

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

John C. Depp, II,)
)
 Plaintiff,)
)
 v.)
)
 Amber Laura Heard,)
)
 Defendant.)
)
 _____)


FILED
CIVIL PROCESSING

2021 JUL -7 P 3:40

JOHN T. FREY
CLERK OF THE COURT
2021 JUL 7 11:00 AM

Civil Action No.: CL-2019-0002911

REPLY MEMORANDUM IN SUPPORT OF AMBER LAURA HEARD'S
SUPPLEMENTAL PLEA IN BAR

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Depp cannot escape the fact that the issue decided by the UK Court is identical to the issue before this Court—whether he abused Heard. The UK High Court ruled against Depp—where defendants had the burden of proof — finding that Depp beat Heard at least 12 times.¹

Depp does not dispute due process in the UK and US Courts are compatible; instead, he asserts he was denied the proper “procedural tools” during his chosen forum in the UK, even though he was also litigating this case for 16 months prior to the UK trial, with full access and ability to use this discovery in the UK. It was Depp who repeatedly resisted producing damaging evidence in the UK, **Att. 1**. In one of Depp’s many requests for relief from sanctions in the UK - this time facing dismissal of his UK lawsuit - Depp contended that to obtain the “vindication” Depp then sought, and now purportedly seeks in this case (Opp’n 22), he preferred the UK Court to the US jury and believed the UK decision would achieve greater vindication for all parties:

[T]he US proceedings will not produce a clear and reasoned judgment, which is exactly what Eady J [a Judge in a case Depp’s counsel was citing] said is so important. Trial in the proceedings in Virginia will be a jury trial with just a verdict. Here, your Lordship will deliver a clear and reasoned judgment taking into account a mass of evidence, hearing from the parties and giving your judgment in relation to the 14 different incidents. As I say, Eady J made clear that it is a reasoned judgment that provides the vindication, not just for the claimant but also for the defendant.

Att. 2, at 15. The UK High Court, in granting Depp’s request for relief, specifically found:

I also see force in Mr. Sherborne’s [Depp’s counsel] points that a reasoned decision (which I shall have to give after the trial) will be a vindication for whatever party is successful of a different order than a bald verdict of a jury. Of course, I mean no disrespect to the procedure adopted in Virginia.

Att. 3, ¶30(v). Heard asks this Court to grant her Supplemental Plea in Bar and apply comity to the UK High Court’s well-reasoned decision reflected in the UK Judgment and dismiss the

¹The UK Court also found that

Complaint. Independently, since Depp made no effort to articulate, much less meet his clear burden to prove, any exception to Va. Code § 8.01-465.13:3(A)–(C), Heard asks this Court to apply the UK Judgment under the Uniform Foreign-Country Judgment Recognition Act and dismiss the Complaint. Finally, Heard asks this Court to follow the line of Virginia cases applying the principles of collateral estoppel to bar the same plaintiff from bringing the same claims after having lost the first time, even where the defendant is different. The Virginia Supreme Court has long provided guidance that, in certain circumstances, collateral estoppel should bar subsequent claims brought by the same plaintiff against a different defendant. This is the case justifying application of the bar while remaining faithful to that guidance and the key principles of collateral estoppel. This is especially appropriate where Depp expressed his preference for the UK Court’s “well reasoned decision” over “just a verdict,” until he lost.

I. The UK Judgment should be recognized by this Court and given preclusive effect under principles of comity and the UFCMJRA.

US courts routinely grant comity to UK Judgments, finding that their procedures comport with this country’s notions of due process. *See, e.g., Apostolou v. Merrill Lynch*, 2007 WL 2908074, at *4 (E.D.N.Y. 2007) (analyzing UK tribunal decision and considering it a “sister common law jurisdiction with procedures akin to our own”); *Pony Express Records v. Springsteen*, 163 F. Supp. 2d 465, 472–73 (D.N.J. 2001) (“Indeed, this court generally considers the courts of the United Kingdom fair and just tribunals.”). The Virginia Supreme Court has also held that “the prevailing English rules of procedure comport favorably with the concept of procedural due process as that concept has evolved in this State and nation.” *Oehl v. Oehl*, 221 Va. 618, 624 (1980). A determination to grant comity is made “*before* a court can evaluate the preclusive effect of a foreign judgment,” not the other way around, as Depp would suggest. *Apostolou*, 2007 WL 2908074, at *4 (emphasis added).

Depp argues that it would be “highly unusual” to afford the preclusive effect of comity, where the parties are not identical or in privity, but that is precisely what the courts did in *Pony Express Records*² and *Schuler v. Rainforest Alliance*, 684 F.App’x 77 (2d Cir. 2017).³

There is no dispute here that the UK had jurisdiction over the prior case and the parties received adequate notice. It was Depp’s claim. He filed it and took it through trial and appeal. The UK Court issued a painstakingly detailed 129-page, 585-paragraph decision in which it thoroughly considered the evidence presented by both parties. The issue in the two cases is identical, and Depp fully and fairly participated in the UK litigation and had every opportunity to challenge the evidence presented by the defendants. Heard was an active participant, providing evidence, seven witness statements, and sitting for four days of live testimony and cross-examination at trial. Depp had the added benefit of conducting simultaneous discovery in this

²In *Pony Express Records*, Bruce Springsteen had previously sued Masquerade Music, Ltd., for copyright infringement of his compositions and sound recordings in the UK and prevailed. 163 F. Supp. 2d at 472. Plaintiffs were not parties to the prior litigation and filed an action against Springsteen in New Jersey federal court alleging multiple claims including copyright infringement. Plaintiffs argued they were prohibited from engaging fully in the UK litigation by Masquerade and had only directly participated in the litigation by sending the court two letters detailing their positions on the copyright issues at stake. The court found that (1) the UK Court had personal jurisdiction over the parties; (2) the parties to the UK action received adequate notice; (3) the UK Court was a fair and just tribunal that “carefully and thoroughly considered their respective allegations and proofs, provided Masquerade with ample opportunity to defend itself, and recorded the court’s final decision clearly within that opinion”; (4) the issue pending litigation was identical to the issue in the previous litigation; (5) there was no privity between plaintiffs and prior parties; and (6) even though there was no privity and plaintiffs had not fully and fairly participated in the litigation, they were still estopped from asserting their claims because “they had the opportunity to participate, but forwent that opportunity.” *Id.* at 474–75.

³In *Gordon & Breach Science Publishers S.A. v. Am. Institute of Physics*, 905 F. Supp. 169, 178–79 (S.D.N.Y. 1995), cited by Depp for his assertion that comity should not be applied in this case, the court examined six factors before declining to grant preclusive effect to German and Swiss judgments. Here, in sharp contrast to *Gordon*, there is reciprocity with the UK Court, which recognizes collateral estoppel (referred to as “issue estoppel in the UK), Depp was a party to the previous litigation and litigated his case on the merits; the UK is a common law jurisdiction from which our legal system is derived; the foreign law is ascertainable and undisputed; the UK applies collateral estoppel consistently; and there are no conflicting foreign judgments.

litigation, for 16 months, and used that discovery in the UK trial. Thus, he was not deprived of any procedural advantage of this Court, in his other chosen forum, the UK.⁴

Furthermore, Depp has misstates the law of UFCMJRA. Nowhere in the Act is there a restriction that it applies to only the same two parties. In fact, Depp admits that the UFCMJRA does not provide *any* limitation “explicitly or implicitly” as to who can seek enforcement. Opp’n 20. It provides that “a court of the Commonwealth shall recognize a foreign-country judgment to which this chapter applies” and lists the limited circumstances in which the court may decline recognition of a foreign judgment. Va. Code § 8.01-465.13:3(A)–(C). Depp has not provided a single reason why any of the circumstances listed in Virginia Code § 8.01-465.13:3(B) or (C) would prevent this Court from recognizing the judgment, and it is his burden to do so.

“A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection B or C exists.” *Id.* § 8.01-465.13:3(D). Depp has failed to articulate any exception, much less meet this burden. The UFCMJRA therefore applies and independently justifies dismissal of the Complaint.

II. This case warrants application of the doctrines of collateral estoppel and res judicata to bar Depp’s claims.

Depp asserts Heard “cannot cite a single authority that supports her Plea.” Opp’n 1. But he ignores, for example, *Moore v. Allied Chemical Corp.*, (Plea in Bar 18), holding the plaintiff was barred from asserting a claim against defendant even though it was not a party to the prior administrative proceedings. 480 F. Supp. 377, 384–86 (E.D. Va. 1979).⁵

⁴Depp misstates the ruling of the US High Court on Depp’s last-minute third-party request of Heard – the Court found Depp failed to meet his burden that the specific evidence requested of Heard would support his claims or adversely affect the other party. **Att. 3, ¶¶ 31-61.**

⁵Likewise, Depp avoids *Hunter v. Chief Constable of the Westmidlands Police* (1982) AC 529, which applied defensive collateral estoppel on due process grounds where there was no privity. Notably, the Virginia Supreme Court has not yet spoken on which country’s preclusion law should apply. Some US jurisdictions apply the preclusion law of the rendering jurisdiction. *See*

Where Depp addresses cases permitting defensive collateral estoppel, he concedes Virginia permits collateral estoppel in cases without privity. Nevertheless, he invents new obstacles purporting to require a “privity-like relationship,” or other “situations where other burden or statutory-policy considerations warrant a departure from the mutuality requirement.” Opp’n 12, 13. It is Depp’s, not Heard’s, position that is at odds with the Virginia Supreme Court’s guidance on the application of collateral estoppel. The critical question is whether the plaintiff had a fair opportunity to litigate an issue on the merits.⁶ Depp clearly did.

Depp misstates the caselaw yet again when he asserts that the defendants in *Leach v. Virginia State Bar*, 73 Va. Cir. 362 (Richmond 2007) were parties to the initial proceeding. Opp’n 13 n.4. Three of the defendants were not. *Leach*, 73 Va. Cir. at 363. Further, Depp fails to address *Leach*’s key holding that the plaintiff’s *defamation* claim was barred by findings of fact in the prior proceedings under the doctrine of collateral estoppel because the statements at issue had been adjudicated as fact. *Id.* at 363–64(emphasis added).

Oddly, Depp attempts to distinguish *Eagle Star* because the prior factual determination in *Eagle Star* was in a criminal proceeding with a higher burden of proof. Opp’n 13. But the *Eagle Star* Court held that plaintiff “had his day in court, with the opportunity to produce his witnesses, to examine and cross-examine the witnesses for the prosecution, and to appeal from the judgment,” and held the plaintiff “who has once litigated the identical question and had it

e.g., *Diorinou v. Mezitis*, 237 F.3d 133, 140, 142 (2d Cir. 2001); *Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146, 1148–49 (5th Cir.1990). Here, Heard would prevail under both UK and Virginia preclusion principles.

⁶See *e.g.*, *Graves v. Associated Transp. Inc.*, 344 F.2d 894, 897 (4th Cir. 1965); See also *Kinsley v. Markovic*, 333 F. 2d 684, 685 (4th Cir. 1964) (holding “the plaintiff has had his day in court”); *Lober v. Moore*, 417 F.2d 714, 719 (D.C. Cir. 1968) (not finding privity, but holding the “decisive” policy governing collateral estoppel under Virginia law is “one adverse litigative adventure on any one issue is enough for any one litigant.”).

adversely decided, under conditions most favorable to himself” was bound to that decision. *Eagle Star & British Dominions Ins. Co. v. Heller*, 149 Va. 82, 89 (1927).⁷ Depp prosecuted his same libel claim in a country where the statements were *presumed* false and the defendant—not the plaintiff—has the burden to prove truth.⁸ Conditions are rarely more favorable in the civil context, and Depp had a full-and-fair opportunity to litigate the issue of his abuse of Heard, even admitting he preferred the UK forum. So even under Depp’s newly created obstacles of a “privity-like relationship” and special “burden or statutory-policy considerations,” Opp’n 14, collateral estoppel is appropriate.⁹

In an attempt to distinguish *Schuler*—a case not involving privity or a “privity-like relationship” where the court held that a prior foreign court adjudication barred the plaintiffs’ defamation claim—Depp reasons that principles of comity only served to bar a subsequent defamation claim because the defamatory statement was based on the foreign court’s

⁷Significantly, in rendering its decision, the Court looked to “English decisions” and found exceptions to mutuality requirements there too. *Eagle Star*, 149 Va. at 90.

⁸It is Depp’s burden to prove by *clear and convincing evidence* that Heard “realized that [her] statement was false or that [s]he subjectively entertained serious doubt as to the truth of [her] statement” that she was a victim of domestic abuse. *Jackson v. Hartig*, 274 Va. 219, 228 (2007); *Jordan v. Kollman*, 269 Va. 569, 576-77 (2005). Depp would also have to prove he never committed any act of domestic abuse against Heard, even though the UK Court already found he did – at least 12 times. Depp would then have to prove damages against Heard for the Op-Ed stating she was a victim of abuse, when the world is aware the UK has adjudicated, permanently, that Depp is a wife beater and abused Heard at least 12 times, causing her to fear for her life.

⁹Depp likewise attempts to sidestep *Hozie v. Preston*, 493 F. Supp. 42 (W.D. Va. 1980), by arguing that that he did not have the “same procedural tools” in the first action. Yet in the UK, Depp referred to the extensive evidence, **Att. 2, at 15**, and Depp withheld evidence in the US case from the UK defendants, while Heard cooperated. **Atts. 1 ¶¶61-61, 70-75, 2 and 3**. Depp omits that he had a full 16 months of the “procedural tools” in this litigation before the UK trial – four months beyond the typical length of a fully litigated Fairfax case, which routinely (before COVID) scheduled trials within one year of filing. Moreover, Virginia does not require identical procedural tools to recognize a foreign judgment and has found that “English rules of procedure comport favorably with the concept of procedural due process as that concept has evolved in this State and nation.” *Oehl*, 221 Va. at 623–624.

determination. Opp'n 20. Depp's logic falls short. First, the defendant's reliance on the order of the statements played no part in the court's reasoning or decision in *Schuler*. Second, the inescapable conclusion of Depp's reasoning would be that if Heard's statements had temporally followed the UK Judgment, then his defamation claims would be barred. By his reasoning, then, Depp would agree with Heard that the entire publishing world should be entitled to rely on the UK judgment and the truth adjudicated therein, underscoring the risks of a contradictory judgment chilling free speech, particularly on matters of public concern.

While Heard was not a formal party to the UK litigation, Depp argued that the "effective opponent was Ms. Heard." JN Att. 1, ¶576. The UK Court also recognized Heard was integral to the UK proceedings by (1) conditioning the disclosure of Virginia litigation documents on her release and, in its July 2, 2020 Order. Att. 3, ¶62, (2) noting the importance of Heard being in the courtroom for the trial, and (3) refusing Depp's request to exclude her. Opp'n, Ex. 5, ¶ 4(c). Ultimately, this case and the UK litigation turn on precisely the same issue—whether Depp abused Heard. He did. Depp fully litigated that issue on the merits and lost.

III. This action and the UK action arise from the same conduct, transaction, or occurrence

Relying on an *unpublished* Fourth Circuit decision applying North Carolina law, *English Boiler & Tube, Inc., v. W.C. Rouse & Son, Inc.*, 172 F.3d 862 (4th Cir. 1999), Depp contends that this action and the UK action do not arise from the same conduct, transaction, or occurrence, because this action stems from statements made in the *Washington Post* while the UK action stemmed from statements made in *The Sun*. Opp'n 16–17. But the Virginia Supreme Court has rejected such a narrow view when identifying the same conduct, transaction, or occurrence.

With the adoption of Rule 1:6, the Virginia Supreme Court returned to the same-subject-matter test for res judicata. *Funny Guy, LLC v. Lecego*, 293 Va. 135, 150 (2017). The applicable

test involves a practical analysis of whether two claims arise from the same conduct, transaction, or occurrence, *Id.* at 154, and “asks ‘whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.’” *Id.* (quoting Restatement (Second) of Judgments § 24(2)). These “factors should be considered ‘pragmatically’ with a view toward uncovering the underlying dispute between the parties.” *Id.* at 154–55.

Applying this analysis, it is clear this action and the UK action arise from the same conduct, transaction, or occurrence. First, the facts underlying the two actions are related in origin and motivation. The origin of both actions is Heard’s allegations and evidence of Depp’s domestic abuse of Heard. The motivation for both actions is Depp’s desire to prove Heard’s claims were false.

The facts underlying the two actions are also related in time and space. The Op-Ed in the *Washington Post* both address Heard’s allegations of domestic violence and abuse by Depp during their relationship, which became public with her filing for divorce and obtaining a Domestic Violence Restraining Order in May 2016. The publications serve readers worldwide, maintaining websites accessible all over the world.

Finally, the facts underlying the two actions form a convenient trial unit and their treatment as such conforms to reasonable parties’ expectations. The factual narrative in the UK action was about Depp’s domestic abuse of Heard and that would be the factual narrative in this action as well. Indeed, the evidence presented here will be virtually identical to the evidence presented in the UK action. Further, reasonable “parties would not expect, much less want,” a dispute over the veracity of a statement “to disintegrate into multiple lawsuits.” *Id.* at 155.

Instead, reasonable “parties would expect there to be one court case to resolve it,” which has already taken place, by Depp’s own choice, in the UK. *Id.* at 156.

While Heard is not required to establish all the factors of the same-subject-matter test to prevail on her plea of res judicata, she has clearly done so. *See id.* at 154. After a full-and-fair trial, the UK court found that Depp abused Heard on at least 12 occasions and thus statements that he had abused her were true and not defamatory. Depp is therefore barred from re-litigating that issue under Rule 1:6.

The purpose of the doctrines of res judicata and collateral estoppel is to end duplicative litigation, once an issue has been fully and fairly litigated. These doctrines prevent Depp from bringing a new defamation action every time anyone publishes statements that he abused Heard, without regard to the fact that he fully and fairly litigated this issue in the Court of his choosing and lost.¹⁰ “Every litigant should have [an] opportunity to present whatever grievance he may have to a court of competent jurisdiction; but having enjoyed that opportunity and having failed to avail himself of it, he must accept the consequences.” *Id.* at 147 (quoting *Miller v. Smith*, 109 Va. 651, 655 (1909)). Depp refuses to accept the consequences of the UK action, but res judicata compels him to do so. This action is thus barred under Rule 1:6 and should be dismissed with prejudice.

¹⁰Depp asserts “no parade of horrors will occur if the UK Judgment is not afforded preclusive effect,” Opp’n. 21, which is not the standard under any of Heard’s defenses. Depp then makes clear that unless every statement about Depp’s abuse is preceded by “claims” or “alleges,” they remain susceptible to a defamation action by Depp, *id.* at 22. This means that unless Heard, the adjudicated victim of domestic violence, testifies to her traumatic experiences in each such action brought by Depp, the publisher risks losing the lawsuit and paying Depp damages. That is a parade of horrors. So too is the continued waste of precious Judicial resources, witness inconvenience, and significant time and expense to the parties.

IV. The UK Courts considered and rejected Depp's efforts to attack Heard on the collateral and immaterial issue of donations.

Depp is incorrect in arguing this issue was not fully and fairly aired in the UK.¹¹ He was simply unhappy that the Courts of Appeal found this "donation" issue to be, at best, a minor collateral attack of no significance to whether he abused Heard. Although Depp has never asserted in this litigation that Heard's allegations of abuse were motivated by money, *see generally* Complaint, Depp admitted he did not pay any money because of her allegations of abuse, **Att. 4**. Heard received much less money in the divorce settlement than she was entitled under California law, **Att. 5**, Depp's business manager admitted Heard pledged the amounts with no set payment schedule, **Att. 6**, and Heard intends to complete those pledges, once she is free of this litigation and able to pay, **Att. 7**. In the words of the UK Court of Appeals, this "peripheral" (**JN Att. C, ¶ 44**) grievance by Depp lingers as the only argument Depp has left in his quiver in his bid to prolong this litigation.

CONCLUSION

For the reasons set forth in her initial Memorandum in Support and this Reply, Defendant Laura Amber Heard respectfully requests this Court to grant the Supplemental Plea in Bar and dismiss the Complaint.

¹¹ Depp apparently misread ¶40, asserting the UK Courts of Appeal found Heard's statement about the donation "misleading." Opp'n 7-8. The court instead found that whether donation and pledge were understood to be interchangeable was not something the court needed to reach: "[W]e need not decide whether that is in fact a fair reading of what Ms. Heard says." **JN Att. C, ¶ 40**. The court further noted, in ¶ 42, that the issue of donations "had only come up, fairly peripherally, in the context of the hoax/insurance thesis." *Id.* ¶ 44. The court further noted the insignificance of the donations to the abuse: "[Nicol, J.] does not refer to her charitable donation at all in the context of his central findings: on the contrary, he only mentions it in a very particular context, as explained above, and after he had already reached conclusions in relation to the fourteen incidents." *Id.* ¶ 49. The court also pointed out that Depp's legal team made a decision not to examine Heard on the donations, including what she meant by donated, and whether she understood this to mean pledge, which may have resolved the issue completely. *Id.* ¶ 42.

Dated this 7th day of July, 2021

Respectfully submitted,

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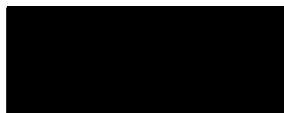
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CERTIFICATE OF SERVICE

I certify that on this 7th day of July 2021, a copy of the foregoing was served upon counsel for Plaintiff by email, as agreed upon by the parties, addressed as follows:

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