ORAL ARGUMENT REQUESTED

CASE NO. 19-7146

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAURA LUHN

Plaintiff-Appellant,
v.

SUZANNE SCOTT, et al

Defendants-Appellees.

APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

The District Court made fundamental errors in its Opinion, App. ___, that must be corrected on appeal. It has incorrectly usurped the role of the jury in misapplying the plausibility standard under *Iqbal* in order to strain to find a way to dismiss Ms. Luhn's claims. This upsets the fundamental tenets of the judiciary, in which trial by jury is a necessary component to ensure that due process and other rights are protected.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DISMISSING MS. LUHN'S DEFAMATION CLAIMS

Under District of Columbia law, a valid defamation claim must plead only four elements:

> [T]he defendant made a false and defamatory statement concerning the plaintiff"; (2) the defendant published the statement without privilege to a third party; (3) the defendant's fault in publishing the statement amounted to at least negligence; and (4) either the statement was actionable as a matter of law irrespective of special harm, or its publication caused the plaintiff special harm.

Devincci Salah Hourani v. Mirtchev, 796 F.3d 1, 16 (D.C Cir 2015) (internal quotations omitted). In their brief, Appellees mimic the erroneous findings of the District Court – that (1) the statements were not of and concerning Ms. Luhn, and (2) the statements were not defamatory.

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A. The Statements Were Of and Concerning Ms. Luhn

First and foremost, it is indisputable that Ms. Luhn did not need to have been explicitly named in the defamatory publications in order for it to be actionable.

> It is well-settled that "it is unnecessary for an article to name a person in order for it to be "of and concerning" that person. If it can be shown either that the implication of the article was that the plaintiff was the person meant or that he or she was understood to be the person spoken about in light of the existence of extrinsic facts not stated in the article, then it is "of and concerning" the plaintiff as though the plaintiff was specifically named.

SACK ON DEFAMATION § 2:9:1. *See also Jankovic v. Int'l Crisis Grp.,* 494 F.3d 1080, 1088-89 (D.C. Cir. 2007). Furthermore, as set forth in *Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713, 737 (1985), a defamation plaintiff "need not show that he was mentioned by name in the publication. Instead, the plaintiff satisfies the 'of or concerning' test if he shows that the publication was intended to refer to him and would be so understood by persons reading it who knew him." This is irrefutable, and is conceded by Appellees in their brief.

Here, Ms. Luhn more than satisfies this burden, and Appellees' arguments to the contrary fail. Appellees assert that Scott's statements were not "of and concerning" Appellant because they were, instead, "of and concerning" Scott. This is simply bizarre circular reasoning. Scott "cleverly" couched her statements as being from her perspective or mental state, while at the same time spewing false

facts about Appellant. However, it is abundantly clear that her statements directly implicated Appellant.

The Amended Complaint pleads that it was widely known that Ms. Luhn had, at a minimum, alleged that she was the victim of a decades long pattern and practice of severe sexual, emotional and physical abuse by Ailes. Ms. Luhn had previously filed two lawsuits detailing the decades-long abuse that she endured at the hands of Ailes, and which was covered up by Scott. *See Luhn v. Showtime Inc*., et al, 1:19-cv-618 (D. Del.); *Luhn v. Showtime Inc*., et al, 19SMCV00110 (Los Angeles Sup. Ct.)." App. _____. Both of these suits were widely publicized[1] and they were also sent to the Appellees by email. App. ____. In this regard, the Amended Complaint further correctly alleges that these allegations were widely publicized and that "[p]ress releases announcing these cases were sent to Scott and FNC…" *Id*

It was so widely known that Appellant was the primary victim of Ailes' nefarious conduct, and that Scott had played an instrumental role in covering it up, that Showtime documented it in its seven-part miniseries, *The Loudest Voice*, which was aired in 2019. This mini-series has been widely viewed by tens of

[1] Paul Bond, **Fo***rmer Fox News Staffer Sues Showtime Over Her Portrayal In Roger Ailes Series*, The Hollywood Reporter, Jan. 9, 2019, available at: https://www.hollywoodreporter.com/news/laura-luhn-sues-showtime-her-portrayal-roger-ailes-series-1174788

millions of viewers and is still available on Showtime. In at least five of the seven episodes, Ms. Luhn has been prominently featured and cast as the primary female sexual, emotional and physical abuse victim of Ailes, as portrayed by A-List Actress Annabelle Wallis. Thus, Ms. Luhn's role as a prominent victim of Ailes is obviously widely known, so much so that her character, other than Ailes himself, is the main one in five of the seven episodes. Indeed, one episode of *The Loudest Voice* went so far as to expressly show Scott covering up for Ailes after he had committed an act of sexual abuse and terrorism towards Ms. Luhn.

One episode explicitly and accurately depicted Scott covering up Ailes' sexual abuse and terrorism of Appellant. For example, relevant excerpts of these episodes which aired widely, accurately depict Scott's involvement covering up Ailes' crimes show her accurately being forced to perform a sexual act, with Ailes pushing her head into his private part. In so doing, Appellant pleads with Ailes, "I can't do this anymore." After Appellant is seen throwing up, then Scott is then shown walking into the room with Bill Shine, where they meet with Ailes to try to discuss and conspire about how to cover up Ailes' sexual abuse of Appellant, including discussing forcing Appellant into rehab. Another excerpt shows Scott trying to prevent Appellant from taking a vacation, for fear that she would not be under her and Ailes' control to keep her mouth shut about what she had been forced to endure. App. ____. The Court should respectfully view relevant excerpts

of the mini-series, which identifies Defendants, which has been uploaded at the following Google Drive link:https://drive.google.com/file/d/1J0J1kAkut_4nNNuSfwJQkA_7qtIQ3bym/view?usp=sharing.

These clips, which are part of the appellate record, accurately depict the fact that Scott was an enabler who covered up Ailes' conduct for over a decade, as alleged in Appellant's sworn, verified original Complaint.

Furthermore, this begs the question as to why Showtime was willing to expressly depict Ailes' sexual, emotional and physical abuse of Appellant and Scott's role as a "cover-up artist" without fear of being hit with a defamation lawsuit from Appellees. The only possible explanation is that there is no gray area, and no room for debate, around the fact that Appellant was Ailes' primary victim, and Scott was a key enabler who covered up Ailes' disgusting actions, including using her own credit card to procure hotel rooms at the Warwick Hotel in 2007 to effectively imprison Appellant for Ailes so he could work his sexual extortion and abuse on her.

It was not as if Scott was a casual observer, or a low level employee at Fox News, who may or may not have been privy to Ailes' actions. To the contrary, it is widely known and undisputed that Scott was essentially Ailes' "right hand" woman, who intricately knew the gory details of Ailes' conduct. Thus, for her to

then come out and say that she had no knowledge of any sexual, emotional and physical abuse by Ailes, can only be interpreted as accusing Appellant, as well as Ailes' other victims, of lying and making up claims. This is in stark contrast to if, hypothetically, a low-level Fox News employee had made the same statement, which may have been believable. Put simply, given Scott's role at Fox News, there is no other way to interpret her statements than being "of and concerning" Appellant.

Appellant even submitted uncontroverted sworn affidavits from Jason Goodman and Judah Freidman, both Hollywood and media professionals, that stated that they understood Scott's comments to be "of and concerning" Appellant, and that they understood them to be defamatory. App. ____. These affidavits swore under oath:

> I have read the article by Stephen Battaglio titled "Fox News Chief Executive Suzanne Scott keeps her focus on winning" of April 3, 2019 (Exhibit 1) in the Los Angeles Times and I understood the references to sexually abused and harassed women at Fox News to refer principally to Laura Luhn. I have also read the statement by Suzanne Scott in this article concerning her lack of knowledge of Roger Ailes' sexual abuse and harassment of Ms. Luhn (and other women) to defame Ms. Luhn, since it is general public knowledge and Ms. Luhn has also made it known publicly that she was sexually abused and harassed by Roger Ailes and that Suzanne Scott, one of Roger Ailes' top assistants, knew about it and covered it up. I took this to impugn the integrity and to defame Ms. Luhn, who has reportedly tried to commit suicide and suffers from PTSD as a result of Ailes' sexual abuse and harassment, as well as the cover-up of this sexual abuse and harassment. App. ____.

Altogether, it is clear that Appellant more than sufficiently pled that Scott's statements were "of and concerning her." The District Court's ruling was therefore in error.

Lastly, Appellees reliance on a nearly century old case, Serv. *Parking Corp. v. Wash. Times Co.*, 92 F.2d 502 (D.C. Cir. 1937) is misplaced. In *Serv. Parking*, an article was published accusing a group of ten to twelve parking lot operators operating twenty to thirty lots of obtaining money under false pretenses. *Id*. at 503. One of the operators sued, and the Court found that "the article could not reasonably be said to concern more than downtown parking lots and their owners as a class. There is no language referring "to some ascertained or ascertainable person." *Id.* at 506. However, the Court did not hold that an article referencing a group of persons could not be defamatory as to one of the members of the class. Indeed, *Serv. Parking* was decided the way it was because "Nor is the downtown class so small, as shown by the appellant's evidence, as to cause defamation of it to defame the appellant." *Id*. Thus, the relevant inquiry is class size. Here, unlike in *Serv. Parking*, the "class" is much smaller. There were only a small handful of women that publicly accused Ailes of sexual misconduct. And, perhaps most importantly, Appellant has already been publicly identified as the most prominent member of the "class" as evidenced by *The Loudest Voice*. Thus, *Serv. Parking* is inapplicable to the facts here.

B. The Statements Were Defamatory

Given that these statements were "of and concerning" Ms. Luhn, it is equally clear that they are defamatory. Falsely accusing an individual of lying is defamatory. The U.S. Court of Appeals for the District of Columbia Circuit has held, "The bald statement '[Plaintiff] is a liar,' for example, would plainly fall within the class of factual defamatory statements." *Moldea v. New York Times Co.*, 15 F.3d 1137, 1144 (D.C. Cir. 1994); *see also Zervos v. Trump*, Case No. 150522/2017 (Sup. Ct. NY).

The District of Columbia has allowed cases to proceed where the plaintiff was falsely deemed or implied to be a liar by the defendant to survive dismissal. *See Houlahan v. World Wide Ass'n of Specialty Programs & Sch*., 2006 U.S. Dist. LEXIS 17093):

> "Turning to the language of Landre's e-mail to Beck, the court finds that Houlahan has properly pled an actionable statement. Based upon a plain language reading of the challenged statements, "honesty is not one of his characteristics to say the least" and "like the Enquirer, Mr. Hallinan's (sp) [sic] approach will sell press today but with disregard for truth and honesty in obtaining his pay check," First Am. Compl. P56, Landre's intended message is clear: that Houlahan is a liar. Landre's comments are analogous to the "John Jones is a liar" illustration used by the *Milkovich* court, and therefore require the same conclusion -- the statement implies a factual underpinning. *Id*. at 9

Furthermore, in *Zervos,* the court entertained a case involving allegations of sexual misconduct against President Trump by a former contestant on the

"Apprentice" that started President Trump. The *Zervos* court specifically addressed the exact same issue that is present here, where Ms. Zervos accused President Trump of committing sexual misconduct and President Trump denied having done so. The *Zervos* court found the Ms. Zervos's claims should not be dismissed. In doing so, it reasoned:

> The use of the term liar could be perceived in some cases as no more than rhetorical hyperbole that is a nonactionable personal opinion (see Davis, 24 NY3d at 271, citing *Independent Living Aids, Inc. v Maxi-Aids, Inc.*, 981 F Supp 124, 128 [ED NY 1997]). However, that is not the case here, where, again, defendant used the term in connection with his specific denial of factual allegations against him, which was necessarily a statement by him of his knowledge of the purported facts.

The *Zervos* court also analyzed another case, which fact also align squarely with this instant case:

> In *Davis v Boeheim*, the Court of Appeals determined that a defamation action could be maintained against a defendant who called individuals claiming to have been victims of sexual abuse liars and stated that he believed that they were motivated by money to go public (*Davis*, 24 NY3d 262, 998 NYS2d 131, 22 NE3d 999 [reinstating defamation action against someone who *may* have known undisclosed facts about alleged sexual abuse]). The Court concluded that the statements were susceptible to a defamatory connotation because they communicated that defendant had information unknown to others that justified his statements that the individuals were neither credible nor victims of abuse (*id.* at 272). Defendant in *Davis* "appeared well placed to have information about the charges" and the context of the statements suggested that he "spoke with authority, and that his statements were based on facts" *Zervos v. Trump*, 2018 NY Slip Op 28082, ¶ 4, 59 Misc. 3d 790, 798, 74 N.Y.S.3d 442, 448 (Sup. Ct.)

Thus, it is clear that the act of falsely calling or imputing to another individual as a "liar" is defamatory.

Scott's primary, but non-meritorious, argument here is that she did not expressly accuse Appellant of fabricating allegations of sexual abuse against Ailes and of a cover-up on Scott's part . However, given the context of Scott's statements, it is clear that that her cleverly crafted statements allowed for only one logical conclusion – that Appellant was lying and making everything up.

As set forth above, it was widely known and publicized that Scott was one of Ailes' chief enablers who covered up his deviant sexual misconduct. This was, again, expressly portrayed in *The Loudest Voice*, which was seen by millions of people. Thus, for an individual in Scott's position to come out and say that she did not witness any of Ailes' sexual misconduct, the only logical conclusion to the listener would be that Appellant made up claims against Ailes and Scott. This is much different than a low-level, rank and file Fox News employee saying the same thing, which very well may not be defamatory. Put simply, where it is indisputable that Scott had personal knowledge of Ailes' sexual misconduct, it simply cannot be enough for Scott to falsely couch her statements as opinion as a way of escaping legal liability.

Appellees cite *Smith v. Clinton*, 886 F.3d 122 (D.C. Cir. 2018) in support of their position. However, first and foremost, it is important to note that *Smith*

involved a defamation claim against Hillary Clinton – then Secretary of State and, importantly a public figure, while Appellant Luhn is not. Whether intentional or not, the evidence shows that courts will often bend over backwards to protect the "political elite," and Mrs. Clinton in particular has gotten a "free pass" for decades. Ms. Luhn is not a prominent politician and public figure like Mrs. Clinton, but simply a woman who was severely sexually, physically and mentally tortured and abused at the hands of Roger Ailes and his enabling henchmen like Scott. Furthermore, the *Smith* opinion gave extremely short shift to its defamation analysis and dealt mostly with claims by Mrs. Clinton that as secretary of state she was immune from suit for wrongful death at Benghazi. Thus, a mere 385 words in total was devoted to the defamation claim. *Smith* thus cannot logically be read as applicable to this case.

The facts of *Smith* are also distinguishable. Whereas the key analysis in *Smith* was centered around the finding that Clinton "did not state or imply that [Plaintiffs] were lying," the same simply cannot be said here. Here, where it was so widely known that Scott had covered up and enabled Ailes' sexual, emotional and physical abuse of Appellant that it was explicitly depicted on television in *The Loudest Voice*, Scott's statements can only be taken as, at a minimum, showing or implying that Appellant was lying. Whereas this element was not present in *Smith*,

according to the Court, it is undeniably present here. Thus, *Smith* is an anomalous outlier and does not control.

Finally, Appellees assert that, at worst, Scott's statements create the impression that Appellant was "mistaken," and not that she had fabricated allegations. This is nonsensical. How could Appellant be "mistaken" about what happened to her personally for years and years? This is not a situation where Appellant is relaying third-party information. This was a nightmare that she was forced to personally endure. There is no possible "mistake." And her original complaint against Appellees was verified and thus sworn to under oath. The same cannot be said for Fox News' and Scott's phony denials, which everyone knows to be false – so much so that Showtime featured Appellant Ms. Luhn and Appellee Scott in its first five episodes of "*The Loudest Voice*," again without any complaint by Fox News or Scott.

II. MS. LUHN HAS PROPERLY PLED A CLAIM FOR FALSE LIGHT

"A false light claim . . . requires a showing of: (1) publicity; (2) about a false statement, representation or imputation; (3) understood to be of and concerning the plaintiff; and (4) which places the plaintiff in a false light that would be offensive to a reasonable person." *Doe v. Bernabei & Wachtel, PLLC*, 116 A.3d 1262, 1267 (D.C. 2015) (internal quotation omitted). As set forth in Appellant's initial brief, Appellant's allegations squarely satisfy these elements. The torts of defamation

and false light are "often analyzed in the same manner, at least where the plaintiff rests both his defamation and false light claims on the same allegations." *Zimmerman v. Al Jazeera Am., LLC*, 246 F. Supp. 3d 257, 273 (D.D.C. 2017). "Nevertheless, they are two different claims, as the D.C. Circuit has recognized." *Id.*

Appellees make no additional substantive argument, simply adopting the arguments set forth regarding defamation, which has a higher factual and legal threshold. Key to false light is that a defendant only merely "impute" a false or misleading statement that would be offensive to a reasonable person. Without any doubt, falsely claiming that Scott knew nothing about the gross sexual, emotional and physical abuse of Ms. Luhn, which she enabled and drove her to the point of attempted suicide on at least two occasions, and which destroyed her psychologically as she still suffers from chronic PTSD and still contemplates taking her own life over the public shaming and humiliation, is much more than simply offensive to a reasonable person. It is despicable, disgusting and heinous, particularly since Scott was obviously made CEO of Fox News after Ailes was forced to step down in disgrace, as cover for this unethical and lawless network. Its owners, the Murdoch family, needed to hire Ailes' enabler to try to keep Ms. Luhn and all of the other female victims' bodies buried – a mission which fortunately failed when Gretchen Carlson came forward to pry the lid off of the can and "spill

the proverbial beans." Who better than a heartless woman CEO to implement a cover-up of crimes against women that she herself enabled and participated in, despite her patently false self-serving phony denials on the eve of the airing of the Showtime series "Loudest Voice?" Put simply, Fox News' CEO Scott is a liar and Ms. Luhn is telling the established truth in her verified original complaint.

As set forth in Appellant's original brief, In *Benz v. Wash. Newspaper Publ'g Co., LLC*, 2006 U.S. Dist. LEXIS 71827 (D.D.C. Sept. 29, 2006), a producer from CNN claimed that defendant Washington Enquirer had stated that she had been "linked romantically with power players" and that she had "hooked up" with a "porn king." I*d.* at n. 5. The court found that plaintiff could proceed on her claim for false light because, inter alia, the published statements would be highly offensive to a reasonable person. *Id.* at 20. "Those articles, which implied that plaintiff, a professional, single woman in her 30s, used her job in the media to obtain romantic and sexual relationships with 'power players' for personal gain . . . would be highly offensive to a reasonable person." *Id.*

Whereas the Court in *Benz* found that statements that the plaintiff "used her job in the media to obtain romantic and sexual relationships with 'power players' for personal gain" placed her in a false light, the statements concerning Appellant are even worse. They also invoke Appellant's personal life and career, although here, Appellant was forced to endure years of extreme sexual abuse and physical

and mental torture. The statements at issue here are far worse because they accuse Appellant of lying about sexual assault allegations and Scott's role in covering it up. Put another way, it goes even a step further than the *Benz* case because it involves falsely attacking the plaintiff's credibility after the fact. Thus, it the statements in *Benz* are actionable, then they must be here as well.

III. MS. LUHN HAS PROPERLY PLED A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To succeed on a claim of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress." *Armstrong v. Thompson*, 80 A.3d 177, 189 (D.C. 2013).

The Amended Complaint sets forth in detail the decades-long pattern and practice of severe psychological and sexual abuse that Plaintiff Luhn endured at the hand of Ailes, App. _____, which Scott assisted in covering up. App. ____. The District Court itself recognized that "Luhn's allegations regarding Ailes's alleged acts of sexual harassment might well rise to that level of outrageousness." App. ____. However, the Court then reasoned that Scott's public denial of Ms. Luhn's allegations did not. In context, it is clear that this finding was erroneous. Here, Ms. Luhn has finally worked up the courage to tell her story after having endured countless instances of heinous abuse. To now have her be publicly branded a "liar" and as someone who fabricates sexual assault allegations – by her

attacker's primary henchmen and perpetrators of the cover up, no less- is as bad as, if not even worse, than the abuse suffered at the hands of Ailes.

Scott's conduct, as set forth in the Amended Complaint, goes far beyond merely denying knowledge, as set forth by the context of the Amended Complaint. The District Court was wrong to minimize Scott's actions as such, and to erroneously take the case away from the jury, who as the trier of fact should determine the factual underpinnings of Ms. Luhn's defamation, false light claims, and other claims, not the District Court itself.

CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed and this case should be remanded so that it may now proceed to discovery after unnecessary delay of nearly seven months.

Dated: June 4, 2020

Respectfully Submitted,

/s/ Larry Klayman_____

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CERTIFICATE OF COMPLIANCE

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Dated: June 4, 2020 /s/ Larry Klayman_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and served through the court's ECF system to all counsel of record or parties listed below on June 4, 2020.

/s/ Larry Klayman_____