No. _____

IN THE
Supreme Court of the United States

MISCHA SHUMAN AND MARIA PIA SHUMAN,

Petitioners

v.

NEW YORK MAGAZINE, NEW YORK MEDIA, VOX MEDIA, AND KERA BOLONIK,

Respondents.

On Petition for Writ of Certiorari to the State of New York Court of Appeals

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

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APPLICATION

To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit:

Pursuant to Supreme Court Rules 13.5, 22, and 30, and 28 U.S.C. § 2101(d), Petitioners Mischa Shuman and Maria Pia Shuman respectfully request a 60-day extension of time to and including Monday, February 19, 2024 (60 days falls on the Sunday), to file a petition for a writ of certiorari to review the decision below.

1. The State of New York Court of Appeals, in the final decision of the highest state court in this matter, ruled below on September 21, 2023, 40 N.Y.3d 974 (2023) (Hon. Rowan D. Wilson, presiding) (at *infra* 1a), denying leave to appeal and any other relief.

2. Currently, a petition for certiorari is due on December 20, 2023. This application is being filed on or over ten days before the petition is due. *See* Sup. Ct. R. 13.5.

3. The jurisdiction of this Court arises under 28 U.S.C. § 1257(a).

4. This case presents the important U.S. Constitutional First Amendment issue of the parameters of the doctrine of public interest or public concern in libel cases for press covering private figures under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Connick v. Myers*, 461 U.S. 138 (1983), and subsequent rulings prominently including *Snyder v. Phelps*, 562 U.S. 443 (2011), with the resulting standard of requisite journalistic care. The Shumans intend to challenge New York's errors of misapplication and nonapplication of the U.S. Supreme Court's

First Amendment jurisprudence on these questions as a violation of their reputational rights to be free of widely published, highly damaging, defamatory falsehoods.

5. In the proceedings below, on a Motion to Dismiss, the Supreme Court of the State of New York, New York County, dismissed the Complaint, erroneously referring to U.S. Supreme Court First Amendment standards and asserting the authority of New York case law that is wrongly predicated on First Amendment jurisprudence. *See* 72 Misc.3d 1211(A), 2021 WL 3161629 (Sup. Ct. N.Y. Cnty. 2021) (R. Latin, J.) (at *infra* 6a). The challenged articles were accordingly mistakenly found "of public concern" (*id.* at *2) and "more substantially accurate than false." (*Id.* at *3). New York's uniquely difficult standard for libel plaintiffs of "gross irresponsibility" of journalistic fault was found not shown. *(Id.)*

6. On appeal to the Supreme Court of the State of New York, Appellate Division, First Department, 211 A.D.3d 558 (N.Y. App. Div. 2022) (Webber, J.P., Friedman, Gonzáles, Mendez, J.J.) (at *infra* 2a), the ruling was affirmed. The challenged articles were found "of public concern" on incorrect Constitutional grounds, *id.* at 558, applying decisions incorrectly based on U.S. Supreme Court precedent and neglecting the Court's subsequent decisions. The journalist's behavior was found not grossly irresponsible. *Id.* at 559–60. The Court of Appeals summarily affirmed. (at *infra* 1a).

7. The Shumans intend to demonstrate, as argued throughout these proceedings, that, on correct application and clarification of First Amendment law,

their libel case is entitled to proceed to trial. Sexually abused women like the Shumans need access to a fair and balanced law of libel when their reputations are defamed in the press in retaliation for seeking justice for their abuse—access New York has refused in this instance, in the mistaken guise of First Amendment authority. They deserve their day in court.

8. Mr. Kleven, who practiced law in the field of defamation and related torts for over 20 years, joined the Shumans' legal team as lead counsel for this stage in the proceedings on December 5, 2023. This extension is requested so newly-retained counsel has sufficient time to prepare and file a petition for a writ of certiorari.

9. Between the date of retention and when the time to file a petition for certiorari expires on December 20, Mr. Kleven is committed to filing briefs in two cases in the Second Appellate District of the State of California, *People v. Camper*, Case No. B325430, and *People v. Crane*, Case No. B324003, and two cases in the First Appellate District of the State of California, *People v. Westmoreland*, Case No. A166966, and *People v. Willis*, Case No. A167569.

10. Accordingly, Mr. Kleven respectfully requests that an order be entered extending the time to file a petition for certiorari to and including February 19, 2024.

Respectfully submitted,

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APPENDIX

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State of New York
Court of Appeals

Decided and Entered on the twenty-first day of September, 2023

Present, Hon. Rowan D. Wilson, *Chief Judge*, ***presiding.***

Mo. No. 2023-391
Mischa Shuman et al.,
Appellants,
v.
New York Magazine et al.,
Respondents.

Appellants having moved for leave to appeal to the Court of Appeals and for ancillary relief in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion for leave to appeal is denied; and it is further

ORDERED, that the motion for ancillary relief is dismissed upon the ground that this Court does not have jurisdiction to entertain it (*see* NY Const, art VI, § 3).

Lisa LeCours
Clerk of the Court

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Webber, J.P., Friedman, González, Mendez, JJ.

16895 & [M-4161]

MISCHA SHUMAN et al.,
Plaintiffs-Appellants,

-against-

NEW YORK MAGAZINE et al.,
Defendants-Respondents.

Index No. 155577/20
Case No. 2021-02653

Boies Schiller Flexner LLP, Armonk (David Boies of counsel), for appellants.

Davis Wright Tremaine LLP, New York (Katherine Bolger of counsel), for respondents.

Order, Supreme Court, New York County (Richard G. Latin, J.), entered on or about June 16, 2021, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

The content of the magazine articles at issue is well within the sphere of legitimate public concern, and plaintiffs did not adequately allege facts to show defendants acted in a grossly irresponsible manner in writing and publishing them (*see Huggins v Moore*, 94 NY2d 296, 302-304 [1999]; *Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 198-199 [1975]). Where, as here, a publication encompasses matters of public concern and related private behavior, it is not for courts to determine the balance to be stricken; instead, "[t]his is precisely the sort of line-drawing that . . . is best left to the judgment of journalists and editors" (*Weiner v Doubleday & Co.*, 74 NY2d 586, 595 [1989], *cert denied* 495 US 930 [1990]). Plaintiffs' efforts to show defendants abused their editorial discretion in this regard are unavailing. To the extent

the articles discuss their sexual relationships and other private conduct, they do so in connection with the matters of significant public concern: their apparent involvement in wrongful activity within and around the Harvard University community. The articles zero in on plaintiffs' ostensible paternity extortion scheme involving nonparty Professor Bruce Hay, and related extortion or attempted extortion of other men, including via accusations of rape, assault and, in Hay's case, sexual harassment. They address plaintiffs' engagement in other wrongful behavior, such as their apparent scheme to defraud Hay out of his home, and the Title IX process at Harvard. Those matters warrant public exposition (*see Huggins,* 94 NY2d at 302, 303), and contrary to plaintiffs' contention, the court properly made this determination at the pleading stage (*see e.g. Hayt v Newsday LLC*, 176 AD3d 787 [2d Dept 2019]; *Ramos v Madison Square Garden Corp.*, 257 AD2d 492 [1st Dept 1999]; *Cassini v Advance Publications, Inc.*, 41 Misc 3d 1202[A], 2013 NY Slip Op 51553[U] [Sup Ct, NY County 2013], *affd* 125 AD3d 467 [1st Dept 2015], *lv denied* 26 NY3d 902 [2015]).

Plaintiffs' blanket denials of having been involved in any paternity extortion scheme, their insistence that plaintiff Mischa Shuman's Title IX action against Hay was brought in good faith, and their rendition of the supposedly legitimate way they came to live in Hay's home do not bear on the analysis of whether these are matters of public concern. Plaintiffs' denials instead go to the question of whether defendants were grossly irresponsible in having produced articles in which wrongful acts such as extortion and fraud are attributed to plaintiffs, a question the motion court properly resolved against them. The gross irresponsibility standard "demands no more than that a publisher utilize methods of verification that are reasonably calculated to produce accurate copy" (*Hayt v Newsday, LLC*, 176 AD3d 787, 788 [2d Dept 2019]) and does not

require "exhaustive research nor painstaking judgments" (*DeLuca v New York News*, 109 Misc 2d 341, 350 [Sup Ct, NY County 1981] [internal quotation marks omitted]). A publisher's "obligation is to base its story on a reliable source" (*Mitchell v Herald Co*, 137 AD2d 213, 217 [4th Dept 1988], *appeal dismissed* 72 NY2d 952 [1988]).

Plaintiffs' arguments as to defendants' gross irresponsibility are largely based on conclusory assertions as to what defendants knew or should have known pre-publication. For example, they aver that they "provided documentary evidence that challenged the accuracy of Hay's story and the documents Hay claimed supported him," but neither their briefs nor the pages they cite to in the record indicate what "documentary evidence" they provided. Nor do they adequately show, beyond conclusory denials, what other "information" they furnished defendants that unambiguously showed the falsity of the statements (*see e.g. Edwards v Natl. Audubon Socy., Inc.*, 556 F2d 113, 121 [2d Cir 1977], *cert denied* 434 US 1002 [1977]). Moreover, defendants' decision to credit sources other than plaintiffs' blanket denials is no indication of gross irresponsibility, but instead a provident exercise of defendants' editorial discretion (*see Alcor Life Extension Found. v Johnson*, 43 Misc 3d 1225[A], 2014 NY Slip Op 50784[U], *11 [Sup Ct, NY County 2014], *affd* 136 AD3d 464 [1st Dept 2016] ["The decision to choose one source over another is an editorial judgment in which the courts and juries have no proper function"]).

Plaintiffs' gross irresponsibility arguments are further weakened by evidence in the record showing that they declined defendants' request to interview them for the article, that the first article reported that they "denied most of Hay's account," and that defendants' fact-checker sought their input on statements to be included in the then-forthcoming first article (*e.g. Prince v Fox Television Stations, Inc.*, 137 AD3d 486, 488

[1st Dept 2016]). Moreover, the first article was more nuanced than plaintiffs suggest in that, while it does depict their involvement in wrongful conduct, it also mentions that when "Hay reached out to local law enforcement," they "told him it would be difficult to prove [plaintiffs] had committed a crime."

The parties do not dispute that Hay was the primary source of the first article, and plaintiffs' other arguments as to defendants' gross irresponsibility, which rest on Hay's supposed unreliability as a source, are also unavailing. Plaintiffs' gross irresponsibility arguments also do not account for the fact that, as the articles show, defendants relied on sources in addition to Hay.

We have considered plaintiffs' remaining arguments and find them unavailing.

M-4161 – Mischa Shuman and Maria-Pia Shuman v New York Magazine et al.

Motion to strike portions of defendants' brief, denied.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: December 15, 2022

Susanna Molina Rojas
Clerk of the Court

72 Misc.3d 1211(A)
Unreported Disposition
(The decision is referenced in the New York Supplement.)
This opinion is uncorrected and will not be
published in the printed Official Reports.
Supreme Court, New York County, New York.

Mischa SHUMAN, Maria-Pia Shuman, Plaintiff,

v.

NEW YORK MAGAZINE, New York Media, Vox Media, Kera Bolonik, Defendant.

Index No. 155577/2020
|
Decided on June 15, 2021

Attorneys and Law Firms

Plaintiff: David Boies, Boies Schiller Flexner LLP

Defendants: Katherine Mary Bolger, Davis Wright Tremaine LLP

Opinion

Richard G. Latin, J.

***1** The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 39, 51, 54 were read on this motion to/for *DISMISS.*

Upon the foregoing documents, it is ordered that defendants New York Magazine, New York Media, LLC, Vox Media, LLC, and Kera Bolonik's motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) is determined as follows:

Plaintiffs commenced the instant action alleging they were libeled in two separate articles published by defendants entitled *The Most Gullible Man in Cambridge A Harvard Law Professor Who Teaches a Class on Judgment Wouldn't Seem Like an Obvious Mark, Would He?* and *The Harvard Professor Scam Gets Even Weirder Six Other Men Describe Their Encounters with the Same Mysterious Frenchwoman.* At its most simplistic, the first article pertained to the complicated relationship between the plaintiffs and Harvard professor Bruce Hay ("professor Hay"), but also concerns allegations of rape, paternity extortion, and abuse of process relating to the Title IX process and other judicial proceedings. The second article was a follow up that tells the accounts of six men who reached out to the article's author to recount their allegedly similar encounters with the plaintiffs. Both articles were written by defendant Bolonik. While plaintiffs generally characterize the two articles as completely false and the result of poor investigative reporting, they specifically argue that plaintiffs were defamed through a paternity extortion scheme libel, a "house-napping" libel, a weaponized Title IX sexual harassment investigation at Harvard libel, and by describing their actions as belonging to a "punitive game."

With this motion, defendants now seek to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(1) and (a)(7) arguing that the defendants did not act with gross irresponsibility, the Title IX Report concludes after a thorough investigation that the allegedly false claims are substantially true, and that the "Poe" statements (essentially that a Harvard medical school student, "Poe," was extorted out of $11,000 as a result of plaintiffs' paternity scheme) are absolutely privileged pursuant to New York Civil Rights Law § 74. In opposition, plaintiffs argue that neither New York substantive law nor a gross irresponsibility standard apply, that the articles published were not matters of public concern as they pertained to mere gossip and prurient interest, and that the numerous exhibits they attached to their pleadings should not be analyzed as part of the pleadings for CPLR 3211 purposes.

As for the choice of substantive law, plaintiffs argue that the determination is not important since, in any event, the allegations in the complaint satisfy the criteria of all jurisdictions. Nevertheless, plaintiffs argue that they were residents of Massachusetts at the time of the controversy and under Massachusetts law, plaintiff must only allege publisher negligence, not gross irresponsibility. Similarly, plaintiffs also argue that they are citizens of France and under French law the defendants would bear the burden of rebutting the presumption of their bad faith or negligence. However, inasmuch as New York is a principal place of business for all the publishing defendants, defendant Bolonik resides in New York, the plaintiffs decided to commence this action in New York, and because New York offers greater protection to the media than other jurisdictions, New York has the superior interest in this case and its substantive law shall apply (*see Kinsey v New York Times Company*, 2020 WL 1435141 [SD NY, March 23, 2020, 18-CV-12345 (VSB)]).

***2** On a motion to dismiss pursuant to CPLR 3211(a)(7), the facts alleged in the complaint must be accepted as

true, the plaintiffs are accorded the benefit of every possible favorable inference, and the Court's function is to determine only whether the facts alleged fit within any cognizable legal theory (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). In making this assessment on the sufficiency of the plaintiffs' claims, the Court may consider both the facts alleged in the complaint as well as the documents attached to it as exhibits, which may be incorporated by reference (*see Deer Consumer Products, Inc. v Little*, 32 Misc 3d 1243[A][Sup Ct, New York County 2011]; *Lore v New York Racing Assn. Inc.*, 12 Misc 3d 1159[A][Sup Ct, Nassau County 2006]; *see generally Armstrong v Simon & Schuster*, 85 NY2d 373 [1995]).

Generally, defamation arises from "the making of a false statement which tends to 'expose the plaintiff[s] to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [plaintiffs] in the minds of right-thinking persons, and to deprive [plaintiffs] of their friendly intercourse in society' " (*Dillon v City of New York,* 261 AD2d 34, 37-38 [1st Dept 1999], quoting *Foster v Churchill*, 87 NY2d 744, 751[1996][citations omitted]; *O'Neill v New York Univ.*, 97 AD3d 199 [1st Dept 2012]). Where the defamation takes the form of libel and is brought by a nonpublic figure against a news publisher, the Court must determine whether " 'the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition' " (*Gaeta v New York News, Inc.*, 62 NY2d 340 [1984], quoting *Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196 [1975]). If the content of the article warrants public exposition, the defamed party may only recover damages upon a showing of the gross irresponsibility of the publishing defendants (*id.*).

There is no mechanical test to identify which subjects involve matters of genuine public concern (*id.*). When an article's subject is merely gossip or only concerns prurient interests, it is not a matter of public concern (*see generally Weiner v Doubleday & Co.*, 74 NY2d 586 [1989]; *Lewis v Newsday, Inc.*, 246 AD2d 434 [1st Dept 1998]). However, because there is a fine line between what is solely gossip and prurient and what may be a matter of public interest, courts generally defer to the judgment of editorial boards, absent clear abuse (*see Weiner*, 74 NY2d at 595; *Gaeta*, 62 NY2d at 349). Nonetheless, just because something is published by a news source does not automatically mean that the subject matter warrants public exposition (*see Huggins v Moore*, 94 NY2d 296 [1999]).

Courts have found that there is no abuse of editorial discretion where the article can be " 'fairly considered as relating to any matter of political, social, or other concern of the community' " (*id.*, quoting *Connick v Myers*, 461 US 138 [1983]). Moreover, matters may be considered to be of the public concern so long as some theme of legitimate public concern can be derived from a " 'human interest' portrayal of events in the lives of persons who are not themselves public figures" (*see Huggins*, 94 NY2d 296; *Gaeta,* 62 NY2d at 340).

Here, the core of the articles reasonably relates to deceptive and/or criminal activity in the community, which is of greater public significance than plaintiffs' private sexual encounters (*see Hayt v Newsday, LLC*, 176 AD3d 787 [2d Dept 2019]; *Robart v Post-Standard*, 52 NY2d 843 [1981]). Likewise, the intent imputed on plaintiffs, prevalent in both articles, involves underlying themes of evolving gender power dynamics in sexual relationships, which is an important modern social issue. Similarly, accounts of sexual harassment, rape, and/or the potential abuse of the Title IX process at well-known academic institutions are matters of social concern to the public (*see Doe v Daily News, L.P.*, 167 Misc 2d 1 [Sup Ct, New York County 1995]). Furthermore, Justice Billings already ruled in her order dated December 10, 2020, when she decided not to seal documents in this case, that this matter was one of substantial public interest (*see generally Baldasano v Bank of New York*, 199 AD2d 184 [1993]). Therefore, there is no clear abuse of discretion, and this Court will not second guess the judgment of the media as to what constitutes a matter of public concern (*see Ortiz v Valdescastilla*, 102 AD2d 513 [1st Dept 1984]; *Gaeta*, 62 NY2d at 349).

***3** The next relevant inquiry is whether the defendants acted with gross irresponsibility. Dismissal of a complaint is appropriate where defendants did not act with gross irresponsibility (*see Crucey v Jackall*, 275 AD2d 258 [1st Dept 2020][author not grossly irresponsible where statements' genesis found in official investigative report]). A publisher acts in a grossly irresponsible manner when it fails to exercise due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties (*see Chapadeau*, 38 NY2d 196 at 199). "Absent specific proof that such reliance was substantially improper, the mere fact that the published information might later be proven false is insufficient to justify a trial" (*Ortiz*, 102 AD2d 513; *Robart*, 52 NY2d 843). Furthermore, an emotionally distraught or embittered person

is not a presumptively unreliable source, as a victim to an incident is still more reliable than a trustworthy source whose information is based on hearsay (*id.*).

Here, the pleadings and the exhibits to the pleadings make clear that professor Hay was the principal source of information to Bolonik for the potentially libelous statements. He answered her questions, provided her with his account, and provided evidence in many forms including, among other things, text messages, court documents from various litigations, and Title IX documents. Given his personal experiences with plaintiffs, his position as a professor of judgment, and the corroborating evidence provided, defendants had no reason to doubt the veracity of the information provided (*see Gaeta v New York News, Inc.*, 62 NY2d 340; *Ortiz*, 102 AD2d 513). Moreover, though professor Hay's perspective may have subsequently evolved after publication, the pleading exhibits demonstrate that he believed that he was telling Bolonik the truth at the time the article was written (*see Farrakhan v N.Y.P. Holdings*, 168 Misc 2d 536 [Sup Ct, New York County 1995]). In addition to professor Hay, the pleading exhibits also demonstrate that the defendants consulted with at least seven other individuals, many with first-hand knowledge. Furthermore, the pleading exhibits show that Bolonik sought to interview plaintiffs and had an off-record phone call with plaintiff Mischa Schuman, and defendants' fact checker reached out to plaintiffs to provide their perspective prior to publication of the first article. To that end, plaintiffs' denials were included in the first article. Defendants decision to credit the sources they did and omit or downplay the information provided by plaintiffs or other sources is a "matter of editorial judgment in which the courts, and juries, have no proper function" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369 [1977]; *Alcor Life Extension Foundation v Johnson*, 43 Misc 3d 1225[A][Sup Ct, New York County 2014]). Thus, defendants were not grossly irresponsible in their reporting.

Inasmuch as defendants have demonstrated that the subject of the articles was of public concern and that they did not act with gross irresponsibility, plaintiffs' complaint cannot survive as a matter of law. Thus, the Court's inquiry needs not go any further. However, it is also worth noting that the Title IX report, that was based on over 2,000 attorney hours and over six months of investigation in preparing and conduction interviews of the plaintiffs, professor Hay, and others, and reviewing documents provided by the aforementioned (including emails and text messages), as well as documents from court filings and other public records, serves to demonstrate that what plaintiffs claim as libel was, by a preponderance of the evidence, more substantially accurate than false. Also, the court transcript concerning "Poe", another alleged victim, demonstrates that plaintiff Maria-Pia Shuman did state that she told "Poe" through an intermediary that he was the father of her child, and that "Poe" did state that she called him and said that he did not need to take a paternity test, but he had to give his time and/or money, for which he paid over $11,000.

***4** Accordingly, defendants' motion pursuant to CPLR 3211 is granted and plaintiffs' complaint is dismissed.

This constitutes the decision and order of this Court.

All Citations

Slip Copy, 72 Misc.3d 1211(A), 149 N.Y.S.3d 874 (Table), 2021 WL 3161629, 2021 N.Y. Slip Op. 50699(U)

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