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Transcript of Hearing

Date: June 28, 2019
Case: Depp, II -v- Heard

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V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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JOHN C. DEPP, II, :

Plaintiff, :

v. : CASE NO. CL-2019-0002911

AMBER LAURA HEARD, :

Defendant. :

-----x

Hearing on Motion

BEFORE THE HONORABLE BRUCE D. WHITE, JUDGE

Fairfax, Virginia

Friday, June 28, 2019

11:14 a.m.

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1 Hearing on Motion held at:

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3 Fairfax County Circuit Court

4 4110 Chain Bridge Road

5 Fairfax, Virginia 22030

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7 Pursuant to Notice, before Dustin Thomason, Digital

8 Court Monitor for the Commonwealth of Virginia.

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A P P E A R A N C E S

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I N D E X

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E X H I B I T S

(None.)

1 P R O C E E D I N G S

2 (The court monitor was duly sworn.)

3 THE COURT: All right. We're ready. Go
4 ahead.

5 MR. McEVOY: Yes. Good morning, Your
6 Honor, Tim McEvoy and Sean Roche of Cameron/McEvoy
7 for the defendant. With me this morning is Eric
8 George and Rich Schwartz from Los Angeles,
9 California, who are serving as the lead counsel in
10 this case, and I'd like to cede the podium to them
11 to do the argument.

12 THE COURT: Okay. Good morning.

13 MR. GEORGE: Thank you very much, Your
14 Honor. May I proceed, Your Honor?

15 THE COURT: Yes, sir.

16 MR. GEORGE: Judge White, it is a great
17 honor to be here in the Circuit Court of Fairfax
18 County, but I submit that, under any test,
19 California is the appropriate forum in which
20 jurisdiction should be entered. And we find
21 ourselves in an interesting position here because
22 no Virginia high court has yet addressed the

1 question of the location for an exercise of
2 jurisdiction in a defamation case in a so-called
3 mass media or internet defamation case.

4 So what I'd like to do is to walk through
5 why, Your Honor, under the so-called old test that
6 looks to place a publication or under the newer
7 test, the two courts outside of --

8 THE COURT: When you say "the newer
9 test," do you mean Judge Moon's test that --

10 MR. GEORGE: I do.

11 THE COURT: -- sort of mirrors the second
12 restatement of torts?

13 MR. GEORGE: I do, Your Honor.

14 THE COURT: Okay.

15 MR. GEORGE: Thank you very much. That
16 is exactly what I mean. Judge Moon, as well as the
17 district court in New York, applying Virginia law,
18 have stated that this is the way that they believe.
19 Far be it for me to say but I think Your Honor
20 would see, perhaps, the wisdom of proceeding with
21 this other way of looking at it.

22 But either way, Your Honor, under either

1 analytical framework, jurisdiction is properly
2 exercised in California, and I'd like to explain
3 why. If we look at the -- I'll call it the former
4 way of assessing jurisdiction for a defamation
5 case --

6 THE COURT: Well, when the Supreme Court
7 of Virginia has rejected the second restatement of
8 torts, it's hard to say that it's the former in
9 Virginia, isn't it?

10 MR. GEORGE: Well, I think because the
11 Court has not yet addressed how publications work
12 for purposes of an internet publication in a
13 defamation context, that that may not, in fact, be
14 the right way that the Court ultimately would look
15 at it if it reached the Virginia Supreme Court.

16 And there are ample policy reasons why,
17 in the context of a defamation that occurs on the
18 internet, it would make a great deal of sense and
19 why I do think that the court in Virginia may well
20 adopt ultimately a framework by which you look at
21 the location of the plaintiff.

22 Let me put that aside. Let me focus on

1 the law as we know it exists in Virginia for
2 so-called paper, newspaper, book, or other types of
3 defamations. And if we look at the law under that
4 scenario, I don't think there's any question,
5 Virginia is not the place of the publication in the
6 first instance.

7 We know from all of the evidence,
8 including the complaint, including the declaration
9 we have submitted of Amber Heard, that the very
10 first instance in which there was any -- I'm going
11 to call it any alleged defamation here would have
12 been the exchanging of the op-ed between Ms. Heard
13 and the ACLU in New York. California and New York.
14 That's paragraph 54 of Ms. Heard's declaration.

15 Your Honor, there is no fact to contest
16 that. In the first instance, that is where this
17 would occur. And, Your Honor, with respect to --
18 we do know about that sort of scenario, the
19 Fryfogle case that's cited -- again, it's a
20 district court decision, Western District of
21 Virginia, that applies the law as it exists pre,
22 let's say, internet. It's a 2009 case, but it

1 deals with a republication issue, and the
2 publication occurs, quote, "When the defendant
3 first made the alleged defamatory statements rather
4 than where the republication occurred."

5 I don't think there's any doubt that, if
6 Mr. Depp wanted to follow that, he would have to
7 say that the first publication of the so-called
8 defamation was in California or it was in New York.
9 There is no conceivable way, Your Honor, that the
10 first publication could be deemed to be in the
11 Virginia. And thereafter, of course, Your Honor,
12 as Mr. Depp alleges in his complaint, the op-ed is
13 simultaneously -- and I'm going to quote from the
14 complaint -- "published to a worldwide audience on
15 'The Washington Post's' website," which would mean
16 it's published everywhere.

17 So, again, the undisputed facts, the
18 first so-called publication would be either
19 California or New York; thereafter, everywhere. I
20 have not even mentioned the name of Virginia yet
21 because there's nothing specific to Virginia.

22 So under the place-of-publication test --

1 and, again, I'd submit that that would be
2 supplanted that it's been correctly decided by the
3 other courts, but setting that aside, if I'm
4 completely in error in making that suggestion,
5 under the place-of-publication test, this doesn't
6 belong here.

7 So, Your Honor, I do want to emphasize
8 the cases that support what I'm saying, and one of
9 the cases in this regard is the Hatfield (ph) case.
10 And these -- the holding in that case does tell us
11 that, under a place-of-publication test, the facts
12 as we know them here, they don't keep us in
13 Virginia.

14 Again, Your Honor, there was a New
15 York-based district court applying Virginia. I'm
16 not suggesting there's any particular wisdom in the
17 way that it's perceived in New York, how Virginia
18 law might apply, but I do think that analysis is
19 appropriate here. The board held that D.C. law had
20 to apply, not Virginia law, on the facts of those
21 cases because, even though the plaintiff in that
22 case had worked in the past in Virginia -- by the

1 way, nothing at all in the record to suggest any
2 such connection to Virginia by Mr. Depp -- that
3 that was not enough because, quote, the -- it was
4 not enough that the, quote, "the tortious articles
5 were published in Virginia." And, here, as in that
6 case, the publication first occurred elsewhere.

7 The Court said that the argument -- the
8 same argument that's being advanced here, Your
9 Honor, was, quote, "easily rejected" because a rule
10 that, quote, "permits the use of the law of any
11 state in which an article is published does not
12 square with Virginia's definition of libel." I
13 think that's right.

14 And, Your Honor, if I'm not going to be
15 convincing in any way, if I get to why I think
16 that, even though we do prevail on the
17 place-of-publication test, it still does make sense
18 to look as well at the legal reasoning for why it
19 is that, in the internet age, we're beyond that. I
20 won't go there if Your Honor doesn't wish me to.

21 THE COURT: You can go anywhere you want
22 in your argument. I would simply keep in mind that

1 Virginia has a long tradition of referring to cases
2 that occurred in 1788.

3 MR. GEORGE: Sure. I love nothing more
4 than citing a case that goes back to the 18th
5 century, Your Honor, but I do think that, in this
6 context, the principles that would have animated a
7 decision in 1788, in this context, if it were in
8 any way conceivable, what would be brought about by
9 publication on the internet would very much caution
10 in favor of the test that focuses on the location
11 of the plaintiff.

12 And the reasons why include -- I'm going
13 to quote the Court here in Gilmore -- "the policies
14 of uniformity, predictability, and ease of
15 application." And also an avoidance, Your Honor,
16 of the need in a mass media context to look to what
17 the Court called a cumbersome application of a
18 patchwork of state law.

19 And, otherwise, if we try to focus simply
20 on the place of publication, you can see how I
21 think these facts do a good job of illustrating the
22 point. Okay. You have got the defendant who

1 writes a piece in Los Angeles that is communicated
2 to somebody in New York that happens to appear, as
3 with all other 49 states, in Virginia at the same
4 time, and how is one to wade through and figure
5 that out especially, Your Honor -- and I have
6 nothing but the greatest respect for opposing
7 counsel -- but especially given the specter of
8 forum shopping.

9 And I mean that specifically in the
10 context of a plain desire that we perceive to avoid
11 suing in California where we have a fairly robust
12 anti-slack statute, which we would very much have
13 welcomed the application of to this. I don't think
14 it's appropriate that a case like this be able to
15 be filed in Virginia and be maintained in Virginia
16 if -- and I don't want to suggest this is the
17 intention of counsel; I wouldn't be comfortable,
18 remotely, doing that. But let's say,
19 hypothetically, some other counsel in some future
20 case wants to avoid the law of this state where
21 both the plaintiff and the defendant, in almost all
22 the 50 so-called -- 50 witnesses and all the

1 physical evidence exist -- we'll just avoid
2 bringing suit in that state. I don't think that's
3 right under an analysis that would be furnished by
4 a court in any of the last couple of centuries. I
5 think that applying those principles to the type of
6 facts that we have here, I don't think that's
7 appropriate to keep this in Virginia.

8 And, Your Honor, I just -- not to overly
9 emphasize the point, but I would say this: If I
10 were wrong on this, it would be tough to imagine
11 literally any defamation case that couldn't be
12 filed and maintained in Virginia, because as soon
13 as a defamation occurs in writing, let's say, by
14 correspondence, by fax, or something else, say,
15 between California and New York, if it is
16 thereafter republished on the internet, those are
17 the facts we have here.

18 So that if Mr. Depp's case is allowed to
19 proceed here notwithstanding the absence of any
20 connection whatsoever other than the fact that the
21 article appeared in Virginia a day after, I might
22 add, in the paper publication, a day after it

1 simultaneously appeared everywhere in the United
2 States and worldwide, based on the internet, that's
3 a non-precedent.

4 So I do believe that there would be
5 compelling reasons were the matter before Virginia
6 Supreme Court for the Court to say that, certainly
7 in this context, the application of jurisdiction
8 for defamation cases would be to look to the
9 location of the plaintiff.

10 So, Your Honor, unless the Court has any
11 specific questions, I think I'll regain my seat and
12 perhaps say a few words after Mr. Chew speaks.

13 THE COURT: All right. Thank you.

14 MR. GEORGE: Thank you, Your Honor.

15 THE COURT: Mr. Chew, before you start,
16 let me ask if anybody on the 11:30 docket has an
17 uncontested order that you want to pass up, rather
18 than waiting another half hour or so...

19 (A discussion was held off the record.)

20 THE COURT: Go ahead. Thank you for
21 allowing the professionalism and letting them get
22 out of here early.

1 MR. CHEW: Thank you very much, Your
2 Honor. May it please the Court. Ben Chew of Brown
3 Rudnick for Plaintiff, Johnny Depp. With me here
4 today is my co-counsel, Bob Gilmore, of Stein
5 Mitchell.

6 Your Honor, I'd like to begin, if I
7 might, responding to a comment you made in a
8 question to Mr. George. It's our understanding
9 that the Court is correct in that the Supreme Court
10 of Virginia has explicitly rejected the restatement
11 approach. That's Gilmore at 39 -- no, 37, citing
12 Jones vs. RS Jones & Associates, 246 Va. 35.
13 That's a 1993 case. Also citing McMillan vs.
14 McMillan, 219 Va. 1127-130. That's a 1979 case.
15 And as Your Honor has pointed out, it rejected the
16 second restatement position in favor of *lex loci*
17 *delicti*.

18 THE COURT: All right. Their argument is
19 that the law has evolved, and now, that really is
20 semi-impractical.

21 MR. CHEW: I think they're wrong on all
22 counts, and if I could just -- I'm trying to do

1 this as efficiently as I might to distinguish the
2 two cases Mr. George referred to and then get to
3 our point, if that's all right.

4 THE COURT: I'll try to remember it.

5 MR. CHEW: So, Your Honor, first, with
6 respect to the Fryfogle case, this, as Mr. George
7 conceded, is a Southern District of New York case,
8 which is, frankly, wrong about Virginia law.
9 Virginia law has not changed, by the way; Fryfogle
10 just misstated it.

11 It's wrongly stated that Virginia adopted
12 the restatement approach, whereas Your Honor
13 pointed out, it manifestly does not. So that case
14 is a misstatement on New York of Virginia law.

15 And now, Your Honor, the Court should
16 deny Defendant Heard's motion because she admits in
17 paragraph 54 of her declaration that she directed
18 that the op-ed be filed here. That means, as Your
19 Honor is aware, that Mr. Depp's cause of action
20 arose here. The turtle did not appear mysteriously
21 on the lamppost; she placed the turtle there. She
22 deliberately availed herself -- and she says so.

1 She sent it -- she sent it to her friend at the
2 ACLU in New York for the explicit purpose of it
3 being submitted to "The Washington Post."

4 And as Your Honor is aware, it was
5 explicitly published here in Virginia, both in hard
6 copy and online, through servers in Virginia. It
7 was published in a Virginia local edition. The
8 idea that any defamation case could be filed is,
9 frankly, absurd. This is a case where she
10 purposely intended that it be filed here, and it
11 was. That fact alone defeats Ms. Heard's motion
12 because, as Your Honor is aware, dismissal under
13 Section 8.01-265, can occur only where the cause of
14 action arose outside of Virginia. And here, it
15 rose in Virginia. So we don't even get to the
16 convenience factors because, as Your Honor is
17 aware, the statute reads that as a prerequisite,
18 before you even get to the convenience factors.

19 As Your Honor is aware, it's --

20 THE COURT: What am I to draw from the
21 conclusion that -- it seems to be an uncontested
22 fact that she sent this to someone in New York with

1 directions to send it to someone else as opposed to
2 sending it directly to "The Washington Post" and
3 saying, "Here's my op-ed"?

4 MR. CHEW: Well, ultimately, she intended
5 to file it in Virginia, and she admits that in
6 paragraph 54 of her declaration. And we're not
7 suing about the initial publication, if there was
8 one. Mr. George says it's uncontested, but we have
9 only Ms. Heard to rely on for that.

10 But even assuming arguendo that she sent
11 it to the ACLU and even if it were sent to other
12 places before it got to its intended target at "The
13 Washington Post," it's irrelevant.

14 Your Honor --

15 THE COURT: Let me slow you down a
16 second; we have plenty of time.

17 MR. CHEW: Okay.

18 THE COURT: So you don't contest that,
19 for the purposes of this hearing, I should consider
20 the declaration of Ms. Heard and consider it to be
21 truthful or you do? I'm not sure I understand your
22 position.

1 MR. CHEW: I don't think -- with respect,
2 Your Honor, I don't think it's appropriate to take
3 it as true since it's merely her allegation and
4 we're here at the context of a motion to dismiss.
5 We are arguing that, assuming arguendo that it's
6 true, it's damning because --

7 THE COURT: All right. I'm trying to
8 stay on the issue I'm thinking of, which is,
9 whichever way I rule, this may go up, and what is
10 the factual underpinning. What is the factual
11 record that will be going up?

12 MR. CHEW: Well, assuming arguendo -- and
13 this is based only on her declaration -- only on
14 her declaration she says that she sent it to a
15 friend of hers or an agent at the ACLU so that it
16 would be published in "The Washington Post", so it
17 would be published here.

18 We say it doesn't matter. Assuming
19 arguendo that's true, it doesn't matter under
20 Weaver. Your Honor will recall --

21 THE COURT: So let me finish.

22 MR. CHEW: Yes, I apologize.

1 THE COURT: So if it should go to the
2 Virginia Supreme Court, then the record is that you
3 accept that her declaration should be considered by
4 the Court and that there is nothing in the record
5 to reflect that that's not accurate. Is that the
6 record that's going up, or is the record going up,
7 "I refuse to really answer that question, Judge,
8 but I will tell you, assuming arguendo" -- how is
9 that a clear record for --

10 MR. CHEW: I don't mean to get wrapped
11 around the axle, but technically, as I understand
12 it, what must be taken as true by the Court is our
13 complaint, and the complaint makes very clear that
14 it was published in Virginia. What I am arguing --
15 what I think is law in Weaver is particularly
16 clear, so we would be happy to accept that
17 representation because we believe it's damning, is
18 that, under Weaver, it doesn't matter. Your Honor
19 may --

20 THE COURT: Okay. Let me -- Mr. Chew, I
21 try to be very, very careful on the words that I
22 use and that other people use. "We would be happy

1 to accept that representation," what does that
2 mean? You mean you stipulate that that's an
3 accurate fact or not? Because one of the things I
4 thought about before this hearing is whether we
5 should be having an evidentiary hearing on this
6 issue or not, and that's why I'm talking to you
7 about the record that goes up.

8 MR. CHEW: Well, for purposes of this
9 argument, Your Honor, we will assume that is true.

10 THE COURT: Okay.

11 MR. CHEW: But I can't represent it to
12 you as true because it's Ms. Heard's untested
13 declaration. But for the reasons I will state,
14 Your Honor, it's irrelevant because one of the
15 arguments -- this is an argument --

16 THE COURT: Well, I might find it to be
17 relevant, and if were to find it to be relevant and
18 it goes up on appeal, it should be clear to the
19 Supreme Court whether that's a fact that you accept
20 and say, "Yes, that is correct for the purposes of
21 this" or whether you say, "Well, I'm not going to
22 make a commitment on that, but let's just assume,

1 for arguendo" --

2 MR. CHEW: I would take the latter
3 approach, Your Honor, because I can't speak to
4 Ms. Heard's credibility. I don't -- I don't --

5 THE COURT: Why shouldn't I have an
6 evidentiary hearing on the case then?

7 MR. CHEW: We will stipulate to that for
8 purposes of this argument, but we reserve the right
9 to question it when we take her deposition. Is
10 that an acceptable stipulation for --

11 THE COURT: Well, I can't make you
12 stipulate to anything. I'm not trying to make you
13 stipulate to anything. I'm simply trying to
14 clarify our record in the event the case --

15 MR. CHEW: For purposes of --

16 THE COURT: -- is appealed by either
17 side, which is a high likelihood, that one side or
18 the other will.

19 MR. CHEW: For purposes of this argument,
20 Your Honor, we would respectfully stipulate to
21 that. And then I would like to proceed.

22 Your Honor may recall that we submitted

1 to Your Honor four cases by a praecipe on
2 June 13th. The reason we did that is because
3 Ms. Heard, for the first time, made an argument in
4 page 4 of the reply brief that you have to look at
5 prior publication. And, therefore, her subsequent
6 publication in Virginia, which she appears to
7 concede, speaking of stipulations, Weaver -- it's a
8 little surprising, Your Honor, that, in making that
9 argument for the first time on reply, they didn't
10 point the Court to the Weaver case.

11 The Supreme Court of Virginia in Weaver
12 effectively dispensed with the argument of "Oh, it
13 may have been first published in New York; maybe it
14 meandered down the New Jersey Turnpike." The point
15 is, it ended up in Virginia, and assuming that this
16 is all true -- everything that she said is true,
17 this is an actionable republication because it's a
18 natural and probable consequence of sending it to
19 New York.

20 Let me quote Weaver, Your Honor, please.
21 Quote: "It is well-settled that the author or
22 originator of a defamation is libel for a

1 republication or repetition thereof by third
2 persons, provided it is the natural and probable
3 consequence of his act or he is presumptively or
4 actually authorized or directed its republication.
5 This is based on the principle that such
6 republication constitutes a new cause of action
7 against the original author." Weaver vs.
8 Beneficial Finance Company, 199 Va. 199 [sic], a
9 1957 case.

10 Applying Weaver, Your Honor, even
11 assuming paragraph 54 of Ms. Heard's declaration is
12 true, the prior publication in New York about which
13 we're not suing -- assuming it happened -- is
14 irrelevant because the publication that they
15 stipulate to in Virginia would constitute a new
16 publication because it's a natural and probable
17 consequence of Ms. Heard sending it to New York in
18 the first place. Indeed, we don't need an
19 evidentiary hearing, Your Honor, because Ms. Heard
20 helpfully admitted to us that the whole purpose of
21 her sending it to New York was to publish it in
22 "The Washington Post".

1 Quote: "I wrote the op-ed in Los
2 Angeles, California, and submitted it to 'The
3 Washington Post' through my contact at the ACLU,
4 who was based in New York. The op-ed was published
5 on December 18th, 2018."

6 So we stipulate, Your Honor, she wrote it
7 in Los Angeles. We stipulate, Your Honor, that she
8 sent it to New York, but she intended it to be
9 published in Virginia, and that is -- we don't have
10 to speculate that that was the natural and probable
11 consequence of her initially publishing in New
12 York. She said -- she testified under oath that's
13 why she did it.

14 So this -- assuming this all happened,
15 this is an actionable republication. And going
16 back to Mr. George's point about old Virginia
17 Supreme Court cases -- although, Your Honor, 1957
18 Weaver case is not that long ago -- far more
19 recently, this Court, Judge Klein, your
20 predecessor, applied Weaver in the Spudaville (ph)
21 case. This is one of the other cases that we
22 submitted to Your Honor on June 13th, finding that

1 a republication in Fairfax County of a prior
2 allegation of child abuse was the natural and
3 probable consequence of Defendant's original
4 publication; therefore, it was a separate cause of
5 action for which Defendant could be libel, and the
6 Court denied Defendant's motion to transfer venue
7 because this was a new republication.

8 So, Your Honor, we're stipulating, we're
9 agreeing. It doesn't matter under Weaver. Weaver
10 makes it very clear that this is an actionable
11 republication, assuming that that happened.

12 And if I could now go back, it's black
13 letter law, Your Honor, that, for libel, Virginia
14 courts look to where the statement was published,
15 not where the damages occurred. One case I know
16 purposely, because I won part of it and I lost part
17 of it, which is the ABLV case before Judge Hilton
18 in the Eastern District of Virginia. I represented
19 the defendant, which was a D.C. non-profit, which
20 put out an online publication emanating from D.C.

21 Our client, Defendant C4ADS, alleged that
22 the plaintiff, which was Atlantean (ph) Bank, was a

1 money launderer. Plaintiff argued to Judge Hilton,
2 We were damaged in New York because, as Atlantean
3 bank, all of the banking authorities are in New
4 York, so being accused of being a money launderer
5 damages us in New York. Judge Hilton emphatically
6 rejected that position by Plaintiff in ABLV
7 stating, quote, "For libel claims, Virginia law
8 looks to where the statement was published." He
9 then continued, "It is irrelevant that the negative
10 effects of the publication were felt in New York.
11 Any reputational damage caused by C4ADS occurred
12 everywhere due to the nature of online
13 publications."

14 So Judge Hill -- strike that. Judge
15 Hilton applied D.C. law because that's where our
16 client, C4ADS, physically published the article.
17 Applying ABLV, the Court should find that the libel
18 here occurred in Virginia. Whether it was an
19 original publication or whether it was a
20 republication after the publication in New York, it
21 doesn't matter under Weaver. But under ABLV, the
22 Court should deny their motion, as Judge Hilton

1 did.

2 As Your Honor has read, we have cited a
3 bushel of cases standing for the very same
4 proposition. And I'll just cite another one, Your
5 Honor. Cockrum vs. The Donald J. Trump Campaign
6 where Judge Hudson, formally of this court, stated,
7 quote, "Based on this Court's analysis of closely
8 related jurisprudence, it is of the opinion that
9 the Supreme Court of Virginia would find that the
10 place of the wrong in these cases for public
11 disclosure of private facts is the place where the
12 act of publication to the internet occurred."
13 That's 365 F.Supp.3d at 670.

14 Now, that -- granted, that's not a
15 defamation case, but it is a very closely related
16 privacy court. Judge Hudson has ample authority to
17 speak and follow the same line as ABLV.

18 By contrast, I would like to take their
19 leading case, which is the Gilmore vs. Jones case,
20 the primary case on which they rely. And I would
21 submit to you, Your Honor, that it's completely
22 inapposite, given what the Court -- the judge said

1 in his opinion was a thorny fact pattern. In
2 Gilmore, unlike this case, and the ABLV case, where
3 the place of publication was clear, the defendant
4 is clear, the Court was addressing in their case a
5 situation where there were multiple defendants in
6 multiple states simultaneously posting the same
7 material on multiple websites, including YouTube.
8 And in that context, the Court had to depart from
9 the normal course, the *lex loci*.

10 And by the way, Your Honor, even the
11 Gilmore case recognized, in Footnote 37, that the
12 Virginia rule was *lex loci*, the place of
13 publication. But, here, the Court explicitly
14 limited its finding by saying there was no one
15 place of publication. There were multiple
16 defendants simultaneously publishing.

17 Here, we have one publication. It was
18 intended to be published here in Virginia. That
19 was her purpose. That's why this case is here.
20 She chose this forum by publishing it in Virginia.

21 Your Honor, we have already dealt with
22 the issue of republication. It doesn't matter.

1 She could publish it in New York. She could
2 publish it anywhere else. She published it here,
3 and as long as that was the natural and probable
4 consequence of the original publication, this is
5 the right forum, and she said that she intended to
6 publish it here, so we are in the right place.

7 Finally, Your Honor --

8 THE COURT: You have one minute.

9 MR. CHEW: Thank you, Your Honor.

10 As Your Honor knows, we don't need to
11 reach the convenience argument because Virginia
12 Code Section 8.01-265 only permits the Court to
13 look at convenience if it finds that the tort
14 occurred elsewhere. It did not. It occurred here.

15 And even if you did consider it, it's a
16 wash because we can take the depositions in
17 California, but the Court cannot -- should not get
18 to that.

19 Last issue is the Fryfogle case. That is
20 also easily distinguishable because it missed
21 Weaver. The Fryfogle case missed, as apparently
22 Defendant did, the Weaver case, which makes very

1 clear that the statement can be actionable if it's
2 republished. And it ended up applying Delaware
3 law, and Delaware does apply the restatement,
4 which, as Your Honor pointed out, is not the law in
5 Virginia. Thank you, Your Honor.

6 THE COURT: Thank you.

7 You have got one minute for rebuttal.

8 MR. GEORGE: Thank you, Your Honor. I
9 think that the stipulation that was proposed -- or
10 I shouldn't call it a stipulation, but the
11 acknowledgment that was made --

12 THE COURT: He called it a stipulation.
13 I think it's fair to call it a stipulation for the
14 purpose of this hearing today.

15 MR. CHEW: I agree, Your Honor.

16 MR. GEORGE: Fair enough. Thank you.

17 And so stipulated by us.

18 THE COURT: I don't want you muddying my
19 record.

20 MR. GEORGE: Fair enough.

21 THE COURT: The stipulation that it is.

22 MR. GEORGE: I'll make it even more

1 clear. We concur and engage in and so stipulate
2 ourselves. And, Your Honor, I submit that is
3 dispositive.

4 By stipulating to that fact, we now know
5 that, for purposes of the publication, it occurred
6 in California or New York. There is no basis under
7 the place-of-publication test for this matter to be
8 in Virginia.

9 And I should quickly note: We had
10 offered in our papers to have an evidentiary
11 hearing. It was very much objected to by the other
12 side. There are opposition papers that --

13 THE COURT: Well, you didn't offer it to
14 me, and I'm the one who makes those decisions. So
15 go ahead with your argument; you have got about
16 half a minute left.

17 MR. GEORGE: Fair enough.

18 Your Honor, I just want to offer one word
19 about the point that we're trying to evolve the law
20 in respect. We're not. The courts have not
21 embraced the restatement second, and neither are we
22 suggesting the Court should do so. To the

1 contrary, contrary to Mr. Depp's statements and
2 attempts to distinguish Gilmore and Hatfield,
3 neither case failed to apply the lex loci test.
4 Both recognized that the lex loci jurisdictions
5 look to the place of the wrong, and that is where
6 the plaintiff was injured.

7 THE COURT: Well, Judge Moon came up with
8 his own new test, didn't he?

9 MR. GEORGE: Well, he did come up with
10 what he believed the Virginia court would accept,
11 and I'm intentionally not embracing that, Your
12 Honor. I'm going back to the place of publication.
13 And I'm saying that, under that, and given the
14 stipulation that we now have, that has to be
15 California or New York. It is not Virginia. In
16 fact, when I heard counsel -- and I was trying to
17 write this down; I may have gotten a word wrong.
18 When I heard counsel say, We are not saying this
19 was the initial publication, he said, quote,
20 "ultimately, she intended to publish in 'The
21 Washington Post'." Ultimately.

22 And, Your Honor, none of the facts, none

1 of the cases that are acknowledged by counsel on
2 the republication issue changes any aspect of this,
3 because the fact is, in the case that was mentioned
4 in Weaver, the first letter was February 23rd,
5 1955, and the second, more than a year later in
6 1956. That was not a single publication as it is
7 here, and it was a totally distinctive audience
8 between the first and second.

9 Here, we know, based on Ms. Heard's
10 declaration, that the op-ed that she had, quote --
11 well, she says, quote, "I wrote the op-ed in Los
12 Angeles, California, and submitted it to 'The
13 Washington Post' through my contact at the ACLU,
14 who was based in New York." Based on that
15 stipulation, based on the single-publication rule,
16 regardless of whether a republication would have
17 given rise to a new cause of action, we do not
18 belong in this court, which is especially
19 important, Your Honor, because to -- give my last
20 sentence to the Court: A deposition, even of 50
21 witnesses, none of whom can be compelled to appear
22 here, is not a substitute for the live testimony

1 that would be needed to demonstrate why not only is
2 this not defamatory but why it's very much true
3 what had been stated in other contexts by
4 Ms. Heard.

5 Thank you very much, Your Honor.

6 THE COURT: Thank you all.

7 I'll take the matter under advisement.

8 As I mentioned, I'm going to be out the week of
9 July 8th and next week is a short week, so I'm not
10 sure how quickly I can get an opinion to you, but I
11 appreciate the briefing and the arguments. Thank
12 you.

13 MR. GEORGE: Thank you.

14 MR. CHEW: Thank you very much, Your
15 Honor.

16 (At 11:52 a.m., the above hearing
17 concluded.)

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I, Bobbi J. Fisher, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.



Bobbi J. Fisher, NCRA Registered
Professional Reporter/Transcriber
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