22-CV-25

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

ZURI BERRY

***Appellant*,**

v.

AMERICAN UNIVERSITY, CURRENT PUBLICATION, SASHA FERNANDEZ, SASHA-ANN SIMONS, LETESE' CLARK, ALANA WISE, KAREN EVERHART, and JULIE DRIZEN

***Appellees*.**

ON APPEAL FROM JUDGMENTS OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CASE NO. 2020 CA 004366 B; CASE NO. 2021 CA 002726 B

APPELLANT'S REPLY BRIEF

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INTRODUCTION

This is an appeal from the trial courts' dismissal of Appellant's complaints, Berry I and Berry II, under the Anti-SLAPP's Act, and the award of hundreds of thousands of dollars in attorney's fees. In Appellant's opening brief, Appellant argued that in applying this Court's analysis in *Close It! Title Servs. v. Nadel,* 248 A.3d 132 (D.C. 2021), the trial courts' erred in granting Appellees' Anti-SLAPP motion to dismiss and awarding attorneys' fees. In its brief, Appellees fail to address the *Close It! Title Servs.* decision and never even mention it. This was intentional because the trial courts' decisions are indefensible under this Court's analysis in *Close It! Title Servs.* The trial court in Berry I erred in denying Berry discovery while relying upon declarations submitted Appellees with the likely assistance of Appellees' counsel. Because Berry presented evidence that the statements made by Appellees involved provable facts and were false and therefore defamatory, the trial court in Berry I erred in dismissing the defamation and false light claims. Similarly, as this Court held in *Close It! Title Servs.*, the Appellant sufficiently pled a tortious interference with business relations claim. Because the trial courts erred in dismissing Berry I and Berry II under the anti-SLAPP motion, the trial courts also erred in awarding attorneys' fees. In addition, Appellant was not required to combine his claims that he was defamed when female employees,

two of which had serious performance issues, influenced an editorial intern to write an article in July that defamed him in July 2020; and separate claims that his employer singled him out for termination based on his race. The trial court in Berry II erred in dismissing the complaint based on res judicata and failure to state a claim under the D.C. Human Rights Act, and then awarding hundreds of thousands of dollars of attorney's fees.

ARGUMENT

I. The Trial Courts Erred in Concluding that the Defamatory Statements Were Made "In the Furtherance of the Right to Advocacy on Issues of Public Interest.

In this appeal, Appellees argue that the communications at issue were made "in furtherance of the right of advocacy on issues of public interest." Brief at 20. They assert that "[u]ndeniably, issues surrounding toxic work environments and the treatment of women in the workplace—particularly in a high-profile field like listener funded public radio in a major metro area—are related to matters of public interest. The public interest is especially acute here, where the allegations involved multiple Black women calling out Berry (a senior manager) for his management style, resulted in public action by the station, and prompted other news coverage." Brief at 20-21. Appellees argues that there was a "special public interest in the

workplace environment at WAMU" and allegations of "misogynistic misconduct by a manager at a high-profile news organization – which has already made news for its workplace issues—is outside the public interest." Brief at 23.

A review of the facts in *Close It! Title Servs.* helps understand the court's analysis. There, the prospective homeowners hired the Appellant, Federal Title, to assist with closing on the purchase of a home, and wired funds to an account they believed to be from Federal Title. It was later determined that Federal Title's computer system had been hacked and the funds wired had been intercepted. The prospective homeowners later filed a RICO suit against Federal Title and others and were represented by Appellee Nadal. Nadal was interviewed by WAMU and later made comments that Federal Title was involved in the theft of the money. Federal Title thereafter notified him and his law firm that the statements were defamation and causing it immediate and irreparable harm and should be retracted, and Nadel and his firm refused a retraction. Federal Title later sued Nadel, his firm and one of the prospective homeowners, for Nadal's statements to WAMU. Nadel moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6) and the Anti-SLAPP Act. The trial court granted the special motion to dismiss on, among other grounds, the publication concerned an issue of public interest, namely "the importance of cybercrime." 248 A.3d at 137. Further, the trial court granted

the Rule 12(b)(6) motion on the grounds that: 1) Nadel's statements were not reasonably susceptible of a defamatory meaning in the context of WAMU's article, and in any event, were protected by the fair-report and judicial proceeding privileges; 2) the false light claim necessarily failed because the defamation claim was deficient; and 3) as to the alleged tortious interference, the complaint failed to specify the business or contractual relationships allegedly damaged by Nadel's statements. 248 A.3d at 137. The trial court concluded that because of the Rule 12(b)(6) shortcomings prevented appellants form demonstrating that they were likely to succeed on the merits of their claims, and therefore dismissal was required under the Anti-SLAPP Act. 248 A.3d at 137.

On appeal, this Court concluded that Appellees failed to make a prima facie showing that Nadel's statements were "in furtherance of the right of advocacy on issues of public interest" and accordingly Appellee's special anti-SLAPP motion to dismiss should have been denied an the trial court's decision to award attorney's fees and costs must be reversed. 248 A.3d at 146. In reaching its decision, the *Close It! Title Servs.* court reviewed the elements for an anti-SLAPP motion to dismiss and reasoned:

> To support an anti-SLAPP motion to dismiss, the defendant initially must make [ ] a prima facie showing that the claim at issue - here, appellants' complaint arises from an act-here, defendant-appellee Nadel's statements in furtherance of the

right of advocacy on issues of public interest. Thus, the issue is whether Nadel's statements go to or touch on the essential substantive requirement, an issue of public interest. An [i]ssue of public interest, as defined as an issue related to health and safety, or environmental, economic, or community well being, as well as to the District government, a public figure, or a good, product, or service in the market place. Expressly excluded form this definition are private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

Once the issue is definable as a matter of "public" not "private" interest, the kind of act that qualifies to further "the right of advocacy on issues of public interest" means: (A) any written or oral statement made: (1) in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or (ii) in a place open to the public or a public forum in connection with an issue of public interest." 248 A.3d 142-43.

If the defendant has made the required prima facie showing – which is "not onerous"—the burden shifts to the . . . plaintiff, who must demonstrate that the claim is likely to succeed on the merits. If the plaintiff cannot carry this burden, the defendant's motion must be granted and the lawsuit dismissed with prejudice." 248 A.3d at 143.

Appellees here make arguments very similar to the argument rejected by the court in *Close It! Title Servs*. There, the Appellees argued that Nadel's statements addressed cybercrime, email fraud or real estate transactions. The *Close It! Title Servs.* Court reviewed the statements and rejected the argument, concluding that Nadel's statements were related primarily to a private dispute about responsibility for the loss belonging to Nadel's clients. The Court commented that Nadel's comments "focused not on the overall hacking or cybercrime theme of the article

but rather, and far more narrowly, on publicizing the alleged responsibility of Federal Title and Ewing for his clients' missing $1.57 million." 248 A.3d at143.

The *Close It! Title Servs.* Court summed up its reasoning"

"In sum, we cannot interpret Nadel's statements as relating to an issue of public interest simply because they appear in an article featuring the issue of cybercrime, which Nadel himself does not address. Neither can it be said that Federal Title and its principal, Todd Ewing, filed their claims as parties on one side of a political or public policy debate about cybercrime or any other issue of public interest, as required for an SLAPP lawsuit. Indeed, the only debate the parties were engaged in was over who was responsible for Smith's and Wrona's missing funds and by what means; Nadel expressed no opinion about cybercrime or any other public matter. Nadel's statements, rather, were directed primarily at protecting his clients' (and thus his own) commercial interests, which are not protected under the Anti-SLAPP Act."

Here, on appeal, without even mentioning the statements that were made in the article, Appellees made a similar argument—that issues surrounding toxic work environments and the treatment of women in the workplace- make the issues here one of public interest. Brief at 20-21. Appellees arguments should be rejected for the same reasons the *Close It! Title Servs.* Court rejected similar arguments.

In *Close It! Title Servs.*, the Court identified four reasons why the statements were not protected by the Anti- SLAPP Act: 1) the Court could not interpret Nadel's statements as relating to an issue of public interest simply because appeared in an article on a subject that may be of interest to the public; 2) the

Federal Title Plaintiffs did not file their lawsuit on one side of a political or public policy debate about any issue of public interest; 3) the only debate the parties engaged in was the underlying claim of who was responsible for the missing money; and 4) Nadel did not express any opinion about any public matter.

First, the facts in this case are far more egregious than in *Close It! Title Servs.* because the article relied upon "anonymous sources" and made no attempt to address a matter of public interest. A review of the facts confirms this. On July 20, 2020, Current, an editorial publication of the American University School of Communication, citing all anonymous sources, published an article titled, "WAMU Licensee Investigates Editor Blamed for Departures of Women of Color," citing all anonymous sources, which identified Mr. Berry and included a photograph of him, written by Appellee Sasha Fernandez, an Editorial Intern. JA0647, JA0037. The article, via the use of exclusively anonymous sources, identified Mr. Berry as being "the subject of multiple complaints" over eleven months. JA0647, JA0038. According to the article, "[t]hree female journalists who have left WAMU's newsroom since January 2019 told Current that their decisions were prompted by Mr. Berry's behavior toward them. They shared experiences of feeling undermined, micromanaged and mistreated, and they felt that [Mr.] Berry had received mild warnings but was allowed to continue his behavior." JA0647, JA0038. The article

continued in asserting that five women of color have left WAMU since January 2019, and that the news director, Mr. Katz, arranged a meeting with staff on July 1 to address tweets by staff who had left the station, and that Mr. Katz read a letter from an employee who wrote that Mr. Berry had "mistrusted and micromanaged women of color and did not support opportunities for their growth in the workplace;" that "Berry habitually questioned reporters 'credentials when editing stories and undermined the employees 'supervising editor, a woman of color, at every tum;" and that Mr. Berry "cultivated a culture of harassment and disrespect towards his female reporters, particularly his female reporters of color." JA0647, JA0038.

The article thereafter asserted that "[i]n an email to newsroom staff the next day, Berry apologized and addressed the complaints filed against him. He acknowledged that many but not all of the complaints had been raised with him and that he discussed them with Katz and Genevieve Croteau, American University director of human resources. Berry said he had taken 'direct action to change my approach.'" JA0648, JA0038. The article continued in stating, "Another former staffer who requested anonymity because they feared retribution for speaking out said that they had met with Katz because they had seen how Berry's behavior was pushing out women of color… 'This guy is, like, toxic, and he's going to push these

girls to quit, 'she said. 'People don't quit jobs. They quit managers.'" JA0648, JA0038.

On July 20, 2020, the publication Current, citing all anonymous sources, published an article titled, "WAMU Licensee Investigates Editor Blamed for Departures of Women of Color," citing all anonymous sources, and the article which was written by an Editorial Intern Sasha Fernandez, identified the editor of Mr. Berry and included a photograph of him. JA 0647, JA 0037-38.

The statements in the article, attributed to anonymous sources, which has destroyed Appellant's career: 1) do not involve a matter of public interest but are a direct attack on Mr. Berry, and Berry is the focus of the article; 2) Mr. Berry did not file his lawsuit on one side of a political or public policy debate about any issue of public interest; 3) the only debate the parties engaged in was the underlying claim of the accusations against Mr. Berry and his attempt to defend himself against false accusations by female employees who were documented with serious performance problems; and 4) the article did not express any opinion about any public matter.

This Court should conclude, as the Court did in *Close It! Title Servs*. that despite the "broad scope of an issue of public interest, which should be liberally interpreted under the Anti-SLAPP Act when addressing each criterion specified in

Section 16-5501(3), we must conclude that appellees have failed to make a prima facie showing that Nadel's states—nowhere embraced by any language in that subsection—were in furtherance of the right of advocacy on issues of public interest" and reverse the award of attorney's fees. 248 A3d at 146. The trial court abused their discretion in awarding attorneys' fees to Appellees under the Anti-SLAPP Act.

II. The Trial Court Erred in Denying Berry's Request for Discovery.

In its special motion to dismiss, Appellees provided multiple statements from individuals who claimed they worked with Mr. Berry and described their experiences working for him. These statements were relied upon by the court in reaching its conclusion to dismiss the complaints, but Mr. Berry was denied an opportunity to conduct limited discovery and denied an opportunity to question the witnesses or challenge the truthfulness of their assertions, even the witnesses who had well documented performance problems. Appellees acknowledge that D.C. Code Section 16-5502 (c)(2) permits limited and targeted discovery where it appears that such discovery will enable the plaintiff to defeat the motion and where discovery will not be unduly burdensome. Appellees argue that Berry did not meet this standard because the statements alleged in the complaint were not actionable as a matter of law. Brief at 24. Mr. Berry's briefing before the trial courts

demonstrated that the anonymous accusations in the Current article against him were false, and disputed and advanced by female employees who had serious performance and conduct issues. The anonymous quotes communicated that Mr. Berry has a bias against women and women of color, which was emphasized in the article's headline. Current never had any corroborating information to suggest that Mr. Berry harbored any bias against women other than the anonymous quotes. The anonymous quotes were coordinated an orchestrated by certain women to shame Mr. Berry and to get him terminated, and they succeeded in doing so. The trial court erred in denying limited discovery.

III. The Trial Court Erred in Concluding that Berry Failed to Meet His Burden of Likelihood of Success on the Merits.

Appellees spend the majority of their brief arguing that the statements were non -actionable opinions and were not materially false. The article painted Berry as a manager who discriminates against Black and minority women based on anonymous sources, and contained many statements which are false. Berry disputed the assertions in the declarations but was denied an opportunity question editorial intern on who made the statements and the declarants on the basis for the assertions they made in their declarations.

IV. Appellant Berry Sufficiently Pled a Claim of Tortious Interference with Business Relations

To state a claim of tortious interference with business relations, a plaintiff must alleged: 1) existence of a valid contractual or other business relationship; 2) [the defendant's] knowledge of the relationship; 3) intentional interference with that relationship by [the defendant]; and resulting damages. *Whitt v. Am. Prop. Constr., P.C.* 157 A.3d 196, 202 (D.C. 2017). The trial court in Berry I dismissed Berry's claim of tortious interference with business relations. Berry clearly pled in his complaint that he had a contractual relationship with his employer and lost out on employment opportunities with prospective employers; that defendants knew about his employment and business relationships; that Appellees intentionally interfered with his employment and business relationships; and that he suffered damage to his reputations, emotional distress and significant financial damage. JA 0023-0050. This Court should hold, as the Court held in *Close It! Title Serv.* with similar facts and identical legal analysis, that Appellant stated a claim of tortious interference with business relations.

V. Appellant Berry did not Inappropriately Split his Claims and they are not Barred by Res Judicata

Appellant was not required to combine his claims that he was defamed in July 2020 when female employees, two of which had serious performance issues, influenced an editorial intern to write an article in July 2020 that they knew would tarnish his reputation and render him almost unemployable with separate claims that his employer singled him out and discriminated against him by terminating his employment based on his race. First, while the complaints have some facts in common simply because of the chronological timeline, the claims are based on different facts and arise six months apart and involve different parties. Thus, the claims did not arise out of the same set of facts. Next, it was not possible to combine the claims because the special motion to dismiss in Berry I had already been briefed when Berry was terminated. Further, combining a complaint that Berry was defamed by several parties in July 2020 with claims that Berry's employer discriminated against him in terminating his employment would be unmanageable in presenting the case at trial and harmful to Berry in presenting his distinct claims. One can only imagine how a jury would respond to a Plaintiff who claimed that five or six parties defamed him in one year and in the same trial attempting to persuade a jury of his claim that his employer discriminated against

him seven months later. Finally, either the Appellees or the court on its own motion could have moved to join the cases or joined or consolidated the cases. Berry had no obligation to attempt to amend Berry I and the trial court in Berry II erred in punishing him because he selected the most rational basis to move forward and that was to file a separate a second complaint against his employer. The trial court in Berry II erred in dismissing the complaint based on res judicata and failure to state a claim under the D.C. Human Rights Act, and then awarding hundreds of thousands of dollars of attorney's fees.

CONCLUSION

For the foregoing reasons, Appellant Zuri Berry respectfully requests that the Trial Court's Orders granting Appellees' Special Motions to Dismiss and Appellees' Petitions for Attorneys' Fees and Costs be reversed, and this matter remanded to the Trial Court for further proceedings.

Date: July 24, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 24, 2023 I caused a copy of the forgoing Reply Brief to be served electronically via the Court's e-filing system on all counsel of record.

/s/ David A. Branch
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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

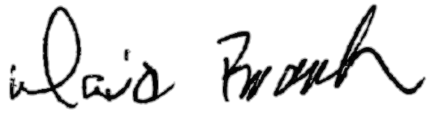
2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.



Signature

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