IN THE

Court of Appeals of Virginia

RECORD NO. 1072-22-4

JOHN C. DEPP, II,

Appellant,

v.

AMBER LAURA HEARD,

Appellee.

BRIEF OF APPELLEE

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Statement of the Case

During the course of their relationship, Appellant John C. Depp, II ("Mr. Depp") abused his wife, Appellee Amber Laura Heard ("Ms. Heard"), physically, verbally, emotionally, and psychologically. (R. 28530). Mr. Depp promised her that if she ever left him, he would make her think of him every single day by ruining her career and life. (R. 28530). After she obtained a protective order against him and commenced divorce proceedings, Mr. Depp did everything in his power to keep that promise. In describing Ms. Heard around the time of their divorce, Mr. Depp stated, "She's begging for total global humiliation . . . She's gonna get it . . . [and] I will stop at nothing!!!" (R. 46549, 28360).

Mr. Depp has marshalled agents to advance his global campaign, including his lawyer, Adam Waldman ("Mr. Waldman"). Mr. Depp retained Mr. Waldman shortly after announcing he would "stop at nothing" to globally humiliate Ms. Heard. (R. 28361). Mr. Waldman assists Mr. Depp with publicity, holds himself out to the press as Mr. Depp's lawyer, and has been quoted in several articles as stating Ms. Heard is carrying out an abuse "hoax." (R. 27555-57, 275511-53). Mr. Waldman also works to generate negative press about Ms. Heard. Specifically, Mr. Waldman filed a report with the Los Angeles Police Department alleging Ms. Heard perjured herself, and then created a story about his claim by telling a news outlet that the

LAPD had opened a criminal investigation into perjury by Ms. Heard. (R. 27557-58).

The defamatory statement at issue in this appeal concerns the last occasion on which Mr. Depp physically abused Ms. Heard, May 21, 2016. When describing this day to the *Daily Mail*, a tabloid published in the United Kingdom and online, Mr. Waldman falsely stated:

> Quite simply this was an ambush, a hoax. They [Ms. Heard and her friends] 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. 21817, 46631-32) (the "Statement"). Following Mr. Depp's suit arising out of Ms. Heard's op-ed in which she described public backlash faced by women who allege violence, Ms. Heard filed a counterclaim for defamation seeking redress for reputational harm caused by the Statement.

Mr. Depp moved for summary judgment arguing the Statement was an opinion and Ms. Heard could not prove actual malice. (R. 14310-11). The Circuit Court of Fairfax County (the "circuit court") correctly denied the motion, finding that the Statement was actionable because it was capable of being proven false. (R. 24246-47). The circuit court also denied summary judgment because the record

contained disputed facts regarding whether the Statement was made with actual malice. (R. 24246).

The case proceeded to trial where the circuit court properly excluded the contents of the full article that contained the Statement because it constituted inadmissible hearsay and was not necessary for the jury to assess whether the Statement was defamatory. (R. 27209, 27542-43).

At the conclusion of the evidence on Ms. Heard's counterclaim, and again at the conclusion of all evidence, Mr. Depp moved to strike. Mr. Depp reiterated the arguments in his motion for summary judgment, contending the Statement was an opinion published without actual malice. (R. 28098-100, 28101-03). Mr. Depp also argued that he could not be held liable for Mr. Waldman's conduct because he was an independent contractor rather than an employee. (R. 20180, 28100-01). The circuit court declined to revisit its ruling that the Statement was actionable and correctly ruled that Ms. Heard presented sufficient evidence of actual malice. (R. 28107). The court further held that Ms. Heard presented sufficient evidence that Mr. Waldman was acting as Mr. Depp's agent when he made the Statement. (R. 28106-07).

Mr. Depp then tendered several jury instructions regarding his theory that Mr. Waldman was an independent contractor. The circuit court refused these

instructions, holding the concept of an independent contractor did not apply to this case and no evidence supported the proposed instructions. (R. 27728).

Following deliberations, the jury returned a verdict in favor of Ms. Heard with respect to the Statement. The circuit court entered judgment in accordance with the verdict and subsequently entered a final order. (R. 21807-08, 22262-64). This appeal followed.

Statement of the Facts

I. The Abuse on May 21, 2016

This Court views the evidence presented at trial in light most favorable to the prevailing party. *Commonwealth v. Perkins*, 295 Va. 323, 323 (2018). So viewed, 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. (R. 26978-79). On May 21, 2016, the couple had not seen each other for one month, but Mr. Depp contacted Ms. Heard and asked if he could come home because his mother had passed away. (R. 26978). He told Ms. Heard that he "really needed his wife," and while she felt "conflicted" because the "situation hadn't gotten better with Johnny mentally" due to his drinking and drug use, she agreed that he could return home. (R. 26978-79).

When Mr. Depp arrived in the early evening, he was inebriated. (R. 26979). He was "peaceful" at first, but later began talking about a "prank" he insisted was

carried out by one of Ms. Heard's friends, iO Tillett Wright ("Mr. Wright"). (R. 26979). Mr. Depp claimed that Mr. Wright defecated in Ms. Heard's bed so that he would find feces there. (R. 26979). Ms. Heard called Mr. Wright and placed him on speakerphone in an attempt to resolve the matter. (R. 26979). During the call, Mr. Depp became angry, grabbed the phone, and screamed at Mr. Wright, who is a member of the LGBTQIA community. (R. 26980). He yelled at the top of his lungs, "You dyke bi***," among other expletives and insults, and told Mr. Wright he could have Ms. Heard. (R. 26980). Mr. Depp then tossed the phone on the couch and proceeded upstairs. (R. 26980).

Ms. Heard retrieved the phone and began apologizing to Mr. Wright. (R. 26980). Mr. Wright, who was still on speakerphone and knew of Mr. Depp's abuse of Ms. Heard on previous occasions, responded, "Amber, get out of the house. Get out of the house now. You're not safe. Get out of the house." (R. 26980). Mr. Depp heard this statement while he was on the staircase and bolted down the stairs. (R. 26980). Mr. Depp grabbed the phone from Ms. Heard and began berating Mr. Wright again. (R. 26980).

After he finished screaming at Mr. Wright, Mr. Depp threw the phone at Ms. Heard, who was sitting on the couch. (R. 26980). The phone hit Ms. Heard's face on "what felt like [her] eye." (R. 26980). Ms. Heard put her head in her hands, began crying, and said, "You hit me with the phone." (R. 26980). In response, Mr. Depp

said, "Oh, yeah, I hit you, huh?," and then hit Ms. Heard on the top of her head and pulled her off the couch by her hair. (R. 26980). Ms. Heard tried to cover her face to protect herself while Mr. Depp continued to pull her around the room by her hair and mocked her. (R. 26981). Referring to her face, he said, "Let me see how bad I hurt you. Let me see it. Let me see how bad I hurt you this time. What if I pull your hair back?" (R. 26981). At trial, Ms. Heard introduced numerous photos, taken later that night and the following days, showing the marks and bruising on her face caused by Mr. Depp throwing her phone at her. (*See, e.g.*, R. 46490-504).

Meanwhile, at some point during the altercation, Mr. Wright called 911. (R. 27246). The physical altercation subsided when Ms. Heard's friend, Raquel Pennington ("Ms. Pennington"), who lived in an adjacent apartment, entered the room. (R. 16981). Ms. Pennington got in between Ms. Heard and Mr. Depp, put her hands on Mr. Depp's chest, and said "Johnny, no." (R. 26981). Mr. Depp swatted Ms. Pennington's hands off his chest and "barreled" towards Ms. Heard who had retreated to the couch. (R. 26981). Ms. Pennington then covered Ms. Heard with her arms while Mr. Depp stood over them and screamed, "Amber, get the f*** up" about ten times. (R. 26981). At that point, two of Mr. Depp's security guards entered the apartment and persuaded Mr. Depp to leave. (R. 26981).

As Mr. Depp was leaving, he picked up a magnum wine bottle that he had brought with him and smashed various items of personal property with the bottle.

(R. 26981). The damaged property included framed photographs, displays of bead necklaces that Ms. Pennington had prepared for an art show, and items in Ms. Heard's office such as "keepsake boxes." (R. 26981, 26989-91). Mr. Depp also spilled wine in the hallway outside their home.[1] (R. 26990-92). Ms. Heard presented evidence of this property damage at trial. (*See, e.g.*, R. 46505-06, 46513, 46481-82, 46479-80, 46509-12, 46483-86, 46491).

After Mr. Depp left with his security guards, Ms. Heard learned that Mr. Wright called 911 and law enforcement was on its way. (R. 26982). Ms. Heard "panicked" because she did not know what law enforcement was going to do when it saw the property damage to her home. (R. 26982, 26986). She testified, "I wanted to protect Johnny. I didn't want him to be arrested. I didn't want him to be in trouble. I didn't want the world to know. I didn't want this [the abuse] to come out." (R. 26987, 26993). She called her attorney who assists her with entertainment law matters for advice, and he gave her the contact information of a domestic relations attorney. (R. 26982). As a result of a conversation with the domestic relations attorney, Ms. Heard told the two law enforcement officers who responded that she "refuse[d] to cooperate at this time based on the advice of [her] attorney." (R. 26982). After speaking with Ms. Heard, the officers walked through the apartments

[1] The couple's home was comprised of multiple apartments located in the Eastern Columbia Building in Los Angeles. The apartments were often referred to as penthouses at trial.

that comprised the couple's home, gave Ms. Heard a business card in case she changed her mind about cooperating, and departed. (R. 22992, 26986).

Once the officers left, Ms. Heard and her friends cleaned up the apartments so their dogs did not step on any broken glass. (R. 26993). They did not call a publicist or summon law enforcement. (R. 26982, 26993). About an hour after the first pair of officers departed, however, a second pair of officers responded to the couples' home. (R. 26993). Ms. Heard did not know additional officers had been called until they arrived. (R. 26993). She declined to cooperate with the second pair officers as well, and they departed after confirming Ms. Heard was safe and without searching the apartments. (R. 26993).

Ms. Heard filed a petition for dissolution of the parties' marriage at the end of May 2016. (R. 26996, 46540). She realized after the violence on May 21, 2016, that despite all of her efforts to help Mr. Depp become clean and sober, nothing was going to work. (R. 26996). Mr. Depp's violent behavior "was now normal and not the exception," and she feared that "it was going to end really badly for [her]" if she did not leave him. (R. 26996-97).

Ms. Heard also obtained a protective order against Mr. Depp at the end of May 2016, so that she could change the locks to their home. (R. 26997). She explained that she had begged Mr. Depp's security guards, who carried his keys, to not let him into their home when he was intoxicated, but they always let Mr. Depp

in anyway. (R. 26997). As a result, she could not sleep and would often wake up with panic attacks. (R. 26997). Ms. Heard's counsel notified Mr. Depp's counsel of her intent to seek a protective order, but Mr. Depp did not appear in court on the day she obtained the order. (R. 26997).

Ever since Ms. Heard obtained a protective order and filed for divorce, Mr. Depp has done everything in his power to destroy her reputation, career, and life.

II. Mr. Depp's Intent to Retaliate Against Ms. Heard

Mr. Depp has deep anger and resentment towards Ms. Heard, which is relevant to this appeal because it demonstrates he was highly motivated to hire Mr. Waldman to defame her. During their relationship, when Mr. Depp became angry with Ms. Heard, he expressed his desire to kill her. For example, in June 2013, he sent a text message to one of his friends stating, "Let's burn Amber!!!." (R. 46322). In response, his friend proposed a "drowning test," to which Mr. Depp responded, "Let's drown her before we burn her!!! I will f*** her burnt corpse afterwards to make sure she is dead." (R. 46322).

After Ms. Heard obtained a protective order and filed for divorce, Mr. Depp announced his plans to retaliate against her. For instance:

- In June 2016, Mr. Depp sent a text message to his sister, who works in the entertainment industry, stating, "I want her replaced on that WB film!!!" (R. 46546). He was referring to Ms. Heard's role in *Aquaman*.

- In August 2016, Mr. Depp described Ms. Heard in a text message to her former assistant that stated, "I'm disgusted that I ever f***ing touched that

scum. Back on Tuesday!!! And then…Court!!! Will hit you when I get back doll…Come over for a spot of purple and we'll fix her flabby ass nice and good!!!" (R. 46547) (ellipsis in original).

- Shortly before he met Mr. Waldman, Mr. Depp expressed his hope that Ms. Heard would die and stated he would stop at nothing to globally humiliate her in a text message to his entertainment agent, which stated, "She's begging for total global humiliation…She's gonna get it. I'm gonna need your texts about San Francisco, brother…I'm even sorry to ask…But, she sucked Mollusk's crooked d*** and he gave her some shitty lawyers…I have no mercy, no fear and not an ounce of emotion, or what I once thought was love for this gold digging, low level, dime a dozen, mushy, pointless dangling overused flappy fish market… I'm so f***ing happy she wants to go to fight this out!! She will hit the wall hard!!! And I cannot wait to have this waste of a cum guzzler out of my life!!! I met a f***ing sublime little Russian here…Which made me realize the time I blew on that 50 cent stripper…I wouldn't touch her with a goddam glove. I can only hope that karma kicks in and takes the gift of breath from her…Sorry man…but, NOW, I will stop at nothing!!! Let's see if mollusk has a pair…Come see me face to face….I'll show him things he's never seen before…Like, the other side of his dick when I slice it off…" (R. 46549) (ellipsis in original).

In light of this evidence, a fact finder could have concluded that Mr. Depp harbors deep animosity towards Mr. Heard and is desperate to destroy her reputation.

III. Mr. Depp and Mr. Waldman's Relationship

Mr. Depp retained Mr. Waldman in October 2016, and he continues to represent him. (R. 28360-61, 27543-44). He serves as "Mr. Depp's primary counsel for all of his affairs," and has assisted Mr. Depp with filing several lawsuits, including actions against Mr. Depp's former business manager, his former attorney, a newspaper, and Ms. Heard. (R. 27546-48).

Mr. Waldman also assists Mr. Depp with publicity. In February 2020, Mr. Depp and Mr. Waldman met with a publicist who works for the *Daily Mail*. (R. 27555). At the meeting or on another occasion, Mr. Waldman gave the *Daily Mail* two audio recordings concerning this case. (R. 27555). Mr. Waldman has also provided information about this case to several social media personalities who he calls "Internet journalists." (R. 27557). He was present when a journalist for the *Rolling Stone* interviewed Mr. Depp, and, according to the journalist, Mr. Waldman reached out to *Rolling Stone* about writing article about Mr. Depp. (R. 27548).

After Mr. Depp and Mr. Waldman's meeting, the *Daily Mail* published a series of articles that accurately quoted Mr. Waldman. In an article published on April 8, 2020, the *Daily Mail* wrote: "Adam Waldman, Depp's lawyer, said 'Amber and her friends in the media use fake sexual violence allegations as both a sword and a shield, depending on their needs. They have selected some of her sexual violence hoax facts as the sword, inflicting them on the public and Mr. Depp.'" (R. 275511, R. 46628-29). On April 27, 2020, the *Daily Mail* published the Statement, which accurately quoted Mr. Waldman as stating:

> 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. 27552, 46630-32). And on June 24, 2020, the *Daily Mail* published an article that accurately quoted Mr. Waldman's assertion that Ms. Heard was carrying out an "abuse hoax against Johnny Depp." (R. 27552-53, 46636-37). Each of these articles identified Mr. Waldman as Mr. Depp's lawyer or attorney. (R. 46628-37).

Mr. Waldman has generated the content for negative press about Ms. Heard as well. He filed a report with the Los Angeles Police Department claiming that Ms. Heard and Ms. Pennington perjured themselves. (R. 27558). Then, based on this report, he told a German media outlet that the "LAPD have now opened up a criminal investigation into perjury of Ms. Heard," which repeated this statement—solely created by him—in one of its publications. (R. 27557).

Mr. Depp and Mr. Waldman have enjoyed widespread success in generating negative publicity about Ms. Heard. An expert witness who analyzed negative tweets on Twitter about Ms. Heard found that between April 2020 and January 2021, over 25% of negative tweets about Ms. Heard were associated with a hashtag that included "Waldman" or a variation of his name. (R. 27568, 27572). The expert witness also detected a "huge spike" of negative hashtags toward Ms. Heard in February 2020, which coincides with when Mr. Waldman and Mr. Depp met with a publicist for the *Daily Mail*. (R. 27571, 27555).

IV. Mr. Depp's Motion for Summary Judgment and Motions to Strike the Evidence

Prior to trial, Mr. Depp moved for summary judgment, arguing, as relevant here, that Ms. Heard could not prove Mr. Waldman published the Statement with actual malice, and that the Statement was a non-actionable expression of opinion. (R. 14310-11). Ms. Heard responded that both Mr. Depp and Mr. Waldman knew the Statement was false and that malice was therefore established. (R. 14935-36). Further, because the Statement accused Ms. Heard of fabricating evidence of domestic violence and then calling law enforcement, the Statement was capable of being proven false and thus actionable. (R. 14936-37).

Agreeing with Ms. Heard, the circuit court observed that absent exceptional circumstances, the question of actual malice should not be decided at the summary judgment stage. (R. 24246). The court held that a reasonable fact finder could conclude Mr. Waldman published the Statement with malice because he has no personal knowledge of the underlying events at issue and nonetheless made the Statement. (R. 24246). The court also held that the Statement was not an opinion because the assertion that Ms. Heard fabricated evidence of domestic violence can be proven false. (R. 24246-47, 16881).

At trial, Mr. Depp moved to strike at the conclusion of Ms. Heard's evidence on her counterclaim. (R. 28098). He reiterated the arguments in his motion for summary judgment, contending the Statement was an opinion and clear and

convincing evidence did not establish it was published with actual malice. (R. 28098-100, 28101-03). He also argued that because Mr. Waldman "is an independent contractor, not an employee," he is not liable for Mr. Waldman's defamatory statements to the press. (R. 20180, 28100-01). Mr. Depp emphasized Mr. Waldman's testimony that he is "not an employee of Mr. Depp," is not "issued a W-2" by Mr. Depp or one of his companies, and provides legal services to clients other than Mr. Depp. (R. 28101). In light of this testimony, Mr. Depp claimed that Mr. Waldman was an independent contractor as a matter of law and, as a result, he "cannot be held responsible for any alleged tort by his attorney." (R. 28101). In response, Ms. Heard observed that Mr. Waldman "freely admitted to speaking to the press on Mr. Depp's behalf," and clarified that Mr. Depp's liability stemmed from Mr. Waldman's role as an agent. (R. 28103).

The circuit court denied the motion to strike, finding the "only evidence in this case to this point is that Mr. Waldman was an agent to Mr. Depp." (R. 28106-07). The evidence showed that Mr. Waldman has served as Mr. Depp's attorney since 2016, and the scope of his legal representation was not limited to litigation. (R. 28106). The court noted that cases holding attorneys are independent contractors are distinguishable because they involve attorneys who serve only as litigators for their clients. (R. 28106).

The court further held that a motion to strike is not a proper vehicle for challenging whether a statement is actionable and declined to revisit its previous ruling that the Statement was not an opinion. (R. 28107). With respect to actual malice, the court observed that Mr. Waldman made the Statement after meeting with his client, both Mr. Waldman and Mr. Depp met with the *Daily Mail*, and Mr. Waldman threw a paper containing the counterclaim statements at Ms. Heard. (R. 28107). Based on this evidence, the jury could infer that Mr. Waldman made the Statement with actual malice. (R. 28107).

At the conclusion of the evidence, Mr. Depp renewed his motion to strike, which the circuit court denied for the same reasons as the initial motion. (R. 28531).

V. The Refused Jury Instructions on Independent Contractors

Mr. Depp tendered Proposed Jury Instructions 22, 23, and 24 regarding independent contractors for the circuit court's consideration at a hearing before the conclusion of the evidence on May 20, 2022. (R. 21402-04). At the hearing, the circuit court rejected Mr. Depp's argument that the concept of an independent contractor applies when ruling on separate proposed jury instructions. (R. 27728). When raising his sole objection regarding independent contractors to those instructions, Mr. Depp stated they "should address the agency issue because you only get to liability on behalf of Mr. Depp if the jury also finds that [he is not an independent contractor]." (R. 27727). The circuit court refused to so instruct the jury,

explaining: "An attorney and a client have a principal and agen[t] relationship," and "[t]here's no evidence of independent contractor." (R. 27728).

When the circuit court considered Proposed Jury Instructions 22, 23, and 24, Mr. Depp did not present additional argument in support of instructing the jury on independent contractors. (R. 27757). The circuit court referenced its previous rulings and denied the instructions over objection. (R. 27757-58).

At the conclusion of the evidence, the circuit court held another hearing on jury instructions, where it ruled on instructions taken under advisement and additional instructions Mr. Depp tendered after the previous hearing. (R. 28533-42). Mr. Depp did not ask the circuit court to revisit its rulings on Proposed Jury Instructions 22, 23, and 24. Nor did he challenge the ruling that no evidence suggested Mr. Waldman was an independent contractor (R. 27728) by arguing that evidence presented after the previous hearing supported these instructions. While Mr. Depp has not relied on evidence presented after the May 20, 2022 hearing on brief, evidence presented after this date, such as Mr. Depp's testimony on May 25, 2022 (day 23 of trial), should not be considered when determining whether sufficient evidence supported these instructions because the circuit court had no opportunity to consider this evidence. *See Brown v. Commonwealth*, 279 Va. 210, 217 (2010) ("Rule 5A:18 requires a litigant to make timely and specific objections, so that the

trial court has 'an opportunity to rule intelligently on the issues presented.'" (citation omitted)).

When instructing the jury, the circuit court gave instructions that fully and fairly covered the agency issues raised by the evidence. The jury instructions explained the burden of proof on agency (R. 21506, 21517), defined the terms "principal" and "agent" (R. 21515), and described the scope of an attorney's authority (R. 21516).

Argument

I. Mr. Depp's Independent Contractor Theory Is Inapposite and Whether Mr. Waldman Is His Agent Was a Question of Fact (Relating to Assignments of Error 1(a) and 2)

A. Standard of Review

"A plaintiff who is armed with a jury verdict approved by the trial court, stands in the most favored position known to the law." *Dixon v. Sublett*, 295 Va. 60, 66 (2018) (cleaned up). When a trial court has refused to strike a plaintiff's evidence, "the well-established standard of appellate review requires this Court to determine whether the evidence presented at trial, taken in the light most favorable to the plaintiff, was sufficient to support the jury verdict in favor of the plaintiff." *Id.* Whether the concept of an independent contractor applies to this case is a question of law that is reviewed *de novo*. *See, e.g. Turner v. Caplan*, 268 Va. 122, 125 (2004). And whether Mr. Waldman was acting as Mr. Depp's agent when he made the

Statement was a question to be resolved by the jury, *Tingler v. Graystone Homes, Inc.*, 298 Va. 63, 101-02 (2019), and the jury's finding should not disturbed on appeal unless it is plainly wrong, *Turner*, 268 Va. at 125.

B. Mr. Waldman Can Be Both an Independent Contractor and an Agent

Mr. Depp claims that Mr. Waldman is, as a matter of law, an independent contractor rather than an "employee agent,"[2] and is thus not liable for his statements to the press. "Agency is defined as 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*, 298 Va. at 101. When an agent commits a tort while acting within the scope of his authority, the principal is liable. *See, e.g*, *Jefferson Standard Life Ins. Co. v. Hedrick*, 181 Va. 824, 834 (1943) (explaining that principal is liable for the torts of his agent even though "the principal did not authorize, or justify, or participate in, or, indeed,

[2] In his assignments of error filed on October 11, 2022, Mr. Depp asserted that "Mr. Waldman is an independent contractor, *not an employee agent*." In his opening brief, Mr. Depp revised his assignments of error and omitted the italicized language. (Opening Br. 4). "It is impermissible for an appellant to change the wording of an assignment of error." *White v. Commonwealth*, 267 Va. 96, 103 (2004). While substantive changes to an assignment of error can result in default, an appellate court has "discretion to address the merits" of an assignment of error "where the alteration appears substantive but 'issues pertaining to appellant's omitted assignments of error are encompassed by the presented assignments of error and are sufficiently briefed.'" *Henderson v. Cook*, 297 Va. 699, 709–10 (2019) (citation omitted). In these cases, the Court "revert[s] to the original assignments of error." *Id*. at 710.

know of such misconduct, or even if he forbade the acts"); *Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 133-34 (2003) (recognizing that defamation may be based statements made by an agent). An agency relationship can arise in any circumstances and is not limited to the employment context. *See, e.g.*, *Thomas v. Wingold*, 206 Va. 967, 970-73 (1966) (affirming jury verdict against mother arising from motor vehicle accident caused by her son, who was acting as an agent when the accident occurred).

In the employment context, a person's status as an independent contractor precludes the existence of an agency relationship. *See McDonald v. Hampton Training Sch. for Nurses*, 254 Va. 79, 81 (1997) ("The doctrine of *respondeat superior* imposes liability on an employer for the negligent acts of its employees. If, however, the negligent acts were performed by an independent contractor rather than an employee, no master-servant relationship exists between the contractor and employer,[3] and the employer is not liable for the negligent acts."). The concept of an independent contractor, however, does not apply in all agency contexts, nor does establishing an individual is an independent contractor defeat the possibility of any agency relationship. *See Petrovich v. Share Health Plan of Ill., Inc.*, 719 N.E.2d 756

[3] Unlike the employment context, where an individual's status and an independent contractor precludes the existence of an agency relationship, it is beyond dispute that an attorney and client have an agency relationship. The concept of an independent contractor is inapposite for this reason alone.

(Ill. 1999) ("Vicarious liability may nevertheless be imposed for the actions of independent contractors where an agency relationship is established."); *Hill v. Jupiter Esources, LLC*, No. 3:05-CV-1820-P, 2006 WL 2713793, at *8 (N.D. Tex. Sept. 21, 2006) ("[A]gency and independent contractor status are not mutually exclusive."); *Gordon v. CRS Consulting Engineers, Inc.*, 820 P.2d 492, 495 (Utah Ct. App. 1991) (same); *Cahill v. Waugh*, 722 P.2d 721, 724 (Okla. Civ. App. 1986) (same); *Milligan v. Anderson*, 522 F.2d 1202, 1207 (10th Cir. 1975) (same).

Mr. Depp is incorrectly importing the concept of an independent contractor, which negates an employer-employee relationship, a specific kind of agency relationship, to all agency contexts. In doing so, he has presented a false dichotomy by arguing Mr. Waldman is either an independent contractor or an agent.[4] But the two are not mutually exclusive. Because Mr. Waldman can be both an independent contractor and an agent, even if Mr. Waldman is an independent contractor, it does not preclude Mr. Depp's liability for Mr. Waldman's defamatory statements to the press. As a result, subpart (a) of the first assignment of error and the second assignment of error do not assert any grounds for reversing the judgment of the circuit court.

[4] A false dichotomy is a logical fallacy based on the false premise that only two mutually exclusive options are available when, in fact, the options are not mutually exclusive or there are more than two options. *See False Dilemma*, Wikipedia, https://en.wikipedia.org/wiki/False_dilemma (last visited Dec. 2, 2022).

C. The Circuit Court Properly Denied the Motions to Strike Because Whether Mr. Waldman Made the Statement While Acting as Mr. Depp's Agent Was a Question of Fact

In his opening brief, Mr. Depp has relied exclusively on his independent contractor theory to challenge whether Mr. Waldman was acting as an agent when he made the Statement. (Opening Br. 11-18). He has not asserted Ms. Heard presented insufficient evidence that Mr. Waldman was his agent or that he was acting within the scope of his authority, and those arguments are therefore waived. Rule 5A:20(e) (requiring argument in support of each assignment of error). To the extent the Court interprets Mr. Depp's contention that Mr. Waldman is an independent contractor, as a matter of law, as challenging the sufficiency of the evidence on agency, the circuit court correctly denied the motions to strike.

"[W]hether an agency relationship exists is a question to be resolved by the fact finder unless the existence of the relationship is shown by undisputed facts or by unambiguous written documents." *Tingler*, 298 Va. at 101-02; *see also McDonald*, 254 Va. at 87 ("Whether a person is an employee or an independent contractor is generally a question of fact for the jury"). Agency "may be inferred from the conduct of the parties and from the surrounding facts and circumstances." *Acordia of Va. Ins. Agency, Inc. v. Genito Glenn, L.P.*, 263 Va. 377, 384 (2002). Indeed, because direct evidence of agency is "not indispensable" and "frequently is not available," circumstantial evidence may be relied upon, "such as the relation of

the parties to each other and their conduct." *Id*. at 385-86; *Royal Indem. Co. v. Hook*, 155 Va. 956, 970 (1931) ("Frequently [agency] is established and has, of necessity, to be established by circumstantial evidence.").

A principal's liability does not turn on whether it directed its agent to take a certain action. Rather,

> The test of the master's responsibility for the acts of his servants is not whether such act was done in accordance with the instructions of the master to the servant, but whether it was done in the prosecution of the business that the servant was employed to do, and *an act is regarded as 'authorized' in the legal sense if it is incidental to the performance of the duties entrusted to the servant* even though it is in disobedience of the master's express orders and instructions.

Thomas v. Wingold, 206 Va. 967, 971 (1966) (citation omitted) (emphasis added) (applying this test outside the employment context and concluding a mother was liable for damages arising out of a motor vehicle accident caused by her son, notwithstanding that he disobeyed her instructions by driving the vehicle, because the son was performing "the very act or class of service" he was instructed to complete by returning the vehicle to his mother); *see also Kensington Assocs. v. West*, 234 Va. 430, 432 (1987) (acts within the scope of employment include those taken "with the intent to further the employer's interest"). Accordingly, Mr. Depp's assertion that he is not liable because he was not "personally involved in directing or making" the Statement is incorrect. (Opening Br. 17). He entrusted Mr. Waldman to be his mouthpiece in continuing to defame Ms. Heard through public statements

as part of his campaign of self-described global humiliation against her. In so doing, Mr. Depp made Mr. Waldman his agent for those purposes.

Furthermore, whether Mr. Waldman was acting as an agent when he made the Statement was an issue of fact and the jury's finding is supported by ample evidence. The evidence established that Mr. Depp seeks to retaliate against Ms. Heard for obtaining a protective order against him and filing for divorce. (R. 46549). Shortly after announcing that he will "stop at nothing" to globally humiliate her, Mr. Depp retained Mr. Waldman, who serves as his "primary counsel for all of his affairs" and assists him with publicity. (R. 28360-61, 27543-44).

Mr. Waldman has spoken to the press on Mr. Depp's behalf on several occasions. For example, Mr. Waldman confirmed that he was accurately quoted by the *Daily Mail* in articles published on April 8, 2020, April 27, 2020, and June 24, 2020. (R. 275511-53, 46628-37). Mr. Waldman was identified as Mr. Depp's lawyer or attorney in each of these articles. (R. 46628-37). Mr. Waldman has also provided information about this case to several social media personalities and was present when a journalist for the *Rolling Stone* interviewed Mr. Depp. (R. 27557, 27548).

Before the articles in the *Daily Mail* were published, Mr. Depp and Mr. Waldman met with a publicist for the *Daily Mail* on or around February 17, 2020. (R. 27555). Mr. Waldman gave the *Daily Mail* two audio recordings concerning this case, but could not recall if he did so at the meeting or on another occasion. (R.

27555). Mr. Waldman also generated negative press about Ms. Heard by filing a report with the Los Angeles Police Department that claimed Ms. Heard perjured herself. (R. 27558). After filing this report, Mr. Waldman generated press about his own accusation by telling a media outlet that the "LAPD have now opened up a criminal investigation into perjury of Ms. Heard," even though all that had happened is that Mr. Waldman had made a police report. (R. 27557).

In summary, during the course of Mr. Waldman's representation, he and Mr. Depp met with the *Daily Mail*, which then published a series of negative statements by Mr. Waldman about Ms. Heard. The *Daily Mail* accurately quoted Mr. Waldman and stated he was Mr. Depp's attorney. Mr. Waldman also provided the *Daily Mail* with two audio recordings concerning this case, has communicated about this case to several other media outlets, and has actively generated the content for negative press about Ms. Heard.[5]

Based on this evidence, a trier of fact could have concluded that the scope of Mr. Waldman's representation involved generating negative publicity about Ms.

[5] While the concept of an independent contract is irrelevant in this case, this evidence demonstrates that Mr. Waldman is not an independent contractor as a matter of law because a fact finder could have concluded Mr. Depp has the right to control Mr. Waldman's publicity work. *See McDonald,* 254 Va. at 81 (power to control an individual's work is determinative of whether he is an employee or independent contractor). For instance, Mr. Depp's presence at the meeting with a publicist for the *Daily Mail* supports the inference that he has the right to control Mr. Waldman's statements to the *Daily Mail*.

Heard or speaking to the press, including the *Daily Mail*, on Mr. Depp's behalf. Alternatively, a fact finder could have concluded that Mr. Waldman had authority to speak to the press on Mr. Depp's behalf or to generate negative publicity about Ms. Heard, without making any finding as to whether doing so was part of his role as an attorney. In either case, Ms. Heard presented sufficient evidence that Mr. Waldman was acting as an agent when he made the Statement because this action was "incidental to the performance of the duties entrusted to" him. *Thomas,* 206 Va. at 971. The circuit court therefore correctly denied the motions to strike.

D. The Court Need Not Adopt Any Rule Regarding Whether Attorneys Are Independent Contractors As a Matter of Law

This Court should reject Mr. Depp's request to adopt a rule that clients cannot be held liable for their attorneys' misconduct because they are independent contractors as a matter of law for several reasons.

First, several courts have held that attorneys are not independent contractors and have imposed liability on defendants for their attorneys' torts. *See, e.g.*, *Koutsogiannis v. BB&T*, 616 S.E.2d 425, 428 (S.C. 2005) (holding that defendant "can be held liable for its agent's, [a]ttorney's, actions taken within the scope of representation, including possible torts committed by him" and that the trial court did not err by instructing the jury only on agency principles and not independent contractor law); *Peterson v. Worthen Bank & Tr. Co.*, 753 S.W.2d 278, 280 (Ark. 1988) (holding that a client may be held vicariously liable for the actions of his

attorney "so long as the attorney is acting within the scope of employment and in accordance with what is believed to be the client's interest"); *Sw. Bell Tel. Co. v. Wilson*, 768 S.W.2d 755, 759 (Tex. App. 1988) (finding the client vicariously liable for his attorneys' intentional torts because the actions arose directly out of the business that the [attorneys were] hired to do" and "were committed for the purpose of accomplishing the mission entrusted to the attorneys"); *Nyer v. Carter*, 367 A.2d 1375, 1377–78 (Me. 1977) (holding that defendant could be liable for his attorney's tort when the tort "arose out of an agency relationship which existed between [the defendant] and his attorney . . . even though [the defendant] did not specifically authorize the tortious conduct"); *see also Med. Informatics Eng'g, Inc. v. Orthopaedics Ne.*, 458 F. Supp. 2d 716, 727 (N.D. Ind. 2006) (accepting as true allegations that an attorney made defamatory statements to press on behalf of defendant and noting that it would be "ultimately a question of fact for the jury" to decide); *Cf. Hewes v. Wolfe*, 330 S.E.2d 16, 22 (N.C. Ct. App. 1985) (holding that a client is liable when an attorney "is guilty of oppressive or wrongful conduct during the course of the proceeding in order to enforce a claim of the principal").

Second, none of the cases Mr. Depp cites involve whether a client can be held liable for his attorney's defamatory statements to the press, and most are distinguishable for additional reasons. *See King v. Dalton* , 895 F. Supp. 831, 837–39 (E.D. Va. 1995) (applying the Fourth Circuit's test for determining employee

status specifically in the context of Title VII and the Age Discrimination and Employment Act, rather than examining vicarious liability for intentional torts); *Lynn v. Super. Court*, 225 Cal. Rptr. 427, 428 (Cal. Ct. App. 1986) (recognizing that "an attorney may act as an employee for his employer in carrying out nonlegal functions [or] business transactions"); *Plant v. Trust Company of Columbus*, 310 S.E.2d 745, 746–47 (Ga. 1983) (noting attorney was "was retained for the sole purpose of collecting moneys upon a judgment" when reaching its holding that the attorney was an independent contractor, unlike Mr. Waldman, who was retained for several purposes that include litigation and publicity); *Horwitz v. Holabird & Root*, 816 N.E.2d 272, 279 (Ill. 2004) ("That someone is an independent contractor does not bar the attachment of vicarious liability for her actions if she is also an agent."); *Feliberty v. Damon*, 527 N.E.2d 261, 264–65 (N.Y. Ct. App. 1988) (holding an insurance company was not liable for the acts of its attorneys, where imposing liability would make the company liable for actions it could not legally control due to specific New York law); *Bradt v. West*, 892 S.W.2d 56, 76–77 (Tex. App. 1994) (noting a "party to a civil suit cannot be liable for the intentional wrongful conduct of his attorney unless the client is implicated in some way other than merely having entrusted his legal representation to the attorney, which is unlike the facts of this case because Mr. Waldman assists Mr. Depp with publicity as well as legal representation).

Third, several of the cases cited by Mr. Depp emphasize that imposing vicarious liability on an client for actions taken during the course of legal representation would lead to negative consequences for the legal system, including making parties reluctant to file suit or giving ill-equipped parties the ultimate responsibility over their legal representation and encouraging clients to micromanage their attorneys. *See Bradt v. West*, 892 S.W.2d 56, 76–77 (Tex. App. 1994); *Horwitz v. Holabird & Root*, 816 N.E.2d 272, 281 (Ill. 2004). These concerns are minimal here, where Mr. Waldman spoke as Mr. Depp's agent to the press, outside of the bounds of a traditional legal relationship, and Mr. Waldman's assistance with publicity only tangentially involved litigation.

Last, clients generally rely on their attorneys' professional skill and judgment with respect to intricacies of the legal field. In such cases, clients have little ability to monitor whether an attorney's conduct is tortious because they lack legal knowledge. When an attorney speaks on his client's behalf to the press, no legal skills or judgment are involved, and, consequently, holding a client liable for his attorney's defamatory statements is warranted. Accordingly, this Court can assume, without deciding, that attorneys are independent contractors, and hold that a plaintiff may nevertheless prove a client is liable for the acts of his attorney, where those acts are not part of the attorney's legal representation in litigation or do not otherwise involve an attorney's professional skills and judgment. *See Butcher v.*

Commonwealth, 298 Va. 392, 396 (2020) ("[T]he doctrine of judicial restraint dictates that we decide cases "on the best and narrowest grounds available.").

II. Ms. Heard Presented Sufficient Evidence of Actual Malice (Relating to Assignment of Error 1(b))

A. Mr. Depp Waived Any Argument that Summary Judgment Should Have Been Granted

In the section of his opening brief regarding actual malice, Mr. Depp asserts the circuit court erred in denying "Mr. Depp's Motion for Summary Judgment and Motion to Strike." (Opening Br. 18). Despite this statement, he has presented no argument concerning the summary judgment record and relies exclusively on the evidence presented at trial. (Opening Br. 18-23). The conclusion of this section suggests Mr. Depp seeks to abandon any error regarding summary judgment by omitting any reference to this motion and stating only that the motion to strike should have been granted. (Opening Br. 23).

Rule 5A:20(e) requires the appellant's opening brief to include argument, including principles of law and authorities, relating to each assignment of error. "At the risk of stating the obvious, the Rules of the Supreme Court are rules and not suggestions; we expect litigants before this Court to abide by them." *Bartley v. Commonwealth*, 67 Va. App. 740, 746 (2017). Failure to adequately develop an argument on brief is "colloquially called a bad-brief waiver." *AlBritton v. Commonwealth*, 299 Va. 392, 412 (2021); *Coward v. Wellmont Health Sys.*, 295 Va.

351, 367 (2018) ("Lack of an adequate argument on brief in support of an assignment of error constitutes a waiver of that issue."). The opening brief contains no argument and no authority supporting Mr. Depp's contention that his motion for summary judgment should have been granted because Ms. Heard cannot prove malice. He has thus waived any error arising from the denial of that motion.

In any event, the circuit court properly denied summary judgment. "[T]he decision to grant a motion for summary judgment is a drastic remedy which is available only where there are no material facts genuinely in dispute." *Smith by Rosen v. Smith*, 254 Va. 99, 103 (1997); Rule 3:20. "A grant of summary judgment must be based upon undisputed facts established by pleadings, admissions in pleadings, and admissions made in answers to requests for admissions." *Andrews v. Ring*, 266 Va. 311, 318 (2003). In reviewing a ruling on a motion for summary judgment, the Court views the record in the light most favorable to the nonmoving party. *Jackson v. Hartig*, 274 Va. 219, 228 (2007).

In Mr. Depp's memorandum supporting his motion for summary judgment, his sole basis for arguing Ms. Heard could not prove actual malice was an interrogatory response he described as "factually empty." (R. 14311). According to Mr. Depp, this interrogatory requested that Ms. Heard explain "how Mr. Depp can be held legally responsible" for Mr. Waldman's conduct. (R. 14311). Ms. Heard had no burden to develop the record at summary judgment. *See Owens v. Redd*, 215 Va.

13, 14 (1974) (granting summary judgment based on discovery depositions was reversible error because the plaintiff "was under no duty to fully develop her allegations of negligence" during discovery). Rather, Mr. Depp, as the moving party, had the burden of proving no material fact was genuinely in dispute. As such, any deficiency in Ms. Heard's interrogatory responses was a discovery matter which did not warrant granting summary judgment.

B. Standard of Review

Ordinarily, when reviewing a circuit court's ruling on a motion to strike, the Court determines whether the evidence presented at trial, taken in the light most favorable to the prevailing party, was sufficient to support the jury's verdict. *Dixon*, 295 Va. at 66. Because Ms. Heard is a public figure, she was required to prove the Statement was made with actual malice, that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *Jackson v. Hartig*, 274 Va. 219, 228 (2007) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989); *see also* Code § 8.01-223.2 (providing immunity for defamation based on statements regarding matters of public concern that are protected by the First Amendment and published without actual malice). "[W]hether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Commc'ns*, 491 U.S. at 685.

Appellate courts have a constitutional duty to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Id.* at 659. This "rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). Taken together, these standards of review require the Court to view the evidence in the light most favorable to Ms. Heard when examining the record for evidence of actual malice.

C. Ms. Heard Could Prove Defamation by Showing Either Mr. Depp or Mr. Waldman Had Actual Malice

There are three distinct bases on which the common law of agency attributes the legal consequences of one person's action to another person: actual authority, apparent authority, and respondeat superior. Restatement (Third) Of Agency 2 Intro. Note (2006). A principal is subject to "direct liability" for an agent's tortious conduct that occurs with the scope of his actual authority, while "vicarious liability" arises from respondeat superior or a tort committed with apparent authority. Restatement (Third) Of Agency § 7.03; *see also Parker v. Carilion Clinic*, 296 Va. 319, 343 n.12 (2018) (citing § 7.03 of the Restatement with approval).

Contrary to Mr. Depp's contention, Ms. Heard did not rely exclusively on a theory of "vicarious liability" by maintaining that Mr. Waldman made the Statement while acting as an agent. (Opening Br. 18). This is because a principal's liability for the acts of an agent is not confined to theories of vicarious liability. Ms. Heard was

free to argue liability arose because Mr. Waldman was acting within the scope of his authority when he made the Statement. Indeed, she tendered, and the circuit court gave, a jury instruction titled "Express and Implied Authority," which provided, "An attorney has the express authority to do everything which the client expressly authorized him to do and the implied authority to do everything necessary or incidental to the *purpose* for which he was retained." (R. 21516) (emphasis added). As previously explained, a fact finder could have concluded that the purposes for which Mr. Waldman was retained included speaking to the press on Mr. Depp's behalf or generating negative publicity about Ms. Heard.

A principal's liability for the acts of an agent is not contingent upon the agent's liability. For example:

> A principal is subject to liability to a third party harmed by an agent's conduct when the agent's conduct is within the scope of the agent's actual authority or ratified by the principal; and
>
> (1) the agent's conduct is tortious, or
>
> (2) the agent's conduct, if that of the principal, would subject the principal to tort liability.

Restatement (Third) Of Agency § 7.04. One of the reasons a principal's liability can be independent of an agent's liability is "an agent's action may not be tortious because the agent lacks information known to the principal." *Id*. § 7.04 cmt. b. Otherwise, a principal could hire an agent to make false statements and avoid

liability for defamation so long as the agent lacked actual malice when publishing the statements.

As § 7.04 makes clear, Ms. Heard could prove defamation by showing either Mr. Depp or Mr. Waldman had actual malice when the Statement was published. Under § 7.04(1), Mr. Waldman's conduct is tortious, and imputed to Mr. Depp, if he published the Statement with actual malice. Under § 7.04(2), the inquiry is whether liability for defamation would arise if Mr. Depp published the Statement, thereby permitting Ms. Heard to rely on Mr. Depp's actual malice to prove defamation. Here, evidence established that both Mr. Depp and Mr. Waldman had actual malice.

1. Mr. Depp Had Actual Malice

As the perpetrator of domestic violence on May 21, 2016, Mr. Depp is aware that he abused Ms. Heard physically, verbally, and emotionally that evening. For that reason, he knows the assertion that there was an "ambush," "hoax," or "set [] up" is false. (R. 21817). He also knows that Ms. Heard and her friends did not spill wine or rough up the penthouses because he caused the property damage to the penthouses and spilled wine there on May 21, 2016. Consequently, there is ample evidence from which the jury could infer that Mr. Depp knew the Statement was false or was reckless with respect to its falsity.

2. Mr. Waldman Had Actual Malice

Mr. Waldman testified that he had no firsthand knowledge of whether Mr. Depp abused Ms. Heard, but claimed he saw "some things that show her statements to be false." (R. 27555). When describing these things with respect to May 21, 2016, Mr. Waldman testified:

> So, there are two police officers; one domestic violence trained female police office, who testified over and over and over that there was *no damage to the penthouse*, which Ms. Heard claimed was destroyed. That's a direct quote, "destroyed."

(R. 27556) (emphasis added). Based on this testimony, a fact finder could have concluded Mr. Waldman believed there was no damage to the penthouses on May 21, 2016. This conclusion would have been supported by the testimony of three law enforcement officers who responded to calls to investigate domestic violence at the penthouses. All three officers saw no damage to the penthouses, and the jury could have inferred that Mr. Waldman spoke to these officers or reviewed their testimony when reaching his conclusion that there was no damage to the penthouses at any point on the evening of May 21, 2016. (R. 25769-73, 25872, 25882).

Yet Mr. Waldman told the *Daily Mail* there was damage to the penthouses. He asserted in the Statement, "Amber and her friends spilled a little wine and roughed the place up." (R. 21817). Mr. Waldman could not logically believe both that there was no damage to the penthouses on May 21, 2016, and that Ms. Heard damaged the property to fabricate evidence of domestic violence. The jury could

have found that Mr. Waldman's testimony contradicted his belief in the truth of the Statement, thereby demonstrating that he knew it was false or was reckless with respect to its falsity.

In addition, when making the Statement and others as Mr. Depp's attack dog, and when he filed a police report for perjury simply so he could tell the press (falsely) that Ms. Heard was being investigated for perjury, Mr. Waldman selectively credited only the evidence that he believed was favorable to Mr. Depp and ignored the abundant evidence of Mr. Depp's abuse of Ms. Heard, including the evidence regarding the night of May 21, 2016. Therefore, a jury could reasonably have concluded that he either knew his statement was false or was reckless in not knowing and thus possessed actual malice.

III. The Statement Is Actionable Because It Contains a Provably False Factual Connotation (Relating to Assignment of Error 1(c))

A. Standard of Review

Whether an alleged defamatory statement is one of fact or opinion is a question of law, which is reviewed de novo. *Handberg v. Goldberg*, 297 Va. 660, 667-68 (2019). In conducting its review, the Court does not determine whether the alleged defamatory statement is true or false, but whether it is capable of being proved true or false. *Id.* at 668.

B. The Statement Is Not Protected Speech

While "pure expressions of opinion" are constitutionally protected and cannot form the basis of a defamation action, there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Raytheon Tech. Servs. Co. v. Hyland*, 273 Va. 292, 303 (2007) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990)). "[E]xpressions of 'opinion' may often imply an assertion of objective fact," and simply couching "statements in terms of opinion does not dispel these implications." *Id.* Factual statements made to support or justify an opinion can also form the basis of a defamation action. *Id.*

The test for distinguishing pure expressions of opinion from actionable factual assertions is whether the statement contains "a provably false factual connotation," and is thus "capable of being proven true or false." *Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 133 (2003) (statements that doctors "abandoned" their patients and that there were "concerns about their competence" were falsifiable); *Handberg*, 297 Va. at 670 (statements that a doctor was engaged in "excessive billing," sought reimbursement for "services that were not authorized or performed," and was "opportunistic and aggressive about pursuing money" were assertions of fact); *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 715 (2006) ("The statement "[t]hat [plaintiff] just takes people's money" is capable of disproof by evidence, if

adduced, that [plaintiff's] clients received monetary or other relief as a result of his legal services.").

The Statement, which clearly contains a provably false connotation, reads:

> 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. 21817, 46631-32). The assertions in the Statement are capable of being proven false with evidence that Ms. Heard and her friends did not call law enforcement on May 21, 2016, spill wine, rough up the couple's home, fabricate evidence of domestic violence, or contact a lawyer or publicist. Evidence could also be presented to demonstrate the officers who responded saw Ms. Heard's injuries and property damage, but did not conduct a thorough search.

The contention that Ms. Heard carried out an "ambush" or "hoax" is falsifiable because Ms. Heard can and did prove Mr. Depp abused her on May 21, 2016. To the extent these phrases are opinions, they are nonetheless actionable because the remainder of the Statement sets forth a factual basis that supports these assertions. *See Handberg*, 297 Va. at 669 ("[F]actual statements made to support or justify an opinion are actionable.").

Mr. Depp does not challenge that the Statement contains a provably false factual connotation. Instead, he maintains that the context of the Statement transforms it into an opinion. When determining whether a statement is actionable, courts examine the statement in context by applying the general rule that "words are to be taken in their plain and natural meaning and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used." *Schaecher v. Bouffault*, 290 Va. 83, 93 (2015). Here, the Statement makes objective assertions about the events of May 21, 2021. The only plain and natural meaning a person would draw from the Statement is that these events in fact occurred.

Relying on a *Riley v. Harr*, 292 F.3d 282 (1st Cir. 2002), Mr. Depp contends that a reader would understand the Statement as "Mr. Waldman speaking as a legal advocate and offering his own interpretation of disputed evidence." (Opening Br. 26-27). In *Riley*, the First Circuit observed that "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." *Id*. at 289. While no Virginia court has adopted this principle, it applies only where "an author outlines the facts available to him, thus making it clear that the challenged statements represent his own

interpretation of those facts and leaving the reader free to draw his own conclusions." *Id*.

Mr. Waldman did not outline the facts available to him in the Statement. Although the article notes that Mr. Depp's legal team pointed out the 911 caller on May 21, 2016, had a female voice and the Los Angeles Police Department registered Mr. Wright's call at 10:09 pm, this explains, at most, why Mr. Waldman asserted two 911 calls were made in the Statement. There is no explanation of facts that could be interpreted as supporting the defamatory assertion that Ms. Heard set up Mr. Depp by fabricating evidence of domestic violence.

Mr. Depp also asserts that courts consider factors, such as whether the forum in which a statement is made would cause a reader to understand it as the author's opinion, the degree to which the audience is familiar with the underlying facts, and the identity of the speaker. Each of these factors suggest the Statement is not an opinion. The forum is the *Daily Mail*, a widely circulated tabloid that publishes newsworthy accounts of factual events, not opinion pieces. The overwhelming majority of the *Daily Mail*'s numerous readers are not familiar with the underlying facts of Ms. Heard's abuse. And the identity of the speaker as Mr. Depp's attorney suggests he has inside knowledge or access to evidence that establishes Ms. Heard's allegations are false. While a reader might consider statements an attorney makes in

court as mere advocacy, the press is not the traditional forum in which attorneys advocate for their clients.

In sum, the context of the Statement does not transform its factual assertions into opinions. For this reason, the circuit court correctly denied the motion for summary judgment and motions to strike the evidence.

IV. The Circuit Court Correctly Rejected the Proposed Jury Instructions on Independent Contractors (Relating to Assignment of Error 2)

A. Standard of Review

The decision to deny a jury instruction rests with the discretion of the trial court and will not be reversed absent an abuse of discretion. *Howsare v. Commonwealth*, 293 Va. 439, 443 (2017). The sole purpose of appellate review of jury instructions is "to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." *Dorman v. State Indus., Inc.*, 292 Va. 111, 125 (2016). "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] review[ed] de novo." *Id*. "Where other instructions fully and fairly cover the principles of law governing the case, the trial court does not err in refusing an additional instruction on the same subject." *Howsare*, 293 Va. at 443.

B. The Jury Instructions Fully and Fairly Covered Principles of Agency

As previously explained, the concept of an independent contractor does not apply to this case because Mr. Depp's liability stems from Mr. Waldman's role as his agent when speaking to the press, and even if Mr. Waldman is an independent contractor, it does not preclude Mr. Depp's liability for his conduct. Therefore, Proposed Jury Instructions 22, 23, and 24, which concern independent contractors, are not "accurate statement[s] of the *relevant* legal principles" and were correctly refused. *Dorman*, 292 Va. at 125 (emphasis added).

Additionally, the refused jury instructions on independent contractors overlap with the given instructions on agency. Jury Instruction TT defined a principle and agent:

> A principal is a person or legal entity with power or right to control the means and methods of performance by which another person performs the principal's work.
>
> An agent is the person *who is subject to the power or right of a principal to control the means and methods of performing the work*.

(R. 21515) (emphasis added). Proposed Jury Instruction No. 22 effectively defined an independent contractor as the opposite of an agent:

> 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) (emphasis added). Both Instruction TT and Proposed Jury Instruction No. 22 explain that liability depends on whether Mr. Waldman was subject to Mr. Depp's control with respect to the means and methods of his work. In light of this redundancy, the circuit court did not abuse its discretion by refusing Proposed Jury Instruction No. 22. *See Howsare*, 293 Va. at 443 (courts may refuse "additional instruction on the same subject" as given instructions).

Moreover, Mr. Depp suffered no prejudice due to the refusal of Proposed Jury Instruction No. 22 because he was free to argue that, based on Jury Instruction TT, he was not liable because Mr. Waldman was not his agent. *See* Code § 8.01-678 (prohibiting reversal for harmless error); *Campbell v. Campbell*, 49 Va. App. 498, 506 n.4 (2007) (a mistake of law made during the trial process is harmless error, unless it prejudiced the appellant).

Proposed Instruction No. 24 is duplicative with the given instructions on the burden of proof. Jury Instruction 20 provided: "Ms. Heard has the burden of proving by the greater weight of the evidence that Mr. Waldman was an agent of Mr. Depp and that Mr. Waldman was acting within the scope of his agency when he made the statements." (R. 21517); *see also* (R. 21506 (explaining jury should return a verdict in favor of Ms. Heard if she proved Mr. Waldman was acting as an agent when he made the Statement)). Proposed Jury Instruction No. 24 states: "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 jury instructions on the burden of proof adequately explained that Mr. Depp's liability turned on proof of agency. Giving an additional instruction providing Mr. Depp was not liable if Mr. Waldman was an independent contractor—defined as the opposite of an agent—would have been duplicative and unnecessary. *See Hall v. Commonwealth*, 32 Va. App. 616, 635 (2000) (noting it "is not desirable to multiply instructions," and finding duplicative instruction was properly refused).

Proposed Instruction No. 24 also expresses the same false dichotomy discussed above by asserting the jury may find Mr. Waldman is an independent contractor "instead of an employee." (R. 21404). This assertion would have confused the jury by indicating Ms. Heard was required to show Mr. Waldman was Mr. Depp's employee, rather than his agent. *See Graves v. Commonwealth*, 65 Va. App. 702, 711 (2016) (courts should not give confusing jury instructions).

Finally, the circuit court did not abuse its discretion by refusing Proposed Jury Instruction No. 23 because giving it would have invaded the province of the jury. "It is fundamental that the court must respond to questions of law and the jury to questions of fact." *Gottlieb v. Commonwealth*, 126 Va. 807, 812 (1920) (affirming

refusal of jury instruction that invaded the province of the jury). Whether a person is an employee or an independent contractor is a question of fact for the jury. *McDonald*, 254 Va. at 87. Yet Proposed Jury Instruction No. 23 stated, "An outside lawyer retained by a client in connection with litigation is an independent contractor." (R. 21403). This instruction would have directed the jury to automatically conclude that Mr. Waldman was an independent contractor, thereby usurping the jury's role to decide this question as a matter of fact based on the evidence presented. At a minimum, this instruction would have "improperly singled out for emphasis a part of the evidence tending to establish a particular fact" by highlighting Mr. Waldman's role as an attorney. *See Graves*, 65 Va. App. at 711 (cleaned up); *see also Gottlieb*, 126 Va. at 812 (argumentative jury instructions should be refused).

V. The Circuit Court Did Not Abuse Its Discretion by Requiring Redaction of Irrelevant and Inadmissible Portions of the Article Containing the Statement (Relating to Assignment of Error 3)

A. Standard of Review

Decisions regarding the admissibility of evidence "lie within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of discretion." *Belcher v. Commonwealth*, 75 Va. App. 505, 523 (2022). "A court has abused its discretion if its decision was affected by an error of law or was one with which no reasonable jurist could agree." *Id*.

B. The Redacted Portions of the Article Were Inadmissible

The circuit court properly excluded the contents of the full article that contained the Statement because it constituted inadmissible hearsay and was not necessary for the jury to assess whether the Statement was defamatory. (R27209, 27542-43, 5208-09). For the purposes of the third assignment of error, the Court need focus only on the Statement that the jury found was defamatory toward Heard.[6] Mr. Depp argues that the full text of the article was necessary for the jury because it would have shown the Statement was not an actionable defamatory comment. (Opening Br. 32). As explained *supra* in section III, the Statement was plainly defamatory and not protected speech. Moreover, Mr. Depp presents no argument or evidence, other than his own conjecture, that anyone reading the article would have understood the Statement as anything other than a statement of fact that Ms. Heard and her friends lied about Mr. Depp's physical abuse and property damage on May 21, 2016.

[6] Mr. Depp challenges the circuit court's redaction of all three articles that formed the basis of the counterclaim. Although Ms. Heard disagrees with the jury's verdict on the other two statements Mr. Depp made through Mr. Waldman that comprised her counterclaim and does not believe such a verdict was supported by the evidence, the jury did not find these statements to be defamatory, and therefore any error relating to the exclusion of the full articles in which these statements appeared is harmless and irrelevant.

The fact that the article contained a quote from Ms. Heard's lawyers, additional statements by Mr. Waldman on behalf of Mr. Depp that were factual in nature, and references to the parties' ongoing dispute does not and cannot remove the defamatory sting of the Statement. As the circuit court noted, whether or not the Statement is defamatory cannot depend on a third party's decision to put the Statement in a certain portion of a certain article. (R 27209). This is because, as the circuit court correctly ruled, at the time the Statement was made, Mr. Waldman "didn't know what the articles were going to say or how they were going to print the article." (R27543). This ruling was not an abuse of discretion. *Cf. Handberg*, 297 Va. at 672 ("Trial courts will have to decide on a case-by-case basis whether an unredacted document containing both actionable statements of fact and statements of mere opinion should be presented to the jury for purposes of providing context for the actionable statements of fact . . . or whether only the actionable statements of fact should be presented for the jury's consideration.").

Mr. Depp's reliance on *Shaecher v. Bouffault*, 290 Va. 83, 93 (2015), is misplaced. Contrary to Mr. Depp's interpretation, *Schaecher* simply stands for the proposition that a court may consider the alleged defamatory comment in the context of a longer statement by the same defendant for the purposes of determining "whether a statement can be reasonably understood as stating or implying actual facts, whether those statements are verifiable, and whether they are reasonably

capable of defamatory meaning." *Id*. at 93, *see also id*. at 101. These are all questions of law for a court, not factual questions for the jury. *See id.* at 93-94. In *Shaecher*, the Supreme Court considered the defendant's full emails because, read in context with all the words *from the same defendant*, the alleged defamatory statements did not contain sufficient defamatory sting or constituted protected opinion. *Id*. at 93-101.

Mr. Depp cites no case that takes the stance he now asks the Court to adopt – that the defamatory nature of one person's statement quoted in an article may somehow be cleansed by the statements of others quoted in the same article or statements of the author of the article itself. The circuit court properly excluded this other commentary because it was inadmissible hearsay and because it was not relevant to the jury's inquiry. (R. 27209, 27542-43). This includes the additional statement from Mr. Waldman that Ms. Heard and her friends' alleged hoax "didn't have the desired effect," because it does nothing to change the meaning of the defamatory Statement. (R. 5209). And unlike the statement in *Schaecher* that the Court found was protected opinion because it was based on facts that, themselves, were not alleged to be false and defamatory, 290 Va. at 106, the Statement itself was a factual statement involving Ms. Heard that the jury found to be false. Nothing about the rest of the article could have changed the correct determination by the jury

that Mr. Depp's statement through Mr. Waldman in that article met the elements of defamation.[7]

Finally, Mr. Depp's suggestion that the full articles were necessary for the jury to assess Heard's damages is wrong. The remainder of the articles simply discussed fragmented aspects of the ongoing dispute regarding Mr. Depp and Ms. Heard's relationship (R. 5199-5211), and the jury was presented with far more details of the relationship through the evidence permitted at trial (albeit an incomplete picture due to the Court's improper exclusion of much of Ms. Heard's evidence of abuse by Mr. Depp). *See Heard v. Depp* Opening Br. § III.A. And the jury was presented with evidence of the ways in which Ms. Heard had been damaged by the Statement both from Ms. Heard herself and from dueling damages experts. Thus, to the extent the circuit court erred in excluding the contents of the article that contained the Statement, any such error was harmless. *Haas v. Commonwealth*, 299 Va. 465, 467, 855 S.E.2d 542, 543–44 (2021) (noting that a reviewing court must "consider the potential effect of the excluded evidence in light of all the evidence that was presented to the jury") (quotations and alterations omitted). There is nothing

[7] Similarly, although Ms. Heard disagrees with the jury's verdict that the other statements Mr. Depp made through Mr. Waldman were not defamatory, the full articles in which those statements appeared have no bearing on whether Mr. Depp is liable for the Statement.

that the remainder of the articles could have added to the evidence regarding damages that was presented to the jury.

Conclusion

For the foregoing reasons, Ms. Heard respectfully requests that the aspect of the judgment of the circuit court at issue in this appeal be affirmed.

Date: December 2, 2022

Respectfully submitted,

/s/ J. Benjamin Rottenborn

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Certificate

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Counsel further certifies that this brief contains 12,464 words, excluding those portions of the brief that do not count toward the word limit, and therefore complies with Rule 5A:19, which provides that a brief of an appellee may not exceed the longer of 50 pages or 12,300 words. Counsel for the Appellee respectfully requests oral argument.

/s/ J. Benjamin Rottenborn