NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 25, 2019

Re: *John C. Depp, II v. Amber Laura Heard*, CL-2019-2911

Dear Counsel:

This matter came before the Court on the 28th of June, 2019, for argument on Amber Heard's Motion to Dismiss pursuant to Virginia Code section 8.01-265(i). At the conclusion of the hearing, the Court took the matter under advisement. There were two underlying issues presented before the Court:

OPINION LETTER

1) Whether the Court should adopt the "significant relationship test" multi-jurisdictional defamation cases or adhere to the long-tradition of *lex loci delicti* adopted in Virginia?
2) Do the facts support publication of the Op-Ed in Virginia or elsewhere?

BACKGROUND

John C. Depp, II ("Mr. Depp") filed the underlying Complaint on March 1, 2019, alleging Amber Heard ("Ms. Heard") defamed him through the publication of her Op-Ed in *The Washington Post*. *See* Compl. ¶ 1. *The Washington Post* is a newspaper printed in Springfield, Virginia, in the county of Fairfax. *See* Compl. ¶ 10. Aside from the newspaper having physical offices in Virginia and a physical publication circulated within Virginia, and throughout the Washington, D.C. region, its digital platform is created and routed through servers in Virginia. *See* Compl. ¶ 10. *The Washington Post* initially uploaded Ms. Heard's Op-Ed to its website on December 18, 2018, and then published the Op-Ed in its hardcopy edition on December 19, 2018. *See* Compl. ¶¶ 20, 68, 75. The Complaint alleges that Ms. Heard's Op-Ed contained defamatory statements implying that Mr. Depp is a domestic abuser. *See* Compl. ¶¶ 1-5. Mr. Depp's Complaint states that his reputation and career sustained immense damage from Ms. Heard's allegations. *See* Compl. ¶¶ 5, 69. He brings this lawsuit seeking $50 million in compensatory damages and $350,000 in punitive damages against Ms. Heard. *See* Compl. ¶ 106.

ARGUMENTS

Ms. Heard's Motion to Dismiss

I. Mr. Depp's Defamation Claim Arises Outside Virginia

Ms. Heard alleges that Mr. Depp's cause of action—defamation from *The Washington Post* Op-Ed—arises in California. *See* Mot. to Dismiss 4. She argues that whether Virginia law or some other state law applies is insignificant because the single, multistate mass media claim at issue here arises in California. *See id.* Ms. Heard contends that since Virginia is a *lex loci delicti* jurisdiction, then the court should "pinpoint the place of the greatest harm in this multistate libel case in the district where the plaintiff was domiciled, absent strong countervailing circumstances." *See Hatfill v. Foster*, 415 F. Supp. 2d 353, 365 (S.D.N.Y. 2006). Ms. Heard argues that Virginia is not the state where any defamation occurred because none of the relevant conduct took place in Virginia,

she has never set foot in Virginia, she never directly contacted any employee of *The Washington Post*, and she never entered *The Washington Post*'s Virginia office. *See* Mot. to Dismiss 6.

Ms. Heard asserts that federal district courts have squarely addressed where a multistate, mass media defamation claim arises as "where the plaintiff suffered the greatest injury . . . that district is usually the one in which the plaintiff is domiciled." *Hatfill*, 415 F. Supp. 2d at 364-65; *see also Gilmore v. Jones*, 370 F. Supp. 3d 630, 664 (2019). In this case, Ms. Heard argues that the alleged defamation plainly arises outside of Virginia since; (1) Mr. Depp is domiciled in California; (2) he does not own property in Virginia; (3) he does the vast majority of his work as an actor in California and; (4) the harm to his professional and personal reputation is most impacted in California. *See* Mot. to Dismiss 5-6.

II. Virginia is a Completely Inconvenient Forum

Ms. Heard argues that litigating this matter in Virginia would be inconvenient for the parties. She states that, in applying *forum non conveniens*, the chosen forum " . . . should be one which insures the ability of the plaintiff to prosecute his cause free from any suggestion of abuse of the venue provisions." *Norfolk & W. Ry. Co. v. Williams*, 239 Va. 390, 393 (1990). Ms. Heard articulates the factors that must be considered in a *forum non conveniens* analysis: "[1] relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; [3] possibility of view of premises, if view would be appropriate to the action; and [4] all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 393.

Ms. Heard asserts that the witnesses and the locations of where the alleged domestic abuse occurred are all located in California; of which, none are easily accessible in Virginia. *See* Mot. to Dismiss 8. Ms. Heard further contends Virginia is an inconvenient forum because the parties and witnesses, whose credibility is in question, the layout and damage done to the physical premises, and the alleged damages to Mr. Depp, are all located in California. *See* Mot. to Dismiss 9. Therefore, Ms. Heard argues, "every factor" in the analysis "weighs in favor of finding that Virginia is an inconvenient forum." Mot. to Dismiss 9.

Mr. Depp's Opposition to the Motion to Dismiss

I. Mr. Depp's Cause of Action Arose in Virginia

Mr. Depp asserts that for Ms. Heard's dismissal motion to survive, she must satisfy her burden by establishing that the cause of action arises outside of Virginia. Mr. Depp claims that she

does not satisfy this burden. *See* Def. Mot. in Opp. 3. Mr. Depp argues that Virginia applies *lex loci delicti* to determine the place of the tort. *See* Def. Mot. in Opp. 4. He contends that as the place of the wrong in defamation cases is the place of publication, then Virginia is the place where Mr. Depp's cause of action arises. *See ABLV Bank v. Center for Advanced Defense Studies Inc.*, No.1:14-cv-1118, 2015 WL 12517012, at *1 (E.D. Va. Apr. 21, 2015) (stating that Virginia courts have held that the *lex loci* rule "looks to where the statement was published.").

Mr. Depp argues that the Supreme Court of Virginia declined to adopt the "most-significant relationship" test for resolving conflicts of laws in multistate tort actions. *See Jones v. R.S. Jones & Assocs.*, 246 Va. 3, 5 (1993). Virginia courts have also clarified that the location of the publication is determined by where the physical publication occurred. *See Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 666 (E.D. Va. 2019). Mr. Depp reiterates that Ms. Heard submitted her Op-Ed to *The Washington Post* through her contact at the ACLU, which was then published in its online edition, created on a digital platform in Virginia, routed through servers in Virginia, and also printed and published in a hard copy edition from Springfield, Virginia. *See* Def. Mot. in Opp. 5.

II. Ms. Heard Cannot Overcome Mr. Depp's "Presumption of Correctness" Regarding the Choice of Forum

Mr. Depp argues that the cause of action arose in Virginia and Ms. Heard cannot overcome the presumption that a plaintiff's choice of forum is correct. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1997); Def. Mot. in Opp. 11. Mr. Depp asserts that because of the limited nature of evidence, the time from the alleged incident, the fact that evidence has already been collected, and that the parties have access to witnesses in either California or Virginia, then there are no countervailing reasons why this case should not be tried in Virginia. *See id.*

Further, Mr. Depp contends that Ms. Heard's inconvenience argument simply fails because it would not be difficult for potential witnesses to appear remotely or otherwise. *See, e.g., Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 289 Va. 426, 433; *Selective Ins. Co. of Am. v. Salinas*, No. CL-2008-13275, 2009 WL 7388859, at *1 (Va. Cir. Ct. July 6, 2009) (Fairfax); Def. Mot. in Opp. 12. Mr. Depp also states that access to the physical premises is unnecessary in this case because demonstrative exhibits can be used. *See* Def. Mot. in Opp. 13. In totality, Mr. Depp states that "litigating this case in Virginia presents no prejudice to Ms. Heard or her proposed evidence." *Id.* at 14.

ANALYSIS

The main issue to be determined on Ms. Heard's Motion to Dismiss is whether Mr. Depp's cause of action arose outside of the Commonwealth for the Court to apply the *forum non conveniens* analysis.

Forum Non Conveniens

Virginia Code section 8.01-262 allows a defendant to dismiss an action upon determination that a more convenient forum exists outside Virginia. *See* VA. CODE ANN. § 8.01-262; *Dr. Gerhard Sauer Corp. v. Gold*, No. 109303, 1992 WL 884806, at *1 (Va. Cir. Ct. July 15, 1992) (Fairfax) (citing *Caldwell v. Seaboard Sys. R.R. Inc.*, 238 Va. 148, 151-55 (1989)). The party making the motion has the burden to show that good cause exists to invoke the *forum non conveniens* doctrine. *See Birdsall v. Federated Dept. Stores, Inc.*, No. CH-2005-4988, 2006 WL 727877, at *2 (Va. Cir. Ct. Mar. 14, 2006) (Fairfax). To even consider whether or not good cause is articulated by the moving party, the cause of action *must* arise outside of the Commonwealth. VA. CODE ANN. § 8.01-262 (emphasis added). The Court turns to examination of where the alleged defamation occurred.

Choice of Law

Virginia is just one of ten states that still adheres to the *lex loci* rule. *See generally* Michael S. Green, *Law's Dark Matter*, 54 WILLIAM & MARY L. REV. 845 (2013) n. 108 ("As of 2008, states still using the traditional lex loci delicti rule for torts are Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming."); Symeon Symeonides, *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 AMER. J. COMPARATIVE L. 327 (1999) ("The commitment of Virginia's highest court to the lex loci delicti . . . appears firm."). Application of the *lex loci delicti* rule defines the "place of the wrong" for defamation cases as where the publication occurred. *See Lapkoff v. Wilks*, 969 F.2d 78, 81 (4th Cir. 1992); *Edwards v. Schwartz*, 378 F. Supp. 3d 468, 481 (W.D. Va. 2019) ("To determine the governing law in a defamation case, Virginia applies the *lex loci delicti commissi* rule, that is, the law of the place of the wrong.") (citation omitted); *McMillan v. McMillan*, 219 Va. 1127, 1128 (1979) (stating that *lex loci delicti* is "the settled rule in Virginia.").

However, the Supreme Court of Virginia has not addressed how this rule would apply in situations where defamatory content is published simultaneously in multiple jurisdictions. *See Cockrum*, 365 F. Supp. 3d at 688-89 ("This Court notes, as it previously has, that it remains 'far

from clear' how the Supreme Court of Virginia would apply *lex loci* in situations where defamatory content is published in multiple jurisdictions, such as on a national television broadcast or . . . a website that can be accessed worldwide."); *Gilmore*, 370 F. Supp. 3d at 664 (stating that the Supreme Court of Virginia has not addressed how the "place of the wrong" should be defined "in situations where the defamatory content is published in multiple jurisdictions.").

Many state and federal courts resolved the problem by adopting the Restatement (Second) of Conflict of Laws, commonly known as the "significant relationship" test. The Fourth Circuit voiced concerns over adherence to the *lex loci delicti* rule when an allegedly defamatory statement was broadcast on a radio station simultaneously to multiple jurisdictions. *See Wells v. Liddy*, 186 F.3d 505, 527 (1999). Applying, Maryland law, the Fourth Circuit contemplated that "[b]ecause of the widespread simultaneous publication of the allegedly defamatory statement in many different jurisdictions, application of the traditional *lex loci delicti* rule becomes cumbersome, if not completely impractical." *Id.* The *Wells* court applied the "significant relationship" test and continues to do so. *See id.* However, the Virginia Supreme Court explicitly rejects the "significant relationship test." *See R.S. Jones*, 246 Va. at 5 (1993). Multiple federal courts, while not binding upon the Court, examined the problem that a multijurisdictional defamation claim creates and hypothesized how the Supreme Court of Virginia *would* apply the *lex loci delicti* rule.

Judge Moon of the Western District of Virginia applied a new test to the place of the wrong analysis. The court held that the Supreme Court of Virginia in "multi-defendant, multi-state Internet tort cases . . . would define the 'place of the wrong' as the state where the plaintiff is primarily injured as a result of the allegedly tortious online content." *Gilmore*, 370 F. Supp. 3d at 666. The case stemmed from the plaintiff uploading footage of an individual driving into a crowd of counter-protestors, protesting the "the Unite the Right" rally in Charlottesville, Virginia in August of 2017, and killing Heather Heyer. *See id.* at 642. The plaintiff brought suit against multiple defendants who "published articles and videos falsely portraying him as a 'deep state' operative . . . ." *Id.* After those publications appeared online, the plaintiff received harassing and threatening messages online and asserted it would be difficult to for him to return to the State Department as a diplomat due to the reputational harm inflicted. *Id.* at 644-45.

While Judge Moon did not endorse the significant relationship test, his new test tracks closely to the underlying rationale behind the significant relationship test: that the extent of each interest of a potentially interested state needs to be determined to find the state with the greater

interest. *See* RESTATEMENT 2D CONFLICTS OF LAW § 150. Judge Moon suggests that applying *lex loci delicti* in a case like *Gilmore* would "require the cumbersome application of a patchwork of state law." *Id.* at 665. Instead, due to the complexity of online publication, the court reasoned that because plaintiff alleged the brunt of his injury was a result of the publications in Virginia, where he lives and works, then Virginia law should apply. *See id.* at 666.

Judge Hudson of the Eastern District of Virginia also examined application of Virginia's *lex loci delicti* rule this past March in *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 654 (E.D. Va. 2019). The plaintiffs in *Cockrum* sought damages from the unauthorized publication of their personal information on the internet, which was allegedly obtained by Russian intelligence operatives during the hack of computer servers belonging to the Democratic National Committee. *See* 365 F. Supp. 3d at 654-55. The court applied the *lexi loci delicti* rule to the common-law claim of public disclosure of private facts. *See id.* at 666. Determining that the place of the wrong is "where the last event necessary to make an act liable for an alleged tort takes place," the court looked to the elements of the tort. *See id.* at 666-67. Judge Hudson determined that the common-law claim of public disclosure's place of the wrong was wherever the act of public disclosure was published. *See id.* at 667. Ultimately, he felt that the Supreme Court of Virginia would find that the place of the wrong in these claims for public disclosure of private facts is the place where the act of publication to the internet occurred. *See id.* at 670.

The conflicting views between Judge Moon and Judge Hudson are both well-articulated and respected by this Court. One represents a view that the Supreme Court of Virginia will move towards adoption of a modern standard similar to the one set forth in the Restatement (Second) of the Conflicts of Law; while the other represents the view that the Supreme Court of Virginia will not and will continue to apply *lex loci delicti*. This Court feels that any adoption of a new standard or adoption of the standard set forth in the Restatement (Second) of the Conflicts of Law is properly made by a court not bound by the doctrine of *stare decisis*.

Although the common-law claim of public disclosure of private facts differs from defamation, both torts hinge on the *publication* of the private information or slanderous words. *See id.* at 669-70 (emphasis added). Both torts require the element of publication before any cause of action can accrue. *See id.* at 669. Application of *lex loci delicti*, the place of the wrong, requires the Court to determine "where the last event necessary to make an act liable for an alleged tort

takes place." *Id.* at 666-67. The last event necessary for an individual to become liable for defamation in online, multi-jurisdictional cases occurs when the defamatory statement is uploaded to the internet. Therefore, the place of the wrong in this case is the place where the act of publication of Ms. Heard's Op-Ed to the internet occurred. The Court will now examine whether the facts support the place of the publication to the internet as being in Virginia, California, New York, or elsewhere.

Place of Publication

"Publication sufficient to sustain a common-law defamation is uttering the slanderous words to some third person so as to be heard and understood by such person." *Thalhimer Bros. v. Shaw*, 156 Va. 863, 871 (1931); *see also Adams v. Lawson*, 17 Gratt. 250, 58 Va. 250, 257 (1867) ("It is enough, it is said, if [the contents of the writing] are made known to a single person."). Defamatory statements must be published to a third-party in order to be actionable. *See Dickenson v. Wal-Mart Stores, Inc.* No. 96-0240, 1997 U.S. Dist. LEXIS 19459, at *8 (W.D. Va. Nov. 3, 1997); *Hines v. Gravins*, 136 Va. 313, 112 S.E. 869, 870 (1922) (citing *Stivers v. Allen*, 115 Wash. 136, 196 Pac. 663, 15 A. L. R. 247). A publication occurs when a third person reads the slanderous words sent by the individual. *See generally Davis v. Heflin*, 130 Va. 169, 172 (1921) (contemplating that publication is not achieved until a statement is received and read by a third person). "It is undoubtedly well-recognized law that the mere act of sending of a letter through the mail is not a publication, as the sender it not responsible for what the recipient does with the letter after it is received." *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S.E. 692, 693 (1903).

1. *Ms. Heard's Op-Ed Was Uploaded to the Internet Through The Washington Post's Servers Located in Springfield, Virginia, so the Cause of Action Arises in Virginia*

Ms. Heard's Declaration on this record,[1] to which the Court cannot add or infer, states that Ms. Heard "submitted [her Op-Ed] to *The Washington Post* through [her] contact at the ACLU, who was based in New York." Heard Decl. ¶¶ 53-54. Her Op-Ed was then published on December 18, 2018, on *The Washington Post*'s website. *See* Compl. ¶¶ 20, 68, 75; Heard Decl. ¶ 54. Ms. Heard's act of emailing the Op-Ed is similar to sending a letter through the mail. *See* Compl. ¶¶ 20, 68, 75; Heard Decl. ¶ 54.Ms. Heard merely submitted her Op-Ed to her "contact" in New York and the Court cannot assume facts that are not in the record as to what the recipient did with the

[1] All parties stipulated to the accuracy of Ms. Heard's Declaration at the hearing on June 28, 2019.

Op-Ed, except that the Op-Ed was published on *The Washington Post*'s website at Ms. Heard's instruction. *See* Compl. ¶¶ 20, 68, 75; Heard Decl. ¶ 54.

The Washington Post's online edition is "created on a digital platform in Virginia and routed through servers in Virginia." Compl. ¶ 10. Like the private information that was directed to be published online by the defendant in *Cockrum*, Ms. Heard submitted her Op-Ed to *The Washington Post* to be published online. *See Cockrum*, 365 F. Supp. 3d at 670; Compl. ¶¶ 68, 75 Heard Decl. ¶¶ 53-54. The last event to make Ms. Heard liable for the alleged defamatory statements in her Op-Ed was uploading it to the internet. Using the servers located in Springfield, Virginia, *The Washington Post* posted it to the internet on December 18, 2018. *See* Compl. ¶¶ 20, 68, 75. Therefore, Mr. Depp's cause of action arises in Virginia and the prerequisite to dismiss the case based on *forum non conveniens* is not met.

2. *Even if Ms. Heard's ACLU Contact Opened and Read the Submitted Op-Ed, She Was an Interested Party and Publication Did Not Occur*

"Communications between persons on a subject in which the persons have an interest or duty are occasions of privilege." *Lairmore v. Blaylock*, 259 Va. 568, 572 (2000).

> An exhaustive review of the English cases on the subject was made in 1930 by three judges of the King's Bench. *See Watt v. Longsdon*, 1 K.B. 130, 69 A.L.R. 1005, 1022. The three judges agreed that the most accurate statement of the rule was made by Lord Atkinson in *Adams v. Ward* (1917) A.C. 309, 334, Ann. Cas. 1917D, 249—H.L., as follows: 'A privileged occasion is an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.'

M. Rosenberg & Sons v. Craft, 182 Va. 512, 526 (1944).

In this case, Ms. Heard's declaration is undisputed and she states that "while working with the American Civil Liberties Union as the ACLU Ambassador for Women's Rights, [she] learned of an opportunity to write an Op-Ed about women's rights issues." Heard Decl. ¶ 53. Ms. Heard agreed to write the Op-Ed and then, through her contact within the ACLU, submitted it to *The Washington Post*. *See* Heard. Decl. ¶¶ 53-54. Ms. Heard did not submit the Op-Ed, containing the allegedly defamatory statements, to a friend, but to an individual in the organization she was "working with." *See* Heard. Decl. ¶ 53. Ms. Heard and her contact in New York both shared a corresponding interest and reciprocity because they were working together for the ACLU. *See Craft*, 182 Va. at 526; Heard Decl. ¶¶ 53-54.

Thus, the publication did not occur until December 18, 2018, when the Op-Ed was uploaded to the internet on *The Washington Post*'s website. *See* Compl. ¶¶ 20, 68, 75; Heard Decl. ¶ 54. It was only then that the allegedly defamatory statements were read by non-interested third parties.

Following Judge Hudson's opinion, and consistent with Supreme Court of Virginia precedent, the Court finds that publication occurred in Virginia.

CONCLUSION

For the reasons stated above, Ms. Heard's "Motion to Dismiss Based on *Forum Non Conveniens*" is Denied. Mr. Depp's counsel is directed to prepare an Order reflecting the Court's ruling and forward it to Ms. Heard's counsel for endorsement and transmitted to the Court for entry.

Sincerely,

[redacted]

Bruce D. White