In The
Court of Appeals of Virginia

RECORD NO. 1072-22-4

JOHN C. DEPP, II,

***Appellant*,**

v.

AMBER LAURA HEARD,

***Appellee*.**

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal arises from a six-week jury trial on competing claims for defamation. Appellant John C. Depp, II ("Mr. Depp") alleged that Appellee Amber Laura Heard ("Ms. Heard") defamed him by implying, in an op-ed in the *Washington Post* (the "Op-Ed"), that he had abused her during their relationship and brief marriage.

By Counterclaim, Ms. Heard alleged that one of Mr. Depp's attorneys, nonparty Adam R. Waldman, Esq. ("Mr. Waldman"), defamed her in three statements (collectively, the "Waldman Statements") to the United Kingdom tabloid the *Daily Mail*, claiming that Ms. Heard's claims of abuse were false.[1] She alleged that Mr. Depp was vicariously liable for his attorney's statements.

Mr. Depp filed a motion for summary judgment on the single-count Counterclaim. [R. 14303-14, 15454-64]. On March 24, 2022, the trial court denied Mr. Depp's motion. [R. 24206-47; 24243-47; 16881-83]. The case was tried from April 11, 2022 through May 27, 2022. On May 24, 2022, at the end of Ms. Heard's case, Mr. Depp made a motion to strike her claims, which was denied, and Mr. Depp renewed such motion on May 26, 2022, which was also denied. [R. 20175-87,

[1] Ms. Heard's Counterclaim originally alleged three claims against Mr. Depp. [Record on Appeal ("R.") 5145-46]. Mr. Depp filed a demurrer and plea in bar to the Counterclaim, R. 6256-74, which the trial court largely granted. It dismissed two of the counts entirely, leaving a single count for defamation based on three Waldman Statements. [R. 8384-93].

28098-107, 28531]. On May 27, 2022, the jury retired to deliberate. On June 1, 2022, it returned its verdict, which overwhelmingly favored Mr. Depp. [R. 28784-90].

The jury found that Ms. Heard defamed Mr. Depp in the Op-Ed and awarded Mr. Depp $10 million in compensatory and $5 million in punitive damages.[2] On the Counterclaim, the jury found in Mr. Depp's favor on two of three Waldman Statements, but in favor of Ms. Heard on the third Waldman Statement. That is the only statement at issue in this appeal.

On June 24, 2022, the trial court entered judgment on the jury's verdict.[3] [R. 21807-19]. Mr. Depp timely noted his appeal on July 22, 2022. [R. 22601-04].

INTRODUCTION

The jury's emphatic favorable verdict on all three defamatory statements alleged in his Complaint fully vindicated Mr. Depp and restored his reputation. Indeed, Mr. Depp prevailed in the trial court on virtually all material issues, and the verdict of the jury and judgment of the trial court represent an intelligent and well-reasoned decision on the merits after a full and fair trial and should be largely (though not entirely) affirmed. However, the trial court was confronted with a

[2] Per Code § 8.01-38.1, the trial court reduced the punitive damages award to the statutory cap of $350,000, for a total judgment of $10,350,000. [R. 21807-08].

[3] On July 1, 2022, Ms. Heard filed a 42-page post-trial motion asking the trial court to set aside the verdict on Mr. Depp's claims, which the court denied on July 13, 2022. That motion is not relevant to this appeal.

number of novel and complex legal and factual issues, and although the trial court decided the vast majority of those issues sensibly and correctly, a few rulings were erroneous.

Mr. Depp does not appeal the verdict on his claim, nor does he appeal the verdict in his favor on two of the three Waldman Statements. His appeal relates solely to the Waldman Statement on which Ms. Heard prevailed, a statement in a *Daily Mail* article dated April 27, 2020 ("April 27 Waldman Statement"). The judgment in Ms. Heard's favor on that lone statement is erroneous.

Ms. Heard's claim was fatally flawed and the trial court should have granted Mr. Depp's motion for summary judgment and his motion to strike the evidence, for three reasons:

First, Mr. Depp cannot be held liable for Mr. Waldman's statements as a matter of law. Ms. Heard sought to hold Mr. Depp liable for the April 27 Waldman Statement on a pure theory of vicarious liability, contending that Mr. Depp was liable merely because Mr. Waldman had been retained by Mr. Depp as his attorney and was therefore his agent. But as a matter of law, Mr. Waldman is an independent contractor, whose allegedly tortious conduct is not automatically attributable to Mr. Depp. Indeed, a wealth of authorities supports limiting a client's liability for allegedly tortious conduct by an attorney, and the Court should impose that same limit here.

Second, because Ms. Heard proceeded against Mr. Depp at trial on a purely vicarious theory of liability, she was required to present evidence that *Mr. Waldman* committed each element of the tort of defamation, including that he acted with actual malice. No evidence of Mr. Waldman's actual malice was presented at trial, so the judgment against Mr. Depp cannot be sustained.

Third, the April 27 Waldman Statement, viewed in context, is a non-actionable statement of opinion insufficient to support a claim for defamation.

In addition to erroneously denying Mr. Depp's motion for summary judgment and motion to strike, the trial court also erred in (1) excluding from evidence the complete *Daily Mail* articles containing the Waldman Statements and (2) refusing to give jury instructions as to Mr. Waldman's status as an independent contractor.

ASSIGNMENTS OF ERROR

(1) **The trial court erred by denying: Mr. Depp's Motion for Summary Judgment as to Ms. Heard's Counterclaim; and (2) Mr. Depp's Motion to Strike the Evidence as to Ms. Heard's Counterclaim.**

a. Mr. Waldman is an independent contractor, and Mr. Depp is not liable for Mr. Waldman's allegedly tortious conduct as a matter of law.
b. Ms. Heard failed to present any clear and convincing evidence that Mr. Waldman made the Counterclaim Statements with actual malice.
c. The Waldman Statements are not actionable statements sufficient to support a claim for defamation.

Preserved: Mr. Depp's Memoranda to Sustain Demurrer, Plea in Bar to all Counterclaims [R. 6256-74; 6878-85], which motion the parties argued before the trial court on October 16, 2020 [R. 23267-92] and the

trial court denied on January 4, 2021 with respect to the three statements that ultimately formed the basis for the Counterclaim at trial [R. 8384-93]; Mr. Depp's Memoranda in Support of Motion for Summary Judgment regarding Counterclaim [R. 14303-14; 15454-64], which motion the parties argued and the trial court denied on March 24, 2022 [R. 24206-47] as further reflected in the trial court's order [R. 16881-83]; Mr. Depp's Memorandum in Support of Motion to Strike [R. 20175-87], which motion the trial court denied after argument on May 24, 2022 [R. 28098-107] and May 26, 2022 [R. 28531].

(2) **The trial court erred in refusing Mr. Depp's Proposed Jury Instruction Nos. 22, 23, and 24, as to whether Mr. Waldman was acting as an independent contractor when he made the Waldman Statements.** Preserved: Mr. Depp's Proposed Jury Instruction Nos. 22-24 [R. 21402-04], which the trial court denied on May 20, 2022 [R. 27727-28].

(3) **The trial court erred in excluding from evidence the full, unredacted versions of Mr. Depp's Exhibit Nos. 881A, 881B, and 881C, which are copies of the news articles in which the Waldman Statements appeared, instead admitting only redacted versions that showed the Waldman Statements out of context.** Preserved: Mr. Depp's Exhibit Nos. 881A, 881B, and 881C, copies of which Ms. Heard attached to her Counterclaim as exhibits F, G, and H [R. 5186-223], which Mr. Depp argued should be admitted in their entirety [R. 27209; 27542-43].

STATEMENT OF FACTS

A. The Waldman Statements

In connection with her Counterclaim, Ms. Heard contended at trial that Mr. Waldman, acting as Mr. Depp's agent, defamed her in three statements to the United Kingdom tabloid the *Daily Mail*.

The first Waldman Statement was quoted in a *Daily Mail* article, dated April 8, 2020, and stated that Ms. Heard had used "fake sexual violence allegations" and

promoted "sexual violence hoax 'facts.'" [R. 5187-5198]. That article also contained a general discussion of the dispute and litigation between Mr. Depp and Ms. Heard,[4] and quotes from attorneys adverse to Mr. Depp. [R. 5194]. The jury did not find this statement to be defamatory.

The second Waldman Statement was quoted in a June 24, 2020, *Daily Mail* article [R. 5213-23] and stated that Ms. Heard's allegations were a "hoax." [R. 5223]. That article also included a quote from Ms. Heard's attorneys that, "[w]e believe Amber and we believe in Amber," [R. 5223], and a summary of both Mr. Depp's and Ms. Heard's sides of the dispute. The jury did not find this statement to be defamatory either.

The April 27 Waldman Statement – the *sole* statement on which the jury found in Ms. Heard's favor – is contained in a *Daily Mail* article, dated April 27, 2020, with the headline "EXCLUSIVE: 'I need to report an assault.' Listen to 911 call made the night Johnny Depp and Amber Heard had blowout fight that ended their toxic 18-month marriage – but both claim tape backs up their version of events." ("April 27 Article") [R. 5199]. The April 27 Article describes a recording of a phone call to the police on the night of May 21, 2016, a date on which Ms. Heard alleged

[4] The article noted, for instance, Ms. Heard's "lurid 300-page filing . . . cataloging the 'horrific' abuse she claims to have suffered at Mr. Depp's hands." [R. 5191].

Mr. Depp threw a phone at her and roughed up their apartments at the Eastern Columbia Building.

The April 27 Article comments that "[Heard's] attorney says phone records and police department logs vindicate Heard's account of the final shocking episode of domestic violence she endured before filing for divorce," whereas "Depp's legal team say this recording does the precise opposite, however, by raising discrepancies in the various accounts Heard and her allies have given of the notorious dust up." [R. 5203]. It details Ms. Heard's various allegations about the abuse she claims to have suffered on May 21, 2016, [R. 5205-06], noting that "[t]he domestic violence case ultimately fizzled when the two LAPD officers who responded to the 8:27 pm call, Melissa Saenz and Tyler Hadden, said they never found any evidence of a crime." [R. 5207-08]. The April 27 Article further states that "Depp's lawyer Adam Waldman said the various discrepancies proved that nothing Heard and her friends said about the events of May 21, 2016 could be considered credible." [R. 5208]. It sets out Mr. Waldman's purportedly defamatory statement:

> "Quite simply this was an ambush, a hoax. They set Mr. Depp up by calling the cops but the first attempt didn't do the trick . . . . The officers came to the penthouses, thoroughly searched and interviewed, and left after seeing no damage to face or property. So Amber and her friends spilled a little wine and roughed the place up, got their stories straight under the direction of a lawyer and publicist, and then placed a second call to 911." [R. 5208-09].

The April 27 Article also includes quotes from Mr. Waldman that Ms. Heard did not include in her defamation claim: "But even this didn't have the desired effect because two domestic abuse-trained LAPD police would later provide a pair of sworn depositions saying they saw no evidence of a crime. These lies about who made the calls and when are just the tip of the iceberg as the evidence will show in court." [R. 5209-10]. Finally, it presents a contrary view, quoting Ms. Heard's attorneys at the time: "Heard's legal team rejected those allegations as 'fantasies.' 'Mr. Depp's representations about the 911 calls on the night of May 21, 2016 are false, and Mr. Depp and his lawyers should know better,' said her attorney, Roberta Kaplan. 'All of the evidence – including sworn testimony from multiple witnesses, phone records, and police department logs – are consistent with the truthful account given by [a witness favorable to Ms. Heard].'" [R. 5210].

B. Evidence Relating to the Waldman Statements at Trial

Ms. Heard presented no evidence at trial that Mr. Depp was personally involved in directing or making any of the three Waldman Statements. Indeed, Mr. Depp testified that he had never even seen the Waldman Statements prior to the filing of the Counterclaim in August of 2020. [R. 28326-27].

Mr. Waldman has a professional license, is the owner and managing member of his own law firm, and provides legal services to his clients. [R. 27558-59]. Mr. Waldman was retained by Mr. Depp in October 2016 and still represented Mr. Depp

at the time of his trial testimony, but Mr. Depp is not his only client. [R. 27543-44, 27558]. Mr. Waldman's relationship with Mr. Depp is solely one of attorney-client [R. 27544], and he has represented Mr. Depp in various litigation matters, including his litigation against Ms. Heard. [R. 27547]. Mr. Waldman testified that, while he believed he had some knowledge of the conduct of Mr. Depp and Ms. Heard, he never personally witnessed any interactions between them prior to his retention in October of 2016, which was after their separation. [R. 27546].

Mr. Waldman testified that he made each of the Waldman Statements. [R. 27551-54]. Ms. Heard did not present any evidence on whether or why Mr. Waldman believed each of his specific statements. In response to a more general inquiry about Ms. Heard's allegations, however, Mr. Waldman testified at length on why he believed that Ms. Heard's allegations against Mr. Depp were false, describing physical evidence and identifying multiple witnesses whose testimony he believed contradicted her allegations. [R. 27555-56]. Mr. Waldman also testified that he had filed a claim with the Los Angeles Police Department ("LAPD") against Ms. Heard for perjury due to her claims that Mr. Depp abused her, and that he presented them with information that established her perjury. [R. 27557-58].

ARGUMENT

1. The Trial Court Erred in Denying Mr. Depp's Motion for Summary Judgment and Motion to Strike the Evidence

Standard of Review

In reviewing a ruling on a motion for summary judgment or motion to strike, the Court normally considers the relevant portions of the record in the light most favorable to the nonmoving party and draws reasonable inferences in favor of the nonmoving party. *Jackson v. Hartig*, 274 Va. 219, 229 (2007) (summary judgment); *Egan v. Butler*, 290 Va. 62, 73 (2015) (motion to strike). However, "an appellate court in Virginia, on the issue of punitive damages or where [actual malice] must be proven, must independently decide whether the evidence in the record on appeal is sufficient to support a finding of *New York Times* 'actual malice' by clear and convincing proof." *Gazette, Inc. v. Harris*, 229 Va. 1, 19 (1985) (quoting *Bose v. Corp. v. Consumer Union of U.S., Inc.*, 466 U.S. 485, 511 (1984)).

In addition, questions of law are subject to de novo review. *Turner v. Caplan*, 268 Va. 122, 125 (2004). Whether an allegedly defamatory statement is "an actionable statement of fact or non-actionable opinion is a matter of law to be determined by the court" and is reviewed de novo. *Jordan v. Kollman*, 269 Va. 569, 576-77 (2005). Under most circumstances, whether a person "is an employee or an independent contractor is generally a question of fact for the jury" but where, as here, "the evidence admits of only one conclusion, the question is a matter of law"

that is reviewed de novo. *McDonald v. Hampton Training Sch. for Nurses*, 254 Va. 79, 87 (1997).

Discussion

A. Mr. Waldman Is An Independent Contractor

Ms. Heard presented no evidence at trial that Mr. Depp was personally involved in directing or making the Waldman Statements. Instead, she chose to pursue a pure vicarious liability claim against Mr. Depp, contending that he was liable for Mr. Waldman's allegedly defamatory statements simply because Mr. Waldman was his attorney. Ms. Heard's proposed jury instructions on her Counterclaim, which the trial court adopted and gave to the jury, were based solely on a vicarious liability theory and did not require a finding of any conduct by Mr. Depp in connection with the Waldman Statements. [R. 21467-21469]. That claim fails on a threshold issue: whether, as a matter of law, Mr. Depp can be held liable for the intentional tort of defamation, based solely on statements made by his attorney, on a pure agency theory.

In the context of vicarious liability, Virginia has long recognized the distinction between servants and independent contractors and follows the well-established rule that a principal is generally not liable for the tortious conduct of an independent contractor. *Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 334 (2005) (recognizing that "[i]n Virginia, the doctrine of *respondeat superior* imposes tort

liability on an employer for the negligent acts of its employees, *i.e.*, its servants, but not for the negligent acts of an independent contractor," and declining to adopt an exception to this rule for the tortious actions of an independent contractor who was an ostensible or apparent agent). "The theory on which the master is held liable for his servant's conduct is based on the right of the master, actual or potential, to control that conduct and to see to it that negligent acts which cause injury to others do not occur." *Griffith v. Electrolux Corp.*, 176 Va. 378, 397 (1940). "If the relation between them does not give the employer that power, then he should not be held responsible for an occurrence over which he had no control." *Id.* In assessing whether a person is an independent contractor, courts consider four factors: "(1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power to control the work of the individual." *McDonald*, 254 Va. at 81. "The fourth factor, the power to control, is determinative." *Id.*

Mr. Depp has not been able to identify any Virginia Supreme Court authority squarely considering the specific issues of (1) whether an attorney retained in connection with litigation is an independent contractor, and (2) whether the principle limiting liability for conduct of an independent contractor applies in the principal-agent context, specifically with respect to the attorney-client relationship. Notably, the Virginia Supreme Court has cited with apparent approval the Restatement's

approach, which limits liability of a principal for the actions of a non-servant agent. *Sanchez*, 270 Va. at 304-305.

However, although other jurisdictions are not uniform, the majority rule, and the rule that should be adopted by the Court, is that an attorney retained by a client for litigation, though undoubtedly an agent of the client in the litigation, nonetheless stands in the capacity of a *non-servant* agent, *e.g.*, an independent contractor, and, therefore, the client is generally not vicariously liable for the lawyer's misconduct, absent exceptions to the general rule that are not present here. Although the authorities are not unanimous, most other jurisdictions that have considered the issue have concluded that attorneys retained in litigation act as independent contractors – and those jurisdictions have, accordingly, imposed limits on clients' liability for tortious acts by their attorneys. *See, e.g.*, *McDevitt v. Wells Fargo Bank, N.A.*, 946 F. Supp. 2d 160, 171 (D.D.C. 2013) ("the weight of authority provides that a client generally is *not* vicariously liable for its attorney's torts, absent evidence that the client directed, controlled, authorized, or ratified the attorney's allegedly tortious conduct"); *King v. Dalton*, 895 F. Supp. 831, 842 (E.D. Va. 1995) ("a law firm attorney working with a client is nonetheless an independent contractor and not an employee of the client corporation"); *Lynn v. Superior Ct.*, 180 Cal. App. 3d 346, 349 (Cal. Ct. App. 1986) ("independent counsel retained to conduct litigation in the courts act in the capacity of independent contractors"); *Plant v. Trust Co. of*

Columbus, 310 S.E.2d 745, 746 (Ga. App. 1983) ("Under traditional master-servant law, the attorney was an independent contractor…. We think the unique attorney-client relationship should not be analyzed merely with reference to ordinary agency law. A general retention of an attorney to do all things necessary to pursue a claim or defense should in legal contemplation mean the attorney has authority to do all things legal and proper; not otherwise. We will not presume a direction or authority or permission to commit a tortious or illegal act inheres in the usual attorney-client relationship."); *Horwitz v. Holabird & Root*, 816 N.E.2d 272, 279 (Ill. 2004) ("when, as here, an attorney acts pursuant to the exercise of independent professional judgment, he or she acts presumptively as an independent contractor whose intentional misconduct may generally not be imputed to the client"); *Baldassare v. Butler*, 625 A.2d 458, 464-65 (N.J. 1994) ("there is a vast difference between an employee agent and a non-employee agent. [T]he non-employee agent is, generally, nothing else but an independent contractor…. Attorneys generally are not subject to their clients' actual control or direction"); *Feliberty v. Damon*, 527 N.E.2d 261, 264-65 (N.Y. 1988) (treating law firm retained by insurance company as independent contractor); *Brown v. Lumbermens Mut. Cas. Co.*, 369 S.E.2d 367, 371 (N.C. Ct. App. 1988) (concluding that a law firm "was an independent contractor whose negligence, if any, is not imputed to [the insurance company that retained it]"); *Bradt v. West*, 892 S.W.2d 56, 76-77 (Tex. Ct. App. 1994) ("the mere fact that an agency

relationship existed between the client-appellees and the attorney-appellees does not mean that the client-appellees would automatically be liable for any tortious conduct….. Unless a client is implicated in some way other than merely being represented by the attorney alleged to have committed the intentional wrongful conduct, the client cannot be liable for the attorney's conduct").

There are sound reasons why multiple jurisdictions have concluded that vicarious liability should have a limited application in the context of the attorney-client relationship. Lawyers, as legal professionals, typically are not subject to their clients' control with respect to the manner in which they provide their services. If clients cannot control the details of their attorneys' work, it makes little sense that clients should nonetheless be held accountable for their attorneys' tortious actions. *See, e.g.*, *Baldassare*, 625 A.2d at 465 ("Attorneys generally are not subject to their clients' actual control or direction. Indeed, most clients have an attorney because they are unfamiliar with the law and want an attorney to guide them through the intricacies of that field. As professionals, attorneys are deemed responsible for their own acts, and, as in this case, most clients have legal recourse against the attorney and his law firm for their actions"). Although a lawyer is subject to the client's direction with respect to the goal of the representation, it is the lawyer who has wide discretion as to the means by which those goals are achieved.

In every American jurisdiction, including Virginia, a lawyer is required to exercise independent professional judgment and is subject to independent professional and ethical obligations. *See, e.g.*, Va. Rules of Prof. Conduct (VRPC), Rules 1.2 ("[a] lawyer shall abide by a client's decisions concerning the objectives of representation… and shall consult with the client as to the means by which they are to be pursued") and 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice"). Further, a lawyer is prohibited from advancing frivolous arguments on behalf of a client, VRPC Rule 3.1, and a lawyer has a duty of candor to the Court and is permitted to refuse to present evidence on behalf of a client that the lawyer "reasonably believes is false," VRPC Rule 3.3. A lawyer is, in sum, required to exercise professional expertise beyond that of the typical client. *See* VRPC Rule 1.1 ("[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").

There are, accordingly, substantial limitations on the client's ability to control the activities of the lawyer. In any case, the typical client, who generally lacks legal expertise, cannot monitor the conduct of a lawyer for wrongful activity. As a client's agent, a lawyer's conduct may be binding on the client with respect to positions taken in litigation or in a business transaction, but to hold the client liable for an

attorney's intentional tort goes a step too far and is fundamentally inconsistent with the logic behind independent contractor principles of limited liability. *See, e.g.*, *Sanchez*, 270 Va. at 334.

Here, the evidence established that Mr. Waldman was retained by Mr. Depp to act as his attorney, and that he acted in that capacity in several litigation matters, including in the initial stages of Mr. Depp's litigation against Ms. Heard. [R. 27543-44; 27547]. Other facts that underline Mr. Waldman's role as an independent contractor only are that he is the managing partner of his own firm, has clients other than Mr. Depp, and offers legal services to other clients. [R. 27558-59].

Ms. Heard presented no evidence that Mr. Depp was personally involved in directing or making the Waldman Statements. In fact, the uncontroverted evidence was that Mr. Depp never even saw the Waldman Statements prior to seeing Ms. Heard's Counterclaim in August 2020. [R. 28326-27]. Accordingly, the premise of Ms. Heard's Counterclaim is that Mr. Depp is liable for the Waldman Statements for no other reason than that Mr. Waldman is his attorney. No one appears to dispute that Mr. Waldman did not act in any capacity for Mr. Depp other than as his attorney. [R. 27544-45, 275447]. As Mr. Depp's attorney, Mr. Waldman should be considered an independent contractor whose tortious activity, if any, cannot be imputed to Mr. Depp without some other proof of direction or control.

The uncontroverted evidence established that Mr. Waldman was only an independent contractor for Mr. Depp. As a matter of law, therefore, Ms. Heard cannot hold Mr. Depp liable for any of the Waldman Statements, and the trial court erred in denying Mr. Depp's Motion to Strike the Counterclaim.

B. Ms. Heard Presented No Evidence of Mr. Waldman's Actual Malice

Even if the Court were to conclude that Mr. Depp could be held liable for Mr. Waldman's allegedly tortious conduct, the trial court nonetheless erred in denying Mr. Depp's Motion for Summary Judgment and Motion to Strike because Ms. Heard failed to present evidence to establish one of the required elements of defamation. Specifically, Ms. Heard failed to present evidence that Mr. Waldman acted with actual malice when he made the April 27 Statement.

As noted above, Ms. Heard chose to pursue a theory of vicarious liability against Mr. Depp at trial. She did not ask the jury to find that Mr. Depp was directly involved in making the Waldman Statements, nor did she present any evidence that would permit that conclusion. Vicarious liability is "liability for the tort of another person." *See*, Dobbs, et al., *Dobbs' Law of Torts* § 425 (2d ed.); *see also*, *Hughes v. Doe*, 273 Va. 45, 48 (2007) ("the crux of *respondeat superior* liability is a finding that the employee was negligent"). A vicarious claim therefore cannot proceed against an employer or principal absent a showing that the agent or employee committed a tort. *Parker v. Carilion Clinic*, 296 Va. 319, 332 n.3 (2018)

("[v]icarious liability is liability for the tort of another person . . . . It necessarily follows that a claimant cannot make out a vicarious liability claim against an employer without first proving that the employee committed a tort within the scope of his employment") (alteration in original) (quoting *Dobbs' Law of Torts* § 425); *see also Mobil Oil Corp. v. Bransford*, 648 So.2d 119, 121 (Fla. 1995) ("if the agent cannot be held liable, neither can the principal, because there is nothing to impute"). As a natural consequence, "[i]t is well settled in Virginia that where master and servant are sued together in tort, and the master's liability, if any, is solely dependent on the servant's conduct, a verdict for the servant necessarily exonerates the master." *Roughton Pontiac Corp. v. Alston*, 236 Va. 152, 156 (1988); *Wintergreen Partners, Inc. v. McGuireWoods, LLP*, 280 Va. 374, 378 (2010).

Because a principal cannot be vicariously liable for his agent's tort unless the agent committed all elements of the tort in the first place, Mr. Depp cannot be vicariously liable for Mr. Waldman's alleged tort unless Ms. Heard carried her burden of proving that Mr. Waldman committed every element of defamation: "(1) publication of (2) an actionable statement with (3) the requisite intent." *Schaecher v. Bouffault*, 290 Va. 83, 91 (2015). With respect to the requisite intent, a

plaintiff who is a public figure, such as Ms. Heard,[5] must prove that a false and defamatory statement was made with "actual malice," *i.e.*, subjective "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

"In order to establish actual malice, a plaintiff must demonstrate by clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Jackson*, 274 Va. at 228 (quoting *Jordan*, 269 Va. at 577). Importantly, actual malice is a subjective standard that examines the actual beliefs of the person publishing the defamatory statement at issue. Consequently, actual malice "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Rather, "[t]here must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication." *Id.* (emphasis added); *see also*, *Shenandoah Pub. House, Inc. v. Gunter*, 245 Va. 320, 324 (1993) ("the evidence must establish that the defendant had a high degree of awareness of

[5] No one has disputed that Ms. Heard is a public figure who must meet the actual malice standard, as she is a well-known actress whose activities are widely reported in the media (including in the very *Daily Mail* articles that form the basis of her Counterclaim). Indeed, Ms. Heard's proposed jury instructions regarding Ms. Heard's Counterclaim, which were ultimately given without objection or appeal by Ms. Heard, set forth the actual malice standard. [R. 21467-69].

probable falsity"). Thus, for instance, a mere failure to reasonably investigate the truth of one's words is not enough to establish actual malice because it does not establish subjective knowledge of falsity. Indeed, "in the context of the actual malice inquiry, a duty to investigate the accuracy of one's statements does not arise until the publisher of those statements has a high degree of subjective awareness of their probable falsity." *Jackson*, 274 Va. at 230.

Thus, to succeed on her defamation claim against Mr. Depp, Ms. Heard was required to establish by *clear and convincing evidence* that, when Mr. Waldman made the Waldman Statements, he either knew that they were false, or he subjectively had a high degree of awareness that they were probably false. *Shenandoah Pub. House*, 245 Va. at 325. "Clear and convincing evidence" is "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Judicial Inquiry & Review Comm'n of Virginia v. Waymack*, 284 Va. 527, 534-35 (2012). On review, appellate courts "must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Shenandoah Pub. House*, 245 Va. at 325.

Ms. Heard presented *no evidence*—much less clear and convincing evidence—that Mr. Waldman made the April 27 Statement with actual malice. Indeed, with respect to the April 27 Waldman Statement, Ms. Heard presented no

evidence regarding whether Mr. Waldman believed his statements to be true or false.[6]

All evidence adduced at trial pertaining to Mr. Waldman's state of mind when he made the Waldman Statements shows that Mr. Waldman believed these statements were true. Mr. Waldman testified at length, for example, about why he believed that Ms. Heard's allegations of abuse were false, citing testimony from multiple witnesses that contradicted Ms. Heard's account of events, including discrepancies in Ms. Heard's own story. [R. 27555-56]. In fact, Mr. Waldman testified that he had filed a claim with the LAPD against Ms. Heard for perjury due to her claims that Mr. Depp abused her, and that he presented them with information that he believed established her perjury. [R. 27557-58]. Since Ms. Heard presented no evidence that would permit the jury to find by clear and convincing evidence that Mr. Waldman subjectively knew that his statements were actually or probably false,

[6] Ms. Heard's counsel did ask whether Mr. Waldman relied on information from Mr. Depp in making the statement. Mr. Depp's counsel asserted the attorney-client privilege and instructed Mr. Waldman not to answer, since the question directly invaded attorney-client communications. [R. 27553]. Ms. Heard did not move to compel a further response, nor could she plausibly have prevailed had she done so. Nor can any inference be drawn from any objections and instructions not to answer. The jury was specifically instructed not to draw any inference from the assertion of an objection or instruction not to answer [R. 21489] – another instruction that is not the subject of Ms. Heard's appeal – and of course no adverse inference arises from the mere assertion of the attorney-client privilege. *See, e.g.*, *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1344 (Fed. Cir. 2004) ("no adverse inference shall arise from invocation of the attorney-client and/or work product privilege").

the trial court erred in denying Mr. Depp's motion to strike the evidence, and the judgment in Ms. Heard's favor on the April 27 Waldman Statements must be reversed.

C. In Context, the Waldman Statements Are Not Actionable

Even if the Court believed that Mr. Depp could be liable for Mr. Waldman's statements, Ms. Heard's Counterclaim for defamation is still fundamentally defective because, read in context, the April 27 Waldman Statement is not an actionable statement of fact. The trial court, thus, erred in not granting Mr. Depp's motion for summary judgment and motion to strike the evidence.

"Pure expressions of opinion, not amounting to fighting words, cannot form the basis of an action for defamation." *Chaves v. Johnson*, 230 Va. 112, 119 (1985) (internal citations and quotations omitted). "The First Amendment to the Federal Constitution and article 1, section 12 of the Constitution of Virginia protect the right of the people to teach, preach, write, or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander." *Id.* Conversely, however, "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

Thus, in an action for defamation, a court must resolve, as a threshold matter, whether "an alleged defamatory statement is one of fact or of opinion[.]" *Tharpe v. Sanders*, 2737 S.E.2d 890, 893 (Va. 2013). A statement of fact is one with a

"provably false factual connotation" or which can "reasonably be interpreted as stating actual facts about a person." *Yeagle v. Collegiate Times*, 255 Va. 293, 295-96 (1998). However, "even a provably false statement is not actionable if 'it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts.'" *Riley v. Harr*, 292 F.3d 282, 289 (1st Cir. 2002) (quoting *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000).

Importantly, in assessing whether allegedly defamatory words are fact or opinion, a court "must examine them in context," with the aim being to interpret them "as other people would understand them, and according to the sense in which they appear to have been used" in the totality of the circumstances. *Schaecher*, 290 Va. at 93. Thus, in considering whether a statement's audience would understand it as a statement of fact or opinion, courts consider such factors as the forum in which the allegedly defamatory statements were uttered, and whether an audience familiar with the forum would expect to hear an opinion. *See, e.g.*, *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995) (if a statement is made in a "forum in which a reader would be likely to recognize that the critiques…represent the highly subjective opinions of the author" and relates to "inherently ambiguous" subject matter about which reasonable minds could draw different conclusions, then "the general context

in which the statements were made negates the impression that they imply a false assertion of fact").

Courts also consider the degree to which the statement's audience is familiar with the underlying facts and therefore able to assess the defamatory statements for themselves. *See, e.g.*, *Nanavati v. Burdette Tomlin Mem'l Hosp.*, 857 F.2d 96, 100-08 (3d Cir. 1988) (concluding that statements were opinion when made to reporters who "were familiar with the long running dispute among the parties and knowledgeable about the underlying facts" and therefore "understood" that the defendant "was presenting his own opinion"). In addition, courts consider whether the statements were made in the context of a debate or controversy, because statements made in the heat of a debate are more likely to be understood by their audience as expressions of opinion. *See, e.g.*, *Schnare v. Ziessow*, 104 F. App'x 847, 853 (4th Cir. 2004) (drawing a distinction between the "language of controversy" and "the language of defamation").

Courts also consider the identity of the speaker and whether the speaker's biases are known and disclosed to the audience. *Chaves*, 230 Va. at 119 ("[t]he most unsophisticated recipient of such a claim, made by one competitor against another, could only regard it as a relative statement of opinion, grounded upon the speaker's obvious bias"). Further, courts can consider whether the speaker claims to have personal knowledge or is merely drawing inferences about events he does not claim

to have witnessed. *Biospherics, Inc. v. Forbes*, 151 F.3d 180, 184 (4th Cir. 1998) (no liability where there was "no claim to first-hand knowledge of facts" and the "context and tenor of the article thus suggest that it reflects the writer's subjective and speculative supposition").

The April 27 Waldman Statement as presented to the jury reads as follows:

> "Quite simply was an ambush, a hoax. They set Mr. Depp up by calling the cops but the first attempt didn't do the trick. The officers came to the penthouses, thoroughly searched and interviewed, and left after seeing no damage to face or property. So Amber and her friends spilled a little wine and roughed the place up, got their stories straight under the direction of a lawyer and publicist, and then placed a second call to 911." [R. 21468]

When read in isolation, this could arguably be interpreted as a factual statement sufficient to state a claim for defamation. When viewed in context, however, it is a non-actionable opinion. Importantly, the April 27 Waldman Statement is presented as a statement by a lawyer in the context of litigation, and necessarily represents only one side of a heated debate. Further, it was made to a reporter who presented quotes from both sides of the debate and was necessarily aware that the facts were hotly disputed. Indeed, the April 27 Article quotes Ms. Heard's attorneys referring to Mr. Waldman's statements as "fantasies." [R. 5210].

Mr. Waldman never claims personal knowledge of what happened on May 21, 2016 at Mr. Depp's and Ms. Heard's shared penthouses, and no one disputes this. Rather, it is clear from the April 27 Article that Mr. Waldman was speaking as

a legal advocate and offering his own interpretation of disputed evidence. The April 27 Waldman Statement is, thus, most reasonably understood as an attorney's interpretation of the conflicting allegations and evidence in a "he said, she said" dispute, and, as such, cannot be defamatory. *See Biospherics*, 151 F.3d at 184 (no liability where there was "no claim to first-hand knowledge of facts" and the "context and tenor of the article thus suggest that it reflects the writer's subjective and speculative supposition"); *Moldea v. New York Times Co.*, 22 F.3d 310, 313 (D.C. Cir. 1994) ("writers must be given some leeway to offer 'rational interpretation' of ambiguous sources") (quoting *Masson v. New Yorker Mag.*, 501 U.S. 496, 519 (1991)); *Spencer v. American Intern. Grp., Inc.*, Civil No. 3:08-CV00591, 2009 WL 47111, at *7 (E.D. Va. Jan. 6, 2009) (no liability in defamation for statements by an attorney that were a "subjective assessment" of evidence, which "could not have been objectively characterized as true or false at the time, as it depended largely on his own perspective and assessment of the weight of the available evidence"); *Schaecher*, 290 Va. at 106 (no liability for defamation for accusing a plaintiff of lying, when "a reasonable person…would have perceived the accusation as a pure opinion…based [on the defendant's] subjective understanding of the underlying scenario").

In context, it is clear that each of the Waldman Statements, including the April 27 Waldman Statement,[7] reflects "a subjective view, an interpretation, a theory, conjecture, or surmise," so as to be non-actionable opinion. *Piccone v. Bartels*, 785 F.3d 766, 771 (1st Cir. 2015); *Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 132 (2003). Mr. Waldman indisputably had no personal knowledge of what happened at the Eastern Columbia Building on May 21, 2016. [R. 27546]. As set forth in Section IV.A.3, *supra*, the evidence presented at trial shows that Mr. Waldman subjectively believed, based on evidence he had collected and reviewed, that Ms. Heard's claims of abuse against Mr. Depp were false; and, so, in the April 27 Waldman Statement, Mr. Waldman was merely drawing inferences and speculating, based on the evidence available to him, what must have happened on May 21, 2016. This reasoned, good faith interpretation of the evidence cannot be defamatory. The trial court, accordingly, erred in denying Mr. Depp's motion for summary judgment and motion to strike.

[7] This analysis holds true of all the Waldman Statements, as each was made to reporters who acknowledged and described the clash of two fundamentally different versions of events from Mr. Depp and Ms. Heard. Each acknowledged Mr. Waldman's bias and status as an attorney for Mr. Depp; and each ultimately expressed Mr. Waldman's own interpretation of the weight, reliability, and credibility of conflicting evidence about which he did not claim to, and did not, have direct, firsthand personal knowledge.

2. The Trial Court Erred in Denying Mr. Depp's Proposed Jury Instruction Nos. 22, 23, and 24

Standard of Review

Jury instructions are reviewed under an abuse of discretion standard. *Gaines v. Commonwealth*, 39 Va. App. 562, 568 (2003). In reviewing a trial court's "decision to refuse jury instructions, the evidence is viewed in the light most favorable to the proponent of the instruction." *Hancock-Underwood v. Knight*, 277 Va. 127, 130 (2009). "Whether the content of the instruction is an accurate statement of the relevant legal principles is a question of law that, like all questions of law," is subject to review de novo. *Id.* at 131. "If a proffered instruction finds any support in credible evidence, its refusal is reversible error." *Id.*

Discussion

A. Evidence Was Presented From Which The Jury Could Have Found That Mr. Waldman Was An Independent Contractor

At trial, Mr. Depp proposed Jury Instruction Nos. 22 ("An independent contractor is a person who is engaged to produce a specific result but who is not subject to the control of the employer/principal as to the way he brings about that result. If you find that Mr. Waldman was acting on Mr. Depp's behalf but was not subject to Mr. Depp's control as to the manner, method, and/or means by which Mr. Waldman worked, you must find that Mr. Waldman was an independent contractor."), [R. 21402]; 23 ("An outside lawyer retained by a client in connection

with litigation is an independent contractor."), [R. 21403]; and 24 ("A person who hires an independent contractor is not liable for the independent contractor's actions. If you find that Mr. Waldman was an independent contractor of Mr. Depp instead of an employee, you may not find Mr. Depp liable for Mr. Waldman's conduct."), [R. 21404]. The Court denied these instructions. [R. 27727-28].

Mr. Depp incorporates by this reference and will not repeat at length the arguments set forth above regarding Mr. Waldman's status as an independent contractor. In sum, since the evidence supports a finding that Mr. Waldman was an independent contractor, his allegedly tortious conduct cannot be imputed to Mr. Depp absent evidence of additional involvement by Mr. Depp in making a defamatory statement, which was not presented at trial.

The evidence at trial established that Mr. Waldman represented Mr. Depp solely as an attorney in various litigation matters, but in no other capacity. [R. 27544-45, 275447]. As such, the Court should adopt the majority position of other jurisdictions that an attorney representing a client in litigation is an independent contractor. *See, e.g.*, *McDevitt*., 946 F. Supp. 2d at 171.

Even if the Court declines to adopt a *per se* rule, evidence was presented from which the jury could reasonably have found that Mr. Waldman was an independent contractor, not subject to his client's control in the details of his work. For instance, Mr. Waldman testified that that he is the owner and managing member of his own

law firm, that he offers legal services to clients, and that Mr. Depp is not his only client. [R. 27558-59]. Accordingly, the trial court erred in rejecting Jury Instruction Nos. 22, 23, and 24 because a reasonable trier of fact could have concluded, based on the evidence, that Mr. Waldman was an independent contractor and, thus, Mr. Depp could not be vicariously liable for the Waldman Statements.

3. The Trial Court Erred In Excluding The Full Articles Containing The Waldman Statements

Standard of Review

A trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *Harman v. Honeywell Intern., Inc.*, 288 Va. 84, 92 (2014).

Discussion

The Unredacted Articles Provide Necessary Context

At trial, Mr. Depp sought to introduce unredacted copies of the three *Daily Mail* articles, [R. 5186-223], containing each of the three Waldman Statements (the "*Daily Mail* Articles"). [R. 27209; 27542-43]. The trial court excluded the *Daily Mail* Articles as hearsay, admitting only copies that had everything but the Waldman Statements redacted. [R. 46628-37]. The Court's apparent reasoning was that the *Daily Mail* Articles were written by reporters, not Mr. Waldman, so the context that matters is the context in which Mr. Waldman made the statements to the reporters, not the context in which the statements appear in the articles.

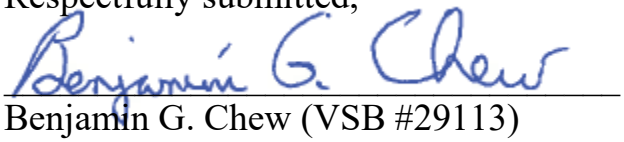
As set forth in Section IV.A.4, *supra*, in assessing whether a statement is actionable for defamation, context is paramount. *Schaecher*, 290 Va. at 93. While the context in which Mr. Waldman made the original statement to reporters is relevant, the contents of the articles are also relevant. For instance, the full articles in which the Waldman Statements appeared are relevant to how the reporters and, ultimately, the readers understood Mr. Waldman's statements: as presenting one side's interpretation of evidence gathered in a hotly contested litigation. Further, the April 27 Article includes additional quotes from Mr. Waldman that put his April 27 Statement in context, identifying the evidence he is interpreting. [R. 5209] ("But even this didn't have the desired effect because two domestic abuse-trained LAPD police would later provide a pair of sworn depositions saying they saw no evidence of a crime"). The full articles in which the Waldman Statements appeared are relevant to assess what, if any, damages Ms. Heard purportedly sustained from them. In assessing whether Ms. Heard suffered any damages from the Waldman Statements, the jury should have been able to consider that the Waldman Statements were buried at the bottom of salacious tabloid articles and surrounded by substantial additional commentary about Mr. Depp and Ms. Heard, little of which was flattering to either of them. The trial court erred in excluding the articles in their full context.

CONCLUSION

This Court should reverse the judgment on Ms. Heard's Counterclaim as to the April 27 Waldman Statement, but should otherwise affirm the judgment in Mr. Depp's favor.

November 2, 2022

Respectfully submitted,



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CERTIFICATE

I HEREBY CERTIFY that on this 2nd day of November, 2022, pursuant to Rules 5A:1 and 5A:19, an electronic copy of the Brief of Appellant has been filed with the Clerk of the Court of Appeals of Virginia, via VACES. On this same day, an electronic copy of the Brief of Appellant was served, via email, upon:

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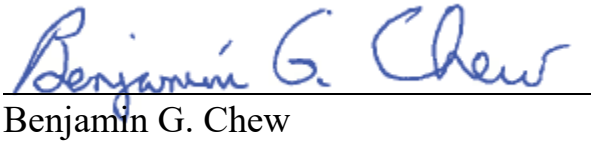
I further certify that this Brief contains 8,004 words, excluding those portions that by rule do not count toward the word limit.

Counsel for the Appellant respectfully requests oral argument.



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