

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

13CV003306

AARON MARJALA,  
S58 W29956 Lorraine Ct.  
Waukesha, WI 53189  
Plaintiff,

**COMPLAINT**

v.

Case No.:

Case Code: 30106

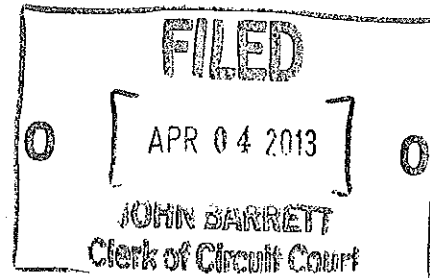
Case Type: Intentional Tort-  
Defamation

FOX NEWS NETWORK, LLC, a Delaware  
limited liability company, D/B/A Fox News  
Channel,  
1211 Avenue of the Americas  
New York, NY 10036

LEE ARMSTRONG,  
Jones Day  
222 East 41<sup>st</sup> Street  
New York, NY,

MEGYN KELLY,  
Fox News  
1211 Avenue of the Americas  
New York, NY 10036

ROBERT C. WHITAKER  
12719 N. Meadow Cir. W.  
Mequon, WI 53092



Defendants.

**COMPLAINT**

NOW COMES the above-named plaintiff, by and through his attorneys, KOHLER & HART, SC represented by Michael F. Hart and Craig S. Powell, and for his claim against defendants, FOX NEWS NETWORK, LLC, LEE ARMSTRONG, MEGYN KELLY, and

KOHLER & HART, SC  
ATTORNEYS AT LAW  
735 NORTH WATER STREET  
SUITE 1212  
MILWAUKEE, WI 53202  
(414) 271-9595

ROBERT C. WHITAKER, each and every one of them, alleges and shows to the Court as follows:

PARTIES AND JURISDICTION

1. That at all times material hereto AARON MARJALA was an adult residing in the City of Waukesha, County of Milwaukee, Wisconsin, and can be contacted c/o Kohler & Hart SC, 735 N. Water St., Suite 1212, Milwaukee, WI 53202.

2. Upon information and belief, at all of the times hereinafter mentioned, Defendant, Fox News Network LLC ("Fox News") is and was a Delaware limited liability company with its principal place of business in New York. Fox News is a national television broadcast and programming content provider which broadcasts and distributes Fox News, including but not limited to specific programming, such as "America Live" and the segment within "America Live", "Kelly's Court." Fox News broadcasts such television programming nationally, including in Milwaukee County and the State of Wisconsin. This Court has jurisdiction over Defendant Fox News in this matter pursuant to Wis. Stats. § 801.05(1)(d), as this defendant is a corporation engaged in substantial and not isolated activities within the State of Wisconsin; Wis. Stats § 801.05(3) as this Defendant caused through its agents and/or employees defamatory statements about Marjala, a Wisconsin resident, to be broadcast in Wisconsin, causing injury to Marjala; and Wis. Stats. § 801.05(4), as this Defendant caused defamatory statements about Marjala to be uttered in New York, New York and broadcast nationwide, including in Wisconsin, causing injury to Marjala, and as this Defendant carries on activities and distributes its product (broadcast television programming) for consumption in this State.

3. Upon information and belief, Defendant MEGYN KELLY is an employee of Defendant Fox News. Kelly is the host of the Fox News program "America Live," including its "Kelly's Court" segment. On information and belief, Kelly is a resident of the state of New York, and is made a party to this action because she uttered defamatory statements about Marjala that were broadcast through Fox News programming, including in Wisconsin, causing injury to Marjala.

4. Upon information and belief, Defendant LEE ARMSTRONG is an attorney practicing and residing in the state of New York. Armstrong, on occasion, participates on-air

in "Kelly's Court" episodes broadcast by and through Fox News. Armstrong is made a party to this action because he uttered defamatory statements about Marjala that were broadcast through Fox News programming, including in Wisconsin, causing injury to Marjala.

5. Upon information and belief, at all of the times relevant hereto, defendant ROBERT C. WHITAKER, was and is now an adult resident of the State of Wisconsin and who is made a party to this action because he uttered defamatory statements about Marjala to a local Fox News affiliate in Milwaukee, Wisconsin that were broadcast to the public in Milwaukee, Wisconsin, injuring Marjala.

6. Venue is proper in Milwaukee County as, on information and belief, Defendants Fox News, LLC, Kelly, and Armstrong conduct substantial business in Milwaukee County. See Wis. Stats. § 801.50(2)(c). Venue is also proper in Milwaukee County as the claim arose in this county. See Wis. Stats. § 801.50(2)(a).

#### FACTS

7. Marjala is a former firefighter with the North Shore Fire Department, a fire district serving various communities in the Milwaukee metropolitan area. Marjala was employed as a firefighter with the North Shore Fire Department from May 6, 2002 until he was found to be permanently disabled as a firefighter by the State of Wisconsin on or about January 17, 2008. Marjala previously worked as an on-call firefighter in Shorewood Hills, Wisconsin during the period 2000 through April, 2002.

8. Marjala was found to be permanently disabled because he had permanent damage to the ulnar nerve in his right arm, notwithstanding two failed surgeries to treat such nerve damage.

9. Prior to being found permanently disabled from working as a firefighter, Marjala underwent surgeries in February and June of 2007, with the hope of returning to work as a firefighter. The February, 2007 surgery consisted of an ulnar nerve transposition (the surgical movement of the nerve) to restore function. The second surgery Marjala underwent in June, 2007 was for an ulnar microneurolysis (the removal of scar tissue surrounding an injured nerve). Despite these two surgeries, Marjala's condition worsened.

10. Prior to his first surgery, Marjala experienced numbness and tingling in his right arm. After that surgery, Marjala developed radiating pain in his right arm, from his

elbow to his hand.

11. After Marjala's second surgery in June, 2007, independent physicians for the State of Wisconsin certified that Marjala suffered from persistent ulnar nerve neuropathy (the degeneration of nerve cells wherein the nerve loses the ability to function properly) and ongoing demyelization (the loss of the protective, insulating sheath around the nerve necessary for proper functioning) of the ulnar nerve in his right arm (collectively, the "Diagnoses"). When demyelization occurs, nerve functioning is impaired and the nerve eventually withers. Marjala continued and continues to suffer from pain, tingling and numbness in his right arm as a consequence of his condition.

12. Prior to his injury, Marjala participated in endurance marathons and triathlons. After his surgeries, Marjala continued to participate in these activities, notwithstanding that his nerve damage permanently disabled him from performing his job duties as a firefighter.

13. On or about August 16, 2011, Defendant Whitaker volunteered to be interviewed by an investigative reporter from Fox 6, a local television station affiliated with Defendant Fox News. In the course of the interview, Defendant Whitaker made defamatory statements about Marjala alleging that Marjala was defrauding the duty disability system:

- "[W]e are continually looking into that whether the information [concerning Marjala's injury and level of disability] we are being provided is accurate"
- "To have even that activity come up and questioned, begs in my mind, what is [Marjala's] current physical status"
- "[Marjala's receipt of disability] needs to be exposed"
- "The system may need some reform" (implying that Marjala is abusing and defrauding the system)

Whitaker's statements were broadcast by local Fox 6 in the Milwaukee area as part of a story targeting Marjala on or about September 5, 2011. Whitaker made these statements with full knowledge that Marjala had been found to be permanently disabled by independent doctors for the State of Wisconsin, and by the Independent Medical Examination physician for the North Shore Fire Department's worker's compensation carrier.

14. On or about September 8, 2011, Fox News, Kelly and Armstrong, through "America Live" and "Kelly's Court," aired a segment of and concerning Marjala on national television and the Internet. The segment was aired in Milwaukee and included video from the

local Fox 6 story.

15. The Kelly's Court Story as published by Fox News on the Internet is titled: "Firefighter Collects Disability After Banging Funny Bone but is Healthy Enough to Run Seven Marathons," and includes a video feed of Fox News' nationally broadcast segment. The story remains available on the web at <http://foxnewsinsider.com/2011/09/08/firefighter-collects-disability-after-banging-funny-bone-but-is-healthy-enough-to-run-seven-marathons/><sup>1</sup>

16. In the opening segment of the national broadcast of the Kelly's Court Story, Defendant Megyn Kelly stated: "The Ironman too injured to fight fires, Aaron Marjala, was one of Wisconsin's bravest until he banged his funny bone on a kitchen counter at a Milwaukee firehouse. Oh the horror." [sarcastically]. Kelly further stated: "Ever hit your funny bone? Cause it hurts a lot. It would be tough to lift a ladder after that." [sarcastically]

17. Contrary to information available to Fox News and Kelly concerning Marjala's condition, Kelly falsely stated that Marjala's purported disability was based upon his "hitting his funny bone on a kitchen counter," rather than upon permanent nerve damage notwithstanding Marjala's surgery and failed attempts to repair Marjala's ulnar nerve.

18. Indeed, Kelly and her on-air commentator, attorney Lee Armstrong, falsely communicated to viewers that Marjala was not really injured at all, that Marjala deserved scorn and ridicule for even applying for disability status, and that Marjala had committed a crime.

19. Armstrong responded to Ms. Kelly's "funny bone" statements by adding: "It takes down a lot of firefighters. It's the number one reason firefighters stop fighting fires." Armstrong added: "He's exploited this supposed injury ... firefighters are genuinely injured, really hurt, mentally and physically, and then, you have this guy. It's not right. There has to be an investigation here – something needs to be done – this guy should no longer get this money. Somebody just has to look into this. It's disgusting." Kelly added, "Something smells bad about that."

20. Armstrong further stated that the Doctor certifying Mr. Marjala's permanent disability was likely Marjala's "cousin" or "his brother." He added that Marjala was culpable for applying for a false disability claim: "I will blame him. You blame him. He started this

domino. He hit his elbow, his pinky became numb and all of a sudden, he's permanently and totally disabled. He's the one that's told them of his supposed limitation so the buck does stop with him." Kelly also explicitly stated that Marjala's disability claim was fraudulent: "Why should [Marjala] be excused from the fraud?" Kelly concluded: "He's too hurt to push paper but he can run Ironman triathlons, we've seen this time and time again, people taking advantage of the system and it's wrong – period – he should be forced back to his job, I think that fourteen (14) million Americans would love to have it."

21. In truth, contrary to Kelly's false statements, Marjala requested a desk or other light duty job at the North Shore Fire Department, but was told that no such opportunities existed. Marjala never claimed to be "too hurt to push paper." Rather, he sought out alternative work within the fire department despite his injury.

22. The Kelly's Court Story defamed Marjala because it depicted him as unethically and unlawfully applying for and profiting from a false claim of permanent disability.

#### **FIRST CAUSE OF ACTION: DEFAMATION PER SE**

##### **(Against All Defendants)**

23. Marjala restates and incorporates paragraphs 1-22 as though they were fully stated in this First Cause of Action.

24. The statements broadcast by Fox News, Kelly and Armstrong in the Kelly's Court Story are false and defamatory per se in that they impute a lack of Marjala's integrity as a firefighter and a lack of integrity in the performance of his ethical duties as a firefighter, and they allege and impute that he is guilty of a fraud. The statements made by Defendant Whitaker to the local Fox 6 reporter with the purpose of publication are false and defamatory per se in that they impute that Marjala is guilty of a crime (committing fraud) and they impute dishonesty to Marjala affecting his trade, business, or office.

25. The statements published by Fox News, Kelly and Armstrong concerning Marjala are false, both literally and in their implications. Specifically, contrary to the Kelly's Court Story:

A. Marjala was permanently disabled from working as a professional firefighter due to his continuing ulnar nerve neuropathy and ulnar nerve

demyelization in his right arm. He was not and did not claim to be totally disabled due to “bumping” or “hitting” his funny bone and did not claim to be disabled from all activity, from all employment, or from engaging in all recreational, athletic activities.

B. Marjala was certified as being permanently disabled by multiple independent physicians and medical examiners retained by the State of Wisconsin and by a physician conducting an examination for the North Shore Fire Department’s worker’s compensation insurer, not by a relative or friend of Marjala or any other person biased in Marjala’s favor. In addition, Marjala’s permanent injury was determined through the use of objective electromogram (EMG) nerve conduction studies, magnetic resonance imaging (MRI), and x-rays. Such tests were performed by multiple physicians.

C. Marjala did not file a false application for permanent disability; he was found to be permanently disabled by independent physicians and medical examiners as well as the North Shore Fire Department’s Workers Compensation Physician because he was, in fact, injured.

D. Marjala’s claim for permanent disability and classification as being permanently disabled as a firefighter was based upon independent medical evidence and his continuing nerve neuropathy and demyelization of the ulnar nerve, and were not based upon his self-reporting of bumping his “funny bone” on a kitchen counter or ladder.

E. Marjala’s permanent disability was impacted by two failed surgeries on his ulnar nerve and was not based upon the “bumping” of his “funny bone.”

F. Marjala did not “exploit” his injury. He was permanently injured, in fact,

and was found to be permanently disabled by independent medical examiners for the State of Wisconsin.

G. Marjala requested to perform desk work or other light duty for the Fire Department and was denied that opportunity; he never claimed to be “too hurt to push paper” as reported by Kelly.

H. Contrary to Armstrong’s statement, Marjala was and remains “genuinely injured.”

I. Defendants depicted Marjala as claiming to be disabled from all work. Instead, Marjala only claimed and was found to be 15% disabled, and available to work in other capacities than as a firefighter. Defendants falsely implied that Marjala was claiming to be totally disabled due to bumping his “funny bone,” a trivial injury and that his ability to run marathons and triathlons showed that his claim was fraudulent.

J. Defendants falsely implied that Marjala was swindling tax payers and the State of Wisconsin, having unethically submitted a false claim of disability and was wrongfully profiting from a non-genuine injury and false claim.

K. Prior to publication of the Fox News Broadcast, the Defendants knew of Marjala’s surgery but purposely did not report that information; instead, Fox News, Kelly and Armstrong falsely depicted Marjala and his permanent disability as a firefighter as scams, depicted Marjala as dishonest and deserving of scorn, and falsely implied, without mention of Marjala’s unsuccessful surgeries, and that his disability claim was solely based upon Marjala’s bumping his funny bone.

L. Defendants each consciously disregarded available information in their



possession which indicated that Marjala's injuries were severe enough to require two surgeries on his ulnar nerve, and instead falsely implied that Marjala claimed to be disabled because he simply "bumped" his funny bone on a kitchen counter or ladder, thus falsely trivializing the nature and extent of Marjala's injury and disability.

26. The statements published by Whitaker are also false, both literally and in their implications.

A. Whitaker stated that Marjala's receipt of disability benefits "need[ed] to be exposed," clearly communicating that Marjala's receipt of benefits was improper or illegal when Whitaker knew that Marjala had been found to be permanently disabled through proper channels, including by the insurance carrier for his own fire department.

B. Whitaker's statements that he continues to question whether the information provided regarding Marjala's disability is accurate and that he wonders what Marjala's physical status actually is, impute dishonesty to Marjala and were made despite Whitaker's knowledge that Marjala had been found to be permanently disabled by independent medical examiners appointed by the State of Wisconsin and by the physician for his own department's worker's compensation insurer.

27. Fox News, Kelly, Armstrong, and Whitaker published the statements with negligence, in that there existed readily available information demonstrating the nature and extent of Marjala's permanent disability as a firefighter including that his disability was the result of nerve neuropathy and demyelization of the ulnar nerve damage, notwithstanding two surgeries on Marjala's right ulnar nerve.

28. In addition, and in the alternative, Fox News, Kelly, Armstrong, and Whitaker published the statements with knowledge that they were false and/or with reckless disregard as to their truth.

29. The publication of such defamatory falsehoods by Fox News, Kelly, Armstrong, and Whitaker was willful and wanton, and was calculated to cause and did cause damage to

Marjala and caused Marjala to suffer injury to his reputation.

### PUNITIVE DAMAGES

30. The defendants' actions, as set forth above, demonstrate that the defendants' acted maliciously toward the plaintiff or with an intentional disregard of the rights of the plaintiff. Accordingly, the plaintiff is entitled to punitive damages in an amount to be determined at trial.

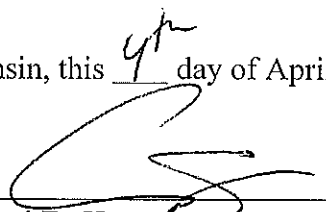
WHEREFORE, the plaintiff demands judgment against the defendants and the following relief:

- a. Actual damages;
- b. Consequential damages;
- c. Punitive damages;
- e. Attorney's fees and costs; and
- f. Equitable and declaratory relief as the Court may deem just and equitable.

Plaintiff alleges that his damages are more than the minimum amount necessary to invoke the jurisdiction of this Court.

**DEMAND IS HEREBY MADE FOR A TWELVE PERSON JURY**

Dated at Milwaukee, Wisconsin, this 4<sup>th</sup> day of April, 2013.

  
\_\_\_\_\_  
Michael F. Hart  
State Bar No. 1001528  
Craig S. Powell  
State Bar No. 1046248  
Kohler and Hart, SC  
Attorneys for Plaintiff