



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 27, 2020

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Re: *John C. Depp, II v. Amber Laura Heard*, Case No. CL-2019-2911

Dear Counsel:

This matter came before the Court on December 20, 2019, for argument on Defendant's Demurrer and non-evidentiary Plea in Bar. At the conclusion of the hearing, the Court took the matter under advisement. The questions presented are (1) whether Plaintiff has pleaded an actionable claim for defamation by implication, and (2) whether Plaintiff is barred from recovering on his defamation claim under the applicable statute of limitations.

OPINION LETTER

BACKGROUND

Plaintiff's claim for defamation stems from four statements made in Defendant's op-ed, which was published in the *Washington Post* online and in print on December 18, 2018, and December 19, 2018, respectively. The article, entitled "Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change" (online) and "A transformative moment for women" (print), does not name Plaintiff explicitly. It discusses how—two years before the op-ed was published—Defendant became a public figure "representing domestic abuse," what Defendant experienced in the aftermath of attaining this status, and what Defendant believed could be done to "build institutions protective of women." See Compl. Ex. A, at 1-4. Plaintiff brought this action on March 1, 2019, alleging that the op-ed was really about "Ms. Heard's purported victimization after she publicly accused her former husband, Johnny Depp ("Mr. Depp") of domestic abuse in 2016" Compl. at ¶ 2. Plaintiff asserts that "the op-ed's clear implication that Mr. Depp is a domestic abuser is categorically and demonstrably false," Compl. at ¶ 3, and he specifically takes issue with the following four statements from the op-ed:

1. Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change.
2. Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out.
3. I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse.
4. I write this as a woman who had to change my phone number weekly because I was getting death threats. For months, I rarely left my apartment, and when I did, I was pursued by camera drones and photographers on foot, on motorcycles and in cars. Tabloid outlets that posted pictures of me spun them in a negative light. I felt as though I was on trial in the court of public opinion—and my life and livelihood depended on myriad judgments far beyond my control.

Compl. at ¶ 22. Plaintiff details a number of facts and circumstances to contextualize the 2018 op-ed, including certain events surrounding the couple's highly publicized divorce in 2016, to support his allegation that Defendant falsely implied that she was a victim of domestic abuse at his hands. See Compl. at ¶¶ 13-19, 24-30.

Presently before the Court is Defendant's Demurrer, wherein Defendant asserts that the four statements are not actionable under a theory of defamation, and one of Defendant's Plea in Bar arguments as to the statute of limitations.¹ This Letter Opinion addresses these issues in turn.

¹ At the plea in bar portion of the hearing, Ms. Heard reserved her arguments that (1) she is entitled to immunity under Virginia's Anti-SLAPP statute and (2) that she cannot be liable for the online article's title for a later evidentiary hearing.

ANALYSIS

I. Defendant's Demurrer

On demurrer, the trial court must determine whether the complaint states a cause of action upon which the relief requested may be granted. *Welding, Inc. v. Bland County Service Auth.*, 261 Va. 218, 226 (2001). "A demurrer admits the truth of all properly pleaded material facts and all facts which are impliedly alleged, as well as facts that may be fairly and justly inferred." *Pendleton v. Newsome*, 290 Va. 162, 171 (2015) (citing *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394, 397 (1991)). "In deciding whether to sustain a demurrer, the sole question before the trial court is whether the facts pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against a defendant." *Id.*

The elements of a defamation claim include: (1) publication of (2) an actionable statement with (3) the requisite intent. *Schaecher v. Bouffault*, 290 Va. 83, 91 (2015). On demurrer, "the trial judge is responsible for determining whether, as a matter of law, the allegedly defamatory statements are actionable." *Taylor v. Southside Voice, Inc.*, 83 Va. Cir. 190 (2011). To be "actionable," a statement must be both "false and defamatory." *Schaecher*, 290 Va. at 91. Because statements of opinion cannot be "false," they are never actionable. *See Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 132 (2003). A statement qualifies as "defamatory" only if it "tends to injure one's reputation in the common estimation of mankind" *Schaecher*, 290 Va. at 92 (noting the speech complained of must have "the requisite defamatory 'sting' to one's reputation.").

Typically, "an editorial or op-ed column" is "ordinarily not actionable" because it appears "in a place usually devoted to, or in a manner usually thought of as representing, personal viewpoints." *Id.* However, Virginia recognizes that "a defamatory charge may be made by inference, implication, or insinuation," *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 8 (1954), and that a statement expressing a defamatory meaning may not be "apparent on its face." *Pendleton*, 290 Va. at 172 (citing *Webb v. Virginian-Pilot Media Cos., LLC*, 287 Va. 84, 89 n.7 (2014)). Accordingly, "[i]n order to render words defamatory and actionable, it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory." *Carwile*, 196 Va. at 7.

Under this theory of implied defamation, "in determining whether the words and statements complained of are reasonably capable of the meaning ascribed to them by innuendo, every fair inference that may be drawn from the pleadings must be resolved in the plaintiff's favor." *Carwile*, 196 Va. at 8. "However, the meaning of the alleged defamatory language cannot, by innuendo, be extended beyond its ordinary and common acceptance." *Id.* The innuendo functions to show "how the words used are defamatory, and how they relate to the plaintiff, but it cannot introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain." *Id.*

The Supreme Court of Virginia has summarized the role of a trial court on demurrer where the plaintiff has proceeded on a theory of defamation by implication as follows:

Because Virginia law makes room for a defamation action based on a statement expressing a defamatory meaning “not apparent on its face,” **evidence is admissible to show the circumstances** surrounding the making and publication of the statement **which would reasonably cause the statement to convey a defamatory meaning** to its recipients. **Allegations that such circumstances attended the making of the statement, with an explanation of the circumstances and the defamatory meaning allegedly conveyed, will suffice to survive demurrer if the court, in the exercise of its gatekeeping function, deems the alleged meaning to be defamatory.** Whether the circumstances were reasonably sufficient to convey the alleged defamatory meaning, and whether the plaintiff was actually defamed thereby, remain issues to be resolved by the fact-finder at trial.

Pendleton, 290 Va. at 172 (bold emphasis added).

In the present case, Plaintiff pleaded (1) that Defendant published the statements at issue, Compl. at ¶ 75, and (2) that Defendant had the requisite intent when making the statements that allegedly imply that Plaintiff abused Defendant. Compl. at ¶ 81 (“At the time of publication, Ms. Heard knew these statements were false.”). Accordingly, the Court must determine whether the statements complained of are actionable. *See Schaecher*, 290 Va. at 91. Because a statement must be both false and defamatory to be actionable, *Fuste*, 265 Va. at 132, and because the statements at issue were made in an op-ed that does not name Plaintiff, the Court must determine whether Plaintiff has adequately pleaded that the statements otherwise possess a prohibited defamatory implication. *See Carwile*, 196 Va. at 8. To make this determination, the Supreme Court of Virginia has articulated that when “[a]llegations that . . . circumstances [that would reasonably cause the statement to convey a defamatory meaning to its recipients] attended the making of the statement, with an explanation of the circumstances and the defamatory meaning allegedly conveyed,” they will “suffice to survive demurrer if the court, in the exercise of its gatekeeping function, deems the *alleged meaning* to be defamatory.” *Pendleton*, 290 Va. at 172 (emphasis added).² Here, Plaintiff has pleaded circumstances that would reasonably cause three of the four statements at issue to convey the alleged defamatory meaning that Mr. Depp abused Ms. Heard, and this alleged meaning is in fact defamatory.

A. Three Statements Are Actionable Under a Theory of Defamation by Implication

The Court finds that the following three statements are actionable:

- i. Amber Heard: I spoke up against sexual violence—and faced our culture’s wrath. That has to change.

² “Whether the circumstances were reasonably sufficient to convey the alleged defamatory meaning, and whether the plaintiff was actually defamed thereby, remain issues to be resolved by the fact-finder at trial.” *Id.*

- ii. Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out.
- iii. I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse.

First, Plaintiff has alleged a number of circumstances that would reasonably cause the three statements above to convey the alleged defamatory meaning—that Mr. Depp abused Ms. Heard—to its recipients. Specifically, the Complaint alleges that the events surrounding the parties' divorce—including Ms. Heard's repeated allegations of domestic violence—attended the making of her statements in the *Washington Post* op-ed. See Compl. at ¶ 16 (alleging that, in May 2016, Ms. Heard falsely yelled “stop hitting me Johnny,” in addition to stating that Mr. Depp struck her with a cell phone, hit her, and destroyed the house, before she “presented herself to the world with a battered face as she publicly accused Mr. Depp of domestic violence and obtained a restraining order against him.”); ¶ 19 (“Despite dismissing the restraining order and withdrawing the domestic abuse allegations, Ms. Heard (and her surrogates) have continuously and repeatedly referred to her in publications, public service announcements, social media postings, speeches, and interviews as a victim of domestic violence, and a “survivor,” always with the clear implication that Mr. Depp was her supposed abuser.”); ¶ 20 (“Most recently, in December 2018, Ms. Heard published an op-ed in the *Washington Post* that falsely implied Ms. Heard was a victim of domestic violence at the hands of Mr. Depp.”); ¶ 21 (“The “Sexual Violence” op-ed’s central thesis was that Ms. Heard was a victim of domestic violence and faced personal and professional repercussions because she “spoke up” against “sexual violence” by “a powerful man.”); ¶ 22 (“Although Mr. Depp was never identified by name in the “Sexual Violence” op-ed, Ms. Heard makes clear, based on the foundations of the false accusations that she made against Mr. Depp in court filings and subsequently reiterated in the press for years, that she was talking about Mr. Depp and the domestic abuse allegations she made against him in 2016.”). Drawing every fair inference in Plaintiff's favor, the Court finds that these circumstances, as pleaded, would reasonably cause the three statements above to convey the alleged defamatory meaning that Mr. Depp abused Ms. Heard.

Second, Plaintiff has alleged an implied meaning that is clearly defamatory. Compl. at ¶ 78 (noting that these statements imply “Ms. Heard was the victim of domestic violence at the hands of Mr. Depp.”). The implication that Mr. Depp abused Ms. Heard is defamatory *per se* because it imputes to Plaintiff “the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished.” See *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 713 (2006) (citing *Fleming v. Moore*, 221 Va. 884, 889 (1981); see also VA. CODE § 18.2-57.2 (2020); CAL. PENAL CODE § 243(e)(1) (2016).

Because the Complaint contains allegations of circumstances that would reasonably cause the three statements above to convey an alleged defamatory meaning, and this alleged meaning—that Mr. Depp abused Ms. Heard—is defamatory *per se*, the Court is instructed under *Pendleton* to allow these statements to proceed beyond demurrer. 290 Va. at 172-73.

Additionally, the Court finds that allowing these three statements to proceed beyond demurrer under the standard articulated in *Pendleton* is consistent with the doctrine set forth in *Carwile*, which states that “[t]he province of the innuendo is to show how the words used are defamatory, and how they relate to the plaintiff, but it [cannot] introduce new matter, nor extend the meaning of the words used [beyond their ordinary and common acceptance], or make that certain which is in fact uncertain.” *Carwile*, 196 Va. at 8.

By holding that Plaintiff has met the pleading standard set forth in *Pendleton*, 290 Va. at 172, the Court is not allowing Plaintiff to proceed on an allegation of an implicit defamatory meaning that introduces new matter. The implied defamatory meaning alleged was that Mr. Depp abused Ms. Heard, and Defendant’s op-ed concerns the matter of what happened after Defendant attained the status of a public figure representing domestic abuse. Drawing every fair inference in Plaintiff’s favor, the Court can conclude—as Plaintiff alleges—that an aspect of the article relied on the factual underpinning that Ms. Heard was abused by Mr. Depp.

This finding also does not extend the meaning of the words in each of the three actionable statements beyond their ordinary meanings.

Amber Heard: I spoke up against sexual violence—and faced our culture’s wrath. That has to change.

The first statement could reasonably convey the alleged defamatory meaning—that Mr. Depp abused Ms. Heard—to its readers without extending the words beyond their ordinary and common acceptance. See *Pendleton*, 290 Va. at 172; *Carwile*, 196 Va. at 8. Resolving every fair inference in Plaintiff’s favor, this statement could reasonably imply that the “sexual violence” Ms. Heard “spoke up against” was in fact perpetrated by Mr. Depp, as he alleges. While the Court recognizes that this factual implication derives only from a part of the statement, and that the remaining portion is couched in Defendant’s subjective opinion and perception, the Supreme Court of Virginia has held that “[f]actual statements made in support of an opinion . . . can form the basis for a defamation action.” See *Lewis v. Kei*, 281 Va. 715, 725 (2011) (citing *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 46 (2009)).

Although the Court in *Lewis* noted that, “in determining whether a statement is one of fact or opinion, a court may not isolate one portion of the statement at issue from another portion of the statement” it made clear that this meant, “in considering whether a plaintiff has adequately pled a cause of action for defamation, *the court must evaluate all of the statements attributed to the defendant and determine whether, taken as a whole, a jury could find that defendant knew or should have known that the factual elements of the statements were false and defamatory.*” *Id.* (emphasis added). This Court holds that a jury in this case could find that Defendant knew or should have known that the implied factual elements of this statement (and the other two allowed to proceed) were false and defamatory based on the pleadings.

Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out.

As for the second statement, Defendant called herself “a public figure representing domestic abuse,” which can be read to imply that she became a representative of domestic abuse *because* she was abused by Mr. Depp, not just because she spoke out against the alleged abuse. This inference can be drawn without extending the language beyond its “ordinary and common acceptance.” *Carwile*, 196 Va. at 8. The word “represent” has over ten meanings in Merriam Webster’s dictionary, including: “to serve as a specimen, example, or instance of,” and “to serve as a counterpart or image of.” *See Represent*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/representing> (last visited Mar. 25, 2020). Notwithstanding the other meanings of the word “represent,” the Court must resolve every fair inference in Mr. Depp’s favor, including that Ms. Heard meant she was an “example of” a public figure who was domestically abused. This conclusion is further supported by Defendant saying she attained this status “two years ago,” which would have been the same time the parties’ divorce was unfolding. Again, in light of the law set forth in *Lewis*, 281 Va. at 725, this Court holds that a jury in this case could find that Defendant knew or should have known that the implied factual elements of this statement were false and defamatory based on the pleadings.

I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse.

Drawing every fair inference in Plaintiff’s favor, the Court can fairly conclude that Defendant’s statement that she saw “how institutions protect men accused of abuse,” could reasonably convey to its recipients that she saw how Mr. Depp was protected by institutions after he abused her and she spoke up against it. The Court finds that to reference one who was accused of abuse and protected by an institution can reasonably imply—at the demurrer stage—that the person in fact committed the abuse of which he was accused without extending the words beyond their ordinary meaning. Further, Defendant said she saw this happen to “men,” “in real time,” which—when read in context of the entire article, where Defendant previously stated that she became a public figure representing domestic abuse “two years ago,” and in light of the circumstances pleaded about the parties’ divorce—would reasonably cause readers to conclude she was referring to her experience with Mr. Depp despite her efforts to globalize the statement. *See Lewis*, 281 Va. at 725 (holding that the court must evaluate the statements taken as a whole to determine whether a jury could find that defendant knew or should have known that the factual elements of the statements were false and defamatory); *see also Carwile*, 196 Va. at 8 (noting that it does not matter “how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory.”).

To summarize, all *Pendleton* requires is that the plaintiff plead allegations of an implied defamatory meaning, that is in fact defamatory, as well as circumstances that would reasonably cause the statements at issue to convey an alleged defamatory meaning. *Pendleton*, 290 Va. at 172-73. Because Plaintiff alleged that all three of these statements carry the same defamatory meaning based on the same attenuating circumstances, the Court must overrule Defendant’s

Demurer because it finds that these statements could reasonably convey the alleged defamatory meaning that Mr. Depp abused Ms. Heard when drawing every fair inference in Plaintiff's favor.

B. The Fourth Statement Is Not Actionable

Even in light of the somewhat relaxed defamation by implication pleading standard set forth by the Supreme Court of Virginia in *Pendleton*, the Court must still determine that the alleged circumstances are ones that **"would reasonably cause the statement to convey a defamatory meaning."** *Id.* (bold emphasis added). The Court finds that the circumstances alleged regarding the statements Ms. Heard made during and after the parties' divorce would not reasonably cause the fourth statement to convey a defamatory meaning. Therefore, the Court cannot proceed to the other steps of the analysis outlined in *Pendleton*. *See id.* Plaintiff argues that the following statement implies that Mr. Depp abused Ms. Heard:

I write this as a woman who had to change my phone number weekly because I was getting death threats. For months, I rarely left my apartment, and when I did, I was pursued by camera drones and photographers on foot, on motorcycles and in cars. Tabloid outlets that posted pictures of me spun them in a negative light. I felt as though I was on trial in the court of public opinion—and my life and livelihood depended on myriad judgments far beyond my control.

This statement lacks any factual underpinning that Mr. Depp abused Ms. Heard even when considering the circumstances alleged and resolving all fair inferences in Plaintiff's favor. The statement is too opinion-laden and representative of Defendant's own perspective for it to be actionable, and it notably lacks any implicit reference to the alleged meaning that Mr. Depp abused Ms. Heard. The Court simply cannot find that this statement has a defamatory charge without extending the meaning of the words far beyond their ordinary and common acceptance. *Carwile*, 196 Va. at 8. Accordingly, Defendant's Demurrer is sustained with prejudice as to the fourth statement discussed above.

Drawing the line at this statement is consistent with this Court's ruling regarding the other three statements, as those were held to be statements that were "artfully disguised," as articulated in *Carwile*, 196 Va. at 8, but nonetheless reasonably capable of conveying the alleged defamatory meaning in light of the circumstances pleaded, such that a jury could find that Defendant knew or should have known that the implied factual elements of the statements were false and defamatory. *See Pendleton*, 290 Va. at 172-73; *Lewis*, 281 Va. at 725. As for the first three statements, it is still the province of the fact-finder in this case to determine whether the circumstances were sufficient to convey the alleged defamatory meaning, and whether the plaintiff was actually defamed thereby. *Pendleton*, 290 Va. at 172-73.

II. Defendant's Plea in Bar as to the Statute of Limitations

A plea in bar condenses the litigation by narrowing it to a discrete issue of fact that bars a plaintiff's right of recovery when proven. *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996). The

burden of proof on the dispositive fact rests on the moving party. *Id.* When considering the pleadings, “the facts stated in the plaintiffs’ motion for judgment [are] deemed true.” *Tomlin*, 245 Va. at 480 (quoting *Glascok v. Laserna*, 247 Va. 108, 109 (1994)). “Familiar illustrations of the use of a plea would be: the statute of limitations, absence of proper parties (where this does not appear from the bill itself), *res judicata*, usury, a release, an award, infancy, bankruptcy, denial of partnership, *bona fide purchaser*, denial of an essential jurisdictional fact alleged in the bill, etc.” *Nelms v. Nelms*, 236 Va. 281 (1988).

Defamation claims are governed by VA. CODE § 8.01-247.1, which provides that “[e]very action for injury resulting from libel, slander, insulting words, or defamation shall be brought within one year after the cause of action accrues.” Defendant argues that the gravamen of Plaintiff’s case is that Defendant should be held liable for reviving statements she made in 2016, which is an attempt to end-run the statute of limitations. Def.’s Mem. Supp. Dem. & Plea in Bar 14-15. Plaintiff argues that the op-ed was published less than three months before Plaintiff filed suit, and—even if this were a case regarding revived statements—that Virginia law considers a new action to accrue each time the defamatory statement is published. Pl.’s Opp’n 10-11.

Assuming *arguendo* that Plaintiff proceeds on a theory of republication, Plaintiff is correct in asserting that the date of republication is the date on which the clock begins running for the statute of limitations in a defamation action. *See Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 689 (4th Cir. 1989) (“It is well settled that the author or originator of a defamation is liable for republication or repetition thereof by third persons, provided it is the natural and probable consequence of his act, or he has presumptively or actually authorized or directed its republication”) (quoting *Weaver v. Beneficial Finance Co.*, 199 Va. 196, 199 (1957)); *Weaver*, 199 Va. at 200 (holding the one-year statute of limitations does not bar a defamation claim involving a letter when the letter’s contents were revealed before a promotion board (i.e., republished) within one year of the present action). Consequently, the original publication date of these statements does not prohibit Plaintiff from bringing this action because the statements—if republished—were reiterated within one year of Plaintiff bringing this action. The Court must therefore deny Defendant’s Plea in Bar as to the statute of limitations.

CONCLUSION

For the foregoing reasons, Defendant’s Demurrer is sustained as to the fourth statement listed above, but it is overruled as to the other three statements. Further, Defendant’s Plea in Bar regarding the statute of limitations is denied. Counsel shall prepare an Order reflecting the Court’s ruling and forward that Order to the Court for entry.

Sincerely,



Bruce D. White