CAV: Submitted on 12-16-2022 13:58:54 EST for filing on 12-16-2022

In The
Court of Appeals of Virginia

RECORD NO. 1072-22-4

JOHN C. DEPP, II,

***Appellant*,**

v.

AMBER LAURA HEARD,

***Appellee*.**

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In her appellee brief ("Heard Brief" or "HB"), Ms. Heard misapplies the law and misstates the findings of the jury, attempting to distract the Court by rearguing factual disputes that the jury emphatically resolved in favor of Mr. Depp. In fact, this appeal presents the Court with only a few narrow legal issues, each of which warrants the reversal of the lone portion of the judgment in favor of Ms. Heard on her counterclaim.

First, can a client be held vicariously liable under a pure agency theory for the allegedly tortious conduct of his attorney?[1] Longstanding principles limiting liability for the acts of independent contractors dictate that the answer is "no" when, as here, no evidence of additional tortious conduct by the client was presented.

Second, did Ms. Heard present any evidence to show that Mr. Waldman made the April 27 Waldman Statement[2] with actual malice? Again, the answer is "no" – Ms. Heard presented no evidence (much less clear and convincing evidence) of Mr. Waldman's state of mind. She argues she can fill in this blank with evidence of *Mr. Depp's* state of mind, but that argument fails as a matter of law. Regardless, Ms.

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[1] Ms. Heard asserts that evidence of direct liability was presented as well. As explained below, Ms. Heard is wrong.

[2] Capitalized terms not defined herein are ascribed the meanings set forth in Mr. Depp's Appellant's Brief.

Heard presented no evidence that Mr. Depp even knew that the statement had been made, much less that he contemporaneously knew it was false.

Third, in context, should a comment by Mr. Waldman to a well-informed journalist about the inferences to be drawn from conflicting evidence in contested litigation, be properly understood as a factual statement sufficient to state a claim for defamation? For a third time, the answer is "no" – the April 27 Waldman Statement, in context, is nothing more than a theory proffered by a speaker with a disclosed bias, discussing an interpretation of ambiguous subject matter, about which he claimed no firsthand personal knowledge.

The Court should uphold the judgment in most respects, but reverse as to the sole finding in Ms. Heard's favor on the April 27 Waldman Statement.

ARGUMENT

I. Ms. Heard Mischaracterizes the Jury's Findings and Verdict

Repeating factual claims that were unambiguously rejected by the jury, Ms. Heard takes the untenable position that the evidence at trial "established that in May 2016, the parties' marriage was falling apart due to Mr. Depp's alcoholism, drug use, and abuse of his wife." (HB at 4). Bafflingly, Ms. Heard spends many pages of her brief reciting a litany of her factual claims that were necessarily found to be false by the jury, in a wholly inappropriate attempt to reargue the facts of the case. (HB at 1-12).

Ms. Heard's arguments fail the straight face test. The jury found in favor of Mr. Depp and against Ms. Heard on virtually all material points in dispute. In finding that Ms. Heard defamed Mr. Depp, the jury necessarily found that Ms. Heard's statements that she was "a public figure representing domestic abuse" who had spoken up against "sexual violence" made a false implication about Mr. Depp and that Ms. Heard acted with actual malice when she made these statements, meaning she knew the implication was false. [R. 28787-788]. Consistent therewith, the jury also found that Mr. Waldman's statements that Ms. Heard's abuse claims were a perjurious "hoax" and "fake sexual violence allegations" did *not* constitute defamation against her. [R. 28788-789]. The *sole* statement on which Ms. Heard prevailed involved additional theorizing by Mr. Waldman that on May 21, 2016, Ms. Heard and her friends had "set Mr. Depp up by calling the cops," "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. 28788-89].

The only intellectually honest interpretation of the verdict is that the jury found Ms. Heard's claim that she had been abused by Mr. Depp was false, but also found that she had not conspired with her friends, a lawyer, and a publicist to create a fake crime scene for police officers on May 21, 2016. Ms. Heard's attempt to recharacterize the verdict as consistent with her claims of abuse is untenable and should not be countenanced.

II. Ms. Heard's Reliance On Vicarious Liability Based on Agency Is Inappropriate in the Attorney-Client Context

A. An Attorney Is Properly Understood as a Non-Servant Agent, *i.e.*, an Independent Contractor

Ms. Heard's Brief proceeds from the flawed premise that she can prove Mr. Depp's liability merely by establishing that Mr. Waldman was his agent. Ms. Heard misses the point. The question is not *whether* Mr. Waldman is an agent but rather what *type* of agent he is – an employee agent or a non-employee agent, *i.e.*, an independent contractor.

Virginia law has long drawn a sharp distinction between employees and independent contractors when imposing vicarious liability. *See, e.g., McDonald v. Hampton Training Sch. for Nurses*, 254 Va. 79, 81 (1997). This reflects the well-recognized principle that it is reasonable to impose liability on a principal for the actions of another person *if* that person is under the principal's control in a meaningful sense, but not otherwise. In other words, the logic of generally holding employers liable for the torts of their agents or employees is simply that when employers have the right to control their employees, they are, at least theoretically, in a position to prevent them from committing tortious acts. *Griffith v. Electrolux Corp.*, 176 Va. 378, 397 (1940). The less control an employer can exercise, the less strength that logic has. *See, e.g., Norfolk & W. Ry. Co. v. Johnson*, 207 Va. 980, 983 ("the crucial question" is whether the employer "had the right to control not merely

results but the progress and details of the work"). Although the Virginia Supreme Court has not squarely considered the type of agency that exists between an attorney and client, there are substantial reasons to adopt the view of multiple other jurisdictions that attorneys, while undoubtedly agents of their clients for certain purposes, are presumptively *non-servant or independent contractor* agents. This is because attorneys are required to exercise *independent professional judgment* and are subject to *independent professional and ethical obligations*. Though guided by their clients with respect to ends, attorneys have wide discretion over means. These factors preclude the level of control by a client that would justify the imposition of vicarious liability for an attorney's intentional torts.

Agency is "a fiduciary relationship arising from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the agreement by the other so to act." *Tingler v. Graystone Homes, Inc.*, 298 Va. 63, 101 (2019) (internal quotations and citations omitted). Importantly, "the control a principal exercises over its agent is not defined rigidly to mean control over the minutia of the agent's actions, such as the agent's physical conduct, as is required for a master-servant relationship," and "may be very attenuated with respect to the details," though "the principal must have ultimate responsibility to control the end result of his or her agent's actions[.]" *Green v. H & R Block, Inc.*, 735 A.2d 1039, 1051 (Md. 1999). "An independent contractor is a person who contracts with another

to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. *He may or may not be an agent.*" Restatement (Second) of Agency § 2 (1958) (emphasis added); *see also, Wiggs v. City of Phoenix*, 198 Ariz. 367, 370 (2000) ("[w]hile it is always the case that an independent contractor is not a servant, it is not always the case that an independent contractor is not an agent. An agent who is not a servant is, therefore, an independent contractor when he contracts to act on account of the principal") (internal citations and quotations omitted). It is, thus, unsurprising that courts in numerous jurisdictions have concluded that one can be *both* an agent *and* an independent contractor, with corresponding limitations on vicarious liability principles.

Ms. Heard incorrectly claims that Mr. Depp is arguing that "Mr. Waldman is either an independent contractor or an agent." (HB at 20). Ms. Heard also appears to suggest that the finding of an agency relationship is incompatible with independent contractor status.[3] Thus, she argues, because Mr. Waldman is an agent, an adequate basis for Mr. Depp's vicarious liability has necessarily been established, irrespective of whether Mr. Waldman was an independent contractor. Ms. Heard, for instance,

[3] Ms. Heard's exact argument is somewhat opaque. At one point she appears to suggest that "a person's status as an independent contractor precludes the existence of an agency relationship" (HB at 19) while elsewhere stating that "Mr. Waldman can be both an independent contractor and an agent[.]" (HB at 20). The latter statement is correct.

cites *Petrovich v. Share Health Plan of Ill., Inc.* for the proposition that vicarious liability for an independent contractor's conduct is permitted based on agency principles. 719 N.E.2d 756 (Ill. 1999). But the theory adopted by that court was that the employer of an independent contractor physician could be held liable under the doctrine of apparent authority – a position that has *not* been adopted in Virginia in the context of tort claims. *See Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 307-308 (2005). Moreover, *Petrovich* did not involve an attorney-client relationship, and other cases from the same jurisdiction that have considered *that* issue have concluded that attorneys are independent contractors whose clients are not automatically liable for their torts. In *Horwitz v. Holabird & Root*, for instance, the court distinguished *Petrovitch* in the attorney-client context, as follows:

> A person may be both an independent contractor and an agent with the authority both to control the details of the work and also the power to act for and to bind the principal in business negotiations within the scope of [the] agency… As a general rule, attorneys fit squarely within this category. Nonetheless, when attorneys act pursuant to the exercise of independent professional judgment, they possess such considerable autonomy over the details and manner of performing their work that they are presumptively independent contractors for purposes of imposing vicarious liability. Accordingly, where a plaintiff seeks to hold a client vicariously liable for the attorney's allegedly intentional tortious conduct, a plaintiff must prove facts demonstrating either that the client specifically directed, controlled, or authorized the attorney's precise method of performing the work or that the client subsequently ratified acts performed in the exercise of the attorney's independent judgment. (internal quotations and citations omitted).

212 Ill.2d 1, 13-14 (Ill. 2004). The court in *Horwitz* also noted the importance of attorneys' ethical obligations, which severely limit the level of control that clients

can exercise over them: "attorneys are constrained by certain court-imposed ethical considerations that serve to distance their behavior from their clients." *Id.* at 16. Thus, "[a]ttorneys cannot blindly follow their clients' directions, even if those directions are particular and express, if doing so would require them to violate their ethical obligations." *Id.*

Although there are some jurisdictions that will impute tortious conduct from an attorney to a client based solely on the agency relationship, numerous courts have concluded that agency alone is *not* sufficient, because attorneys are independent contractors with considerable autonomy and discretion over the conduct of their representation of clients. *See, e.g., State Farm Mut. Auto Ins. Co. v. Traver*, 980 S.W.2d 625, 627 (Tex. 1998) ("A defense attorney, as an independent contractor, has discretion regarding the day-to-day details of conducting the defense, and is not subject to the client's control regarding those details"). That approach is most consistent with the core premise of vicarious liability – *i.e.*, that it should be based on the right of the principal to control the agent and prevent tortious conduct. The Court should adopt that approach here.

B. Ms. Heard's Vicarious Liability Theory Is Particularly Inapposite in the Defamation Context

Whether Mr. Waldman was an independent contractor is an especially critical inquiry in the defamation context. Several courts have concluded that the First Amendment restricts imputation of actual malice in the absence of an employer-

employee relationship – and that the existence of a mere non-servant agency relationship is *not* sufficient. For instance, the U.S. District Court for the Eastern District of Virginia has stated:

> With respect to the agency theory, it is well established that actual malice must be proved with respect to *each* defendant. Although reckless disregard may be imputed to a defendant under *respondeat superior*, multiple courts have held that actual malice cannot be imputed from one defendant to another absent an employer-employee relationship. (internal citations and quotations omitted).

AdvantFort Co. V. Maritime Exec., LLC, No. 1:15–cv–220, 2015 WL 4603090 at *7 (E.D. Va. 2015). The imputation of actual malice was examined at some length by the court in *McFarlane v. Esquire Magazine*, 74 F.3d 1296 (D.D.C. 1996). The question in *McFarlane* was "whether the malice of a non-employee agent can be imputed to the principal." *Id.* at 1302. The court noted that, in the seminal case *New York Times v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court had "refused to impute to the individuals as principals any information in the minds of persons they authorized to act as their agents in the matter" and that federal courts commonly interpret the Supreme Court's holding in *Cantrell v. Forest City Publishing*, 419 U.S. 245 (1974) as "barring liability on any theory other than *respondeat superior* (which is limited to employees)."[4] *Id.* The *McFarlane* court

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[4] *See, e.g., Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1446 (8th Cir. 1989); *Secord v. Cockburn*, 747 F. Supp. 779, 787 (D.D.C. 1990); *Murray v. Bailey*, 613 F. Supp. 1276, 1281 (N.D. Cal. 1985).

ultimately "doubt[ed] that actual malice can be imputed except under *respondeat superior*" and held that a principal's malice could only be established "through evidence of the information available to, and conduct of, its employees." *Id.* at 1303. As even Ms. Heard appears to concede, Mr. Waldman was never Mr. Depp's employee, and *respondeat superior* does not apply.

C. Ms. Heard Did Not Establish that Mr. Depp Directed, Controlled, or Authorized the April 27 Waldman Statement

Because liability based solely on Mr. Waldman's status as Mr. Depp's outside attorney is inconsistent with longstanding Virginia principles limiting the liability of employers of independent contractors (especially in the context of the First Amendment), Ms. Heard should have been required to establish tortious conduct by Mr. Depp beyond merely employing Mr. Waldman as an attorney. Ms. Heard did not do so. Although Ms. Heard makes the conclusory assertion that Mr. Depp "entrusted Mr. Waldman to be his mouthpiece in continuing to defame Ms. Heard through public statements" (HB at 22), there is no actual evidence of that in the record. Indeed, in response to questioning from Ms. Heard's attorney, Mr. Waldman made clear that his relationship with Mr. Depp is simply that of an attorney.[5] [R. 27544-45, 275447]. Though Mr. Waldman acknowledged speaking to the press

[5] Ms. Heard appears to take the position that speaking to the press presumptively falls outside the normal attorney-client relationship. (HB at 28).

on several occasions, that does not constitute evidence that Mr. Depp was involved in the April 27 Waldman Statement. Ms. Heard offered *no* evidence that Mr. Depp directed or had any involvement in making the April 27 Waldman Statement.[6] Rather, the uncontroverted evidence at trial was that Mr. Depp did not even know the statement had been made until Ms. Heard commenced this action. [R. 28326-27]. The *sole* basis of finding liability against Mr. Depp based on the April 27 Waldman Statement was, therefore, that Mr. Waldman was his attorney and agent. Such a finding is inconsistent with legal principles applicable to independent contractors and should be rejected.

III. Ms. Heard Failed to Establish Actual Malice

A. Ms. Heard Was Required to Show that *Mr. Waldman* Made the April 27 Waldman Statement with Actual Malice

It is well-established in Virginia law that a claim cannot proceed against an employer or principal based on an employee or agent's conduct, without a showing that that employee or agent committed a tort. *Parker v. Carilion Clinic*, 296 Va. 319, 332 n.3 (2018) ("a claimant cannot make out a vicarious liability claim against an employer without first proving that the employee committed a tort within the scope

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[6] Ms. Heard cites a meeting with an unnamed representative from the *Daily Mail* on February 17, 2020, more than two months prior to the April 27 Waldman Statement, at which Mr. Depp may have been present. At trial, no evidence was presented as to what was discussed at that meeting or the identity of the *Daily Mail* representative. That meeting is not evidence of anything.

of his employment") (internal quotations omitted); *Roughton Pontiac Corp. v. Alston*, 236 Va. 152, 156 (1988) ("It 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."). Ignoring these authorities, Ms. Heard argues that the Court can find a complete tort by mixing-and-matching the conduct of both a principal and agent. Here, that means stitching Mr. Depp's supposed state of mind onto Mr. Waldman's conduct to find against Mr. Depp, even if Mr. Waldman's conduct did not satisfy all elements of the tort of defamation. This is not permitted under Virginia, or any, law.

Ms. Heard's sole basis for her theory is language in the Restatement indicating that a principal can be held directly liable for an agent's conduct that "is within the scope of the agent's *actual authority or ratified* by the principal" if "the agent's conduct, if that of the principal, would subject the principal to tort liability." Restatement (Third) of Agency § 7.03 (emphasis added). Ms. Heard, however, omits the Restatement's definition of "actual authority," which provides that: "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, *the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."* Restatement (Third) of Agency § 2.01 (emphasis added).

There are multiple problems with Ms. Heard's argument. ***First,*** it runs contrary to well-settled Virginia authorities, including those noted above, that make plain that the liability of a principal or employer is contingent on a showing that the agent or employee committed a tort. Indeed, the Supreme Court of Virginia noted as recently as 2018 that "if a mere *employee* commits the tortious conduct, the corporate employer will not be subject to direct liability, technically speaking, but rather only to respondeat superior liability." *Parker*, 296 Va. at 344 (emphasis in original). In other words, absent a showing that Mr. Waldman was acting at Mr. Depp's specific direction in making the April 27 Waldman Statement (which is nowhere in the record), Ms. Heard is limited to vicarious liability. ***Second,*** the portion of the Restatement cited by Ms. Heard does not salvage her argument because there is zero evidence that Mr. Waldman's statements were directed by Mr. Depp, *i.e.*, were within the scope of his actual authority. Ms. Heard has not cited to any evidence in the record of any manifestations from Mr. Depp to Mr. Waldman instructing him to make the April 27 Waldman Statement such that Mr. Waldman reasonably believed Mr. Depp wanted him to make the April 27 Waldman Statement. Nor has Ms. Heard identified any evidence in the record that Mr. Depp ratified the April 27 Waldman Statement. ***Third,*** even overlooking those defects, actual malice requires clear and convincing evidence of contemporaneous knowledge that a *statement* is false or probably false. Mr. Depp's uncontroverted testimony was that he had not seen the

April 27 Waldman Statement prior to this litigation, and the jury received no evidence to suggest he contemporaneously knew it had even been made. Thus, even if Mr. Depp's state of mind could theoretically be mixed and matched with Mr. Waldman's conduct to create a single Frankenstein tort, there is no evidence from which it can reasonably be inferred that Mr. Depp had the requisite state of mind (i.e., that he knew that the April 27 Waldman Statement was false when it was made), because he did not even know that it *had* been made.

B. Ms. Heard Failed To Show That *Mr. Waldman* Made The April 27 Waldman Statement With Actual Malice

Even assuming that the tort could somehow be imputed to Mr. Depp, Ms. Heard was required to establish that *Mr. Waldman* made the statement with actual malice, meaning he subjectively knew that it was false or probably false. *Jackson v. Hartig*, 274 Va. 219, 229 (2007). "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." *Id.* at 228 (emphasis added) (internal quotations and citations omitted). Evidence of mere hostility, failure to reasonably investigate, or lack of prudence are not sufficient. *Id.* Ms. Heard never presented *any* evidence of Mr. Waldman's state of mind that would permit the conclusion, by clear and convincing evidence, that he believed that any of his statements were false.

Ms. Heard is unable to come up with any serious argument to the contrary. She argues that Mr. Waldman could not have simultaneously believed that there was no damage to the penthouse and that Ms. Heard had caused damage to the penthouse described in the April 27 Waldman Statement. This argument is contradicted by the evidentiary record. At trial, Ms. Heard asserted that there was evidence of damage to her penthouse [R. 26978-993] – supposed damage that Mr. Waldman explained in his statement by suggesting that she had done it herself, while noting that the police officers called to the premises had seen nothing that supported her allegations. This is not clear and convincing evidence that Mr. Waldman subjectively believed his statement was false. To the contrary, the evidence overwhelmingly indicates that he believed what he said. Similarly, Ms. Heard complains that Mr. Waldman "selectively credited only the evidence he believed was favorable" and "ignored the abundant evidence of Mr. Depp's abuse of Ms. Heard." (HB at 36). Again, that is a feeble argument (and directly contradicted by the findings of the jury against Ms. Heard). Mr. Waldman is entitled to make value judgments about the weight of evidence, just as the jury did – and both Mr. Waldman and the jury concluded that Ms. Heard was not credible. The fact that Mr. Waldman rejected Ms. Heard's version of events is not clear and convincing evidence of subjective knowledge of falsity. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts* as to

the truth of his publication.") (emphasis added). Ms. Heard has not pointed to, and cannot point to, any evidence in the record to permit the conclusion, by clear and convincing evidence, that Mr. Waldman *in fact* entertained serious doubts as to the veracity of the April 27 Waldman Statement. The lone judgment in her favor on the April 27 Waldman Statement, thus, should not stand.

IV. The April 27 Waldman Statement Is Properly Understood As Opinion

Context is crucial in determining whether a statement is defamatory. In arguing that the April 27 Waldman Statement is factual, Ms. Heard largely ignores that the statement was made to a reporter who wrote articles laying out statements from representatives of both sides of Mr. Depp's and Ms. Heard's dispute. Ms. Heard contends that statements by the journalist cannot render Mr. Waldman's statements less defamatory. That is not the point. The statement was made to a reporter who clearly recognized *and presented* it as a controverted opinion, not a factual statement. *Nanavati v. Burdette Tomlin Mem'l Hosp.*, 857 F.2d 96, 100-08 (3d Cir. 1988).

Significantly, Mr. Waldman has never claimed firsthand personal knowledge of what transpired between Mr. Depp and Ms. Heard. Rather, the April 27 Waldman Statement is commentary by a lawyer on the inferences to be drawn from conflicting evidence in a contested litigation, which was discussed in the article. The subject matter of Mr. Waldman's statements and Mr. Waldman's relation to that subject

matter indicate that his statements were non-actionable opinions. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984) (there is a distinction between "alleged libel [that] purports to be an eyewitness or other direct account of events that speak for themselves," on the one hand, and a mere interpretation of ambiguous events about which the speaker does not claim direct knowledge, on the other hand). Indeed, when a speaker offers "one of a number of possible rational interpretations of an event that bristled with ambiguities," the United States Supreme Court has indicated that such speech is entitled to First Amendment protection as opinion. *Id.* at 513; *see also Moldea v. New York Times Co.*, 22 F.3d 310, 313 (D.C. Cir. 1994) ("the Supreme Court has recognized, writers must be given some leeway to offer rational interpretation of ambiguous sources"); *Hunter v. Hartman*, 545 N.W.2d 699, 707 (1996) ("A commentator who advocates one of several feasible interpretations of some event is not liable in defamation simply because other interpretations exist," and "remarks on a subject lending itself to multiple interpretations cannot be the basis of a successful defamation action."); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993); *Gacek v. Owens & Minor Distrib., Inc.*, 666 F.3d 1142, 1147 (8th Cir. 2012). A reasonable listener would recognize Mr. Waldman's statements, in context, as a lawyer advocating for his client's position by providing a theory, based on disclosed evidence, of what happened – not a factual statement based on personal knowledge.

V. The Court Should Have Instructed the Jury on Independent Contractor Theory

Whether a person is an employee or independent contractor can be determined as a question of law when, as here, the facts compel one interpretation; otherwise it is a factual question for the jury. *See, e.g., Atkinson v. Satchno*, 261 Va. 278, 284 (2001). On the facts of this case, Mr. Waldman is an independent contractor whose allegedly tortious conduct should not be imputed to his client. The judgment was, thus, erroneous as a matter of law. At minimum, there was sufficient evidence in the record to permit the giving of a jury instruction on this point. The evidence at trial established that Mr. Waldman represented Mr. Depp as an attorney in various litigation matters, but in no other capacity [R. 27544-45, 275447]; and Mr. Waldman is the owner and managing member of his own law firm, which offers legal services to clients other than Mr. Depp. [R. 27558-59]. These facts plausibly support the conclusion that Mr. Depp's control over the details of Mr. Waldman's work was limited and could support a finding by the jury that Mr. Waldman was an independent contractor. A jury instruction on that issue would not have been duplicative, but would have, rather, appropriately focused the jury on this core issue – the level of control Mr. Depp exercised over Mr. Waldman. It was an error not to instruct the jury on independent contractor limited liability.

VI. The Trial Court Should Have Admitted the Entire April 27 Article

Ms. Heard's argument that the April 27 Article was properly admitted in redacted form misses the mark. The April 27 Article was not offered for any hearsay purpose, but for two separate and significant reasons: (1) it established that the reporter did not accept Mr. Waldman's statements at face value, undercutting the notion that they were defamatory in context; and (2) it was relevant to assessing what damage, if any, Ms. Heard suffered. Without the full, unredacted article, the jury was forced to speculate on damages without being able to make an informed assessment of the prominence of Mr. Waldman's statement in the April 27 Article.

Notably, the April 27 Waldman Statement is contained in a *Daily Mail* article, with the prominent 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." [R. 5199]. The April 27 Article lays out both sides' conflicting versions of events, noting that "[Ms. 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 Mr. "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 also describes Ms. Heard's various allegations of abuse, Mr.

Waldman's rejection of their credibility, and the response from Ms. Heard's attorneys calling Mr. Waldman's statements "fantasies." [R. 5205-10].

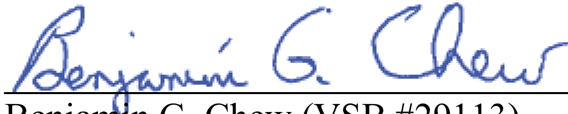
It is relevant to a damages analysis that Mr. Waldman's statement was not presented to the public as an uncontroverted fact. Moreover, as noted above, a relevant inquiry in assessing whether a statement is defamatory is whether the statement was made to someone knowledgeable about the facts and capable of recognizing the statement as an opinion rather than an objective, reliable fact. *Nanavati*, 857 F.2d at 100-08. The content of the article is evidence that Mr. Waldman spoke to a journalist that understood he was hearing one side of a story that had two sides, as the journalist presented both sides in the article. Further, the fact that the article contained so much additional commentary about both parties would have been relevant to enable the jury to assess the likelihood that Ms. Heard suffered any actual damage as a result of the statement as it appeared in context, or whether any supposed damages were attributable to the many other statements in the article that were not at issue in Ms. Heard's counterclaim for defamation. The full article should have been admitted.

CONCLUSION

Mr. Depp respectfully requests that the Court reverse the judgment in Ms. Heard's favor on the April 27 Waldman Statement and affirm the judgment in all other respects.

December 16, 2022

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of December, 2022, pursuant to Rules 5A:1 and 5A:22, an electronic copy of the Reply 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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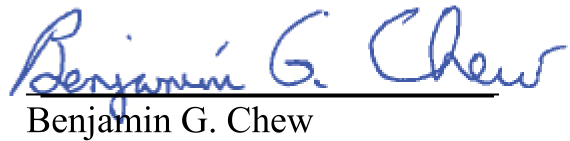
I further certify that this brief is in compliance with the length limits found in Rule 5A:19(a) because it does not exceed 20 pages.

Counsel for the Appellant respectfully requests oral argument.



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