For the foregoing reasons, Heard requests that this Court reverse the judgment against her and either (a) enter judgment for her or dismiss Depp's claims without prejudice, or (b) remand for a new trial.

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Respectfully submitted,

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CERTIFICATE

I hereby certify on this 23rd day of November, 2022, pursuant to Rules 5A:1 and 5A:19, that this Opening Brief of Appellant has been filed via VACES with the Court of Appeals of Virginia. This same day, an electronic copy of the brief was served on counsel listed below via email.

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Counsel for the Appellant further certifies that this brief complies with the October 18, 2022 Order of the Court of Appeals of Virginia granting a fifty-five page Opening Brief.

Counsel for the Appellant requests oral argument.

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