VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

John C. Depp, II,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No.: CL-2019-0002911**
	)	
Amber Laura Heard,	)	
	)	
Defendant.	)	
	)	

DEFENDANT AND COUNTERCLAIM PLAINTIFF AMBER LAURA HEARD'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY AUGUST 17, 2021 ORDER FOR INTERLOCUTORY APPEAL

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Rather than focusing on the merits of Ms. Heard's Motion to Certify, Mr. Depp engages in personal and false attacks that reveal his desperation to retry the same issues tried in the UK Action, hoping for a different outcome. Ms. Heard's Motion, however, satisfies the requirements of Va. Code § 8.01-670.1 and this Court should certify its August 17, 2021 Order for interlocutory appeal.

I. Ms. Heard Satisfies the Four Requirements for Certification.

A. Virginia Lacks Clear Precedent in Defensive Collateral Estoppel and Comity Cases.

The Virginia Supreme Court in *Bates* intentionally preserved a logical exception to the mutuality doctrine and explained the underlying policy—that a litigant should have one "full and fair day in court on any issue essential to an action in which he is a party.". *Bates v. Devers*, 214 Va. 667, 671 n.7 (1974). This logical exception was expressly intended to prevent a rigid application of the mutuality doctrine in appropriate cases, like the one before this Court. The "footnote" in *Bates*, which Mr. Depp attempts to minimize (Pl.'s Opp'n 9), articulated a clear exception to mutuality that has been cited approvingly by Virginia state and federal courts alike. *See, e.g.*, *Arlington Ridge Rd. Assocs. v. Am. Realty Trust,* 7 Va. Cir. 512 (Arlington 1978) ("[T]he doctrine of mutuality [] has been largely eroded 'when it is compellingly clear from the prior record that the party in the subsequent civil action against whom collateral estoppel is asserted has fully and fairly litigated and lost an issue of fact which was essential to the prior judgment.'") (quoting *Bates,* 214 Va. at 671 n.7); *Hozie v. Preston*, 493 F. Supp. 42, 45 (W.D. Va. 1980) (applying the exception articulated in footnote 7 in *Bates* and granting summary judgment on the grounds of collateral estoppel); *Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 274 –75 (1987) (Thomas, J., dissenting) ("In *Bates* ..., we discussed, in a footnote, the rationale for the mutuality requirement and suggested that the requirement was not appropriate in every case.") Significantly, Mr. Depp

now concedes mutuality need not exist in every instance under *Bates*, but without explanation says this case does not fit the "particular circumstance" where mutuality does not apply. Pl.'s Opp'n 9.

Defensive collateral estoppel is a "particular circumstance" where mutuality should not be "mechanically applied," and the *Bates* exception to mutuality has not been fully explored by the Virginia Supreme Court in this context. Mr. Depp once again[1] misleads this Court because of a lack of understanding of defensive collateral estoppel or because of a failure to comprehend *Rawlings v. Lopez*, 267 Va. 4 (2004), by asserting that *Rawlings* is a defensive collateral estoppel case. As recognized by this Court in its August 17, 2021 Letter Opinion ("Letter Opinion"), "nonmutual defensive collateral estoppel, occurs when 'the defendant, *a stranger to the prior proceeding*, attempts to preclude the plaintiff, *a party to the former proceeding*, from relitigating an issue plaintiff lost in the earlier case.'" Letter Op. 4 (emphasis added) (quoting *Norfolk & W. Ry. Co. v. Bailey Lumber Co.*, 221 Va. 638, 641 (1980)). In *Rawlings*, Lopez prevailed as the defendant, not the plaintiff, and was then sued by plaintiffs who were not parties to the other action. 267 Va. at 4. Thus, *Rawlings* is not on point and not controlling in this case where Ms. Heard is attempting to preclude the plaintiff, Mr. Depp, "a party to the former proceeding, from relitigating an issue [he] lost in the earlier case." *Bailey*, 221 Va. at 641.[2]

The dissents in the 4-3 decision in *Selected Risks Ins. Co. v. Dean*, 233 Va. 260 (1987), demonstrate the substantial grounds for differences of opinion on whether the *Bates* exception would apply to this case. Mr. Depp attempts to recast Justice Poff's dissent as limited to "prior adjudication of criminal intent in a criminal proceeding." Pl.'s Opp'n 11. But no such limitation is

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[1] At the hearing on Ms. Heard's Plea in Bar, Mr. Depp falsely claimed Ms. Heard had failed to distinguish "controlling authority" that was "right on point." **Att. 1**, Plea H'rg. Tr. 92:8-20.

[2] For the reasons stated in Ms. Heard's initial Memorandum, *Angstadt v. Atlantic Mutual Ins. Co.*, 249 Va. 444 (1995), is also not on point, and the *Bates* exception endures.

found in the case, and the principle remains that "when a party has fully and fairly litigated an issue of fact essential to a valid judgment and a judgment against him has become final, he is estopped to relitigate that issue in a subsequent action." 233 Va. at 266. Instead, the Court relied in part on *Eagle, Star & British Dominion Ins. Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927), and noted that there was "special validity" when the first action requires a "heavier burden of proof than that required in the later action," as was the case here. *Id.*; *see also* Def.'s Reply Mem. in Supp. Plea in Bar 5–6. Justice Poff reasoned that "although a person is entitled to his day in court on a particular issue, he is not entitled to a day in court against a particular adversary." *Selected Risks Ins.*, 233 Va. at 266–67 (Poff, J., dissenting). Justice Thomas expressly relied on *Bates* in his analysis, noting, "The present case is one in which it is *compellingly clear*" that defendant "fully and fairly litigated the issue of his intent in striking" plaintiff. *Id.* at 275 (emphasis in original). This Court should let the Supreme Court decide now whether the principles guiding these dissents and the true bounds of the *Bates* exception apply here.

With respect to comity, it is not a matter of discretion whether Virginia courts are required to afford comity to a foreign judgment, as Mr. Depp contends, and this Court did not so hold in its Letter Opinion.[3] Rather than unfettered discretion, the Virginia Supreme Court has applied tests and factors, with some variation depending upon the circumstances, to determine whether comity should be afforded. In *America Online, Inc. v. Nam Tai Electronics, Inc.*, 264 Va. 583, 591–92 (2002), for example, the Court applied four factors to determine whether to grant comity, not to a foreign-country judgment, but to a California court's commission for out-of-state discovery, in the context of the Uniform Foreign Depositions Act. Whether the same factors should be used to

[3] "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor one of mere courtesy and good will, upon the other...." *Oehl v. Oehl*, 221 Va. 618, 622 (1980) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895)).

decide whether a libel judgment of a foreign country should be granted comity remains, at a minimum, a question for the Virginia Supreme Court to decide. Even Mr. Depp initially conceded that Virginia law is "unsettled as to what comity precisely entails," and thus there is substantial ground for difference of opinion. Pl. Opp'n to Plea in Bar 18.

Further, in its comity determination, this Court considered the fact that Ms. Heard was not a formal party to the UK proceedings (Letter Op. 9), and Mr. Depp continues to rely on this factor to bar comity and interlocutory appeal without citing any authority (Pl.'s Opp'n 13). There is no mutuality requirement for the application of comity. At best this is a matter of first impression that the Supreme Court should decide. And while Ms. Heard cites multiple cases recognizing a UK judgment under principles of comity, Plaintiff cites no cases refusing to do so.

B. Determination of the Issues Will be Dispositive of a Material Aspect of the Proceeding.

Virginia Code § 8.01-670.1 requires that "determination of the issues will be dispositive of *a* material aspect of the proceeding currently pending before the court," not *every* material aspect of the proceeding. *See Vuich v. Great E. Resort Corp.*, 281 Va. 240, 243–44 (2011) (interlocutory appeal of partial summary judgment was dispositive of whether plaintiff could increase her damages only and the other claims remained pending). *See also Brown v. Lukhard*, 229 Va. 316, 321 (1995). Mr. Depp does not dispute that resolution of these issues will be dispositive of his entire case, which is "a material aspect of the proceeding." This would significantly reduce the number of witnesses, the amount of evidence, and the length of the trial, which is the rationale behind this element of §8.01-670.1.

C. It is in the Parties' Best Interest to Seek an Interlocutory Appeal.

Essentially, Mr. Depp's position is that it is not in his best interests because this Court ruled in his favor, so an appeal does not benefit him and there should be no further delay. Pl's Opp'n 9.

Undoubtedly, Mr. Depp would have sought interlocutory appeal were the tables turned. Nevertheless, this is clearly not the standard, as it would render the concepts of an interlocutory appeal and best interest meaningless.[4] Further, there is no downside to granting the certification: If the Virginia Supreme Court grants the Petition, then it clearly considers these issues ripe for determination and a stay is appropriate. If the Court denies the Petition, since Ms. Heard has not asked for a stay pending the determination by the Court of whether to grant the Petition, there is no consequence to Mr. Depp and no delay. Both parties stand to save literally millions of dollars in fees and costs if the Court applies the *Bates* exception to this case and follows the rationale in *Oehl* and *Middleton* now, rather than waiting until after a second trial on the exact same issues. If the Court does not believe this case merits such application and denies the Petition, nothing has been lost in the meantime, and the certainty still benefits both sides and this Court.[5]

CONCLUSION

Mr. Depp claims that an appeal would "further delay the vindication Depp seeks" (Pl.'s Opp 6–7) sound familiar because it is the same verbiage he used in the U.K. where Mr. Depp desired "a reasoned judgment that provides the *vindication*..." Reply in Supp. Plea in Bar 1 (emphasis added). Ms. Heard respectfully requests this Court grant certification.

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[4] Mr. Depp's self-serving and subjective disagreement is immaterial. Section 8.01-670.1 was amended in 2020 to remove any requirement that "*the court and the parties agree* it is in the parties' best interest to seek an interlocutory appeal." 2020 Virginia Laws Ch. 907 (S.B. 771) (italicized emphasis deleted). Thus, the parties' best interest must be determined objectively.

[5] Sanctions are not warranted and particularly inappropriate in this instance. Ms. Heard seeks to obtain a ruling from the Virginia Supreme Court on whether this case is the exception carved out in *Bates* and whether comity also applies to UK libel cases. It "is well grounded in fact and is warranted by existing law or a good faith argument for the extension" of the law. Va. Code § 8.01-271.1.B(ii). It is not "interposed for any improper purpose." *Id.* § 8.01-271.1. B(iii). *Wrenn v. McFadden*, 905 F.2d 1533, 1990 U.S. App. LEXIS 7557 (4th Cir. 1990), the *per curiam* case Mr. Depp cites, has no applicability to this situation. In sharp contrast to Mr. Depp's accusations, Ms. Heard seeks a much swifter and final resolution of Mr. Depp's claims that have embroiled the parties in litigation for more than three years.

Dated this 6th day of October 2021.

Respectfully submitted,

Amber L. Heard

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CERTIFICATE OF SERVICE

I certify that on this 6th day of October 2021, a copy of the foregoing was served by email, pursuant to the Agreed Order dated August 16, 2019, as follows:

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ATTACHMENT 1

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

----------x

JOHN C. DEPP, II,

Plaintiff,

v. Case No. CL2019-0002911

AMBER LAURA HEARD,

Defendant.

----------x

Hearing on Motions

Before the HONORABLE PENNEY AZCARATE, Judge

Fairfax, Virginia

Thursday, July 22, 2021

10:56 a.m. EST

Job No.: 388256

Pages: 1 - 141

Transcribed by: Bobbi J. Fisher, RPR

Hearing on Motions before the HONORABLE PENNEY AZCARATE, Judge, at the Fairfax County Circuit Court.

Pursuant to Docketing, before Joshua Tubbs, Digital Court Reporter.

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been bound by the UK judgment had they lost. And Your Honor asked Ms. Bredehoft asked that question. She artfully avoided it and gave you two answers, neither of which really answered it, which was of course she wouldn't have been bound by that judgment. We wouldn't have argued that she was. She wasn't a party there.

But what's really striking to me -- I'm not surprised about that, but what's really striking is that Ms. Heard made no attempt whatsoever in her reply brief and did not, in her opening argument today, make any attempt to distinguish Rawlings. She didn't even mention it. This is -- I was taught in law school that you have to bring to the Court's attention controlling authority in the jurisdiction. You can try to distinguish it, but you better mention it. And that's a fairly recent and relative terms decision by the Supreme Court of Virginia, and it's right on point.

Rather, the reply in Ms. Bredehoft's argument today cites factually distinguishable --

CERTIFICATE OF COURT REPORTER - NOTARY PUBLIC

I, Joshua Tubbs, the officer before whom the foregoing deposition was taken, do hereby certify that said proceedings were electronically recorded by me; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 22nd day of July, 2021.

[redacted]

Joshua Tubbs, Notary Public
for the Commonwealth of Virginia

CERTIFICATE OF TRANSCRIBER

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.

[redacted]

Bobbi J. Fisher, RPR
NCRA Registered Professional Reporter (RPR)
Prepared: July 23, 2021