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***DOMINION VOTING SYSTEMS V FOX NEWS NETWORK:
DEFAMATION ACTIONS AS A TOOL FOR THE RULE
OF LAW IN TURBULENT TIMES***

Abstract

When we think about areas of law that are most essential to advancing the Rule of Law in turbulent times, constitutional law and its limits on the power of government might be the first thing that comes to mind. Injury or tort law is probably not at the top of the list. Yet the law of defamation, one type of tort law, arguably played a significant role in counteracting false statements about the 2020 Presidential Election in the United States, false statements that led to a violent assault on the U.S. Capitol.

Dominion Voting Systems, the manufacturer of electronic voting machines, sued Fox News for defamation based on statements asserting that Dominion rigged the election and committed election fraud. After a judge rejected several of Fox's main defenses raised in a summary judgment motion, Fox agreed to pay Dominion \$787.5 million to settle the case. This Article explains the court's summary judgment decision. It concludes by arguing that controversial aspects of U.S. defamation law – such as the high bar of the actual malice standard and the trend against recognizing the privilege of neutral reportage – helped advance the Rule of Law in this case.

KEYWORDS

defamation, actual malice, neutral reportage, election fraud

SŁOWA KLUCZOWE

zniesławienie, typowa złośliwość, neutralny reportaż, oszustwo wyborcze

I. INTRODUCTION

One recent example of turbulent times in the United States is the controversy over the legitimacy of the 2020 Presidential Election. In November 2020, Donald Trump, the President of the United States, said repeatedly that the 2020 Presidential Election had been stolen from him due to fraud by, among others, Dominion Voting Systems, the manufacturer of electronic voting machines used in numerous states.¹ Over the next few months, two of his lawyers appeared repeatedly on Fox News television programs, asserting that Dominion committed election fraud by rigging the election and that Dominion's software and algorithms manipulated vote counts in the election.²

One example involves Trump's attorney Sidney Powell's appearance on Fox News with Host Maria Bartiromo on 8 November 2020. Powell stated, 'There has been a massive and coordinated effort to steal this election from We the People of the United States of America, to delegitimize and destroy votes for Donald Trump, to manufacture votes for Joe Biden. They used an algorithm to calculate the votes they would need to flip and they used computers to flip those votes from Trump to Biden.'³ Bartiromo responded, 'Sidney, I want to ask you about these algorithms and the Dominion software. Sidney, we talked about the Dominion software. I know that there were voting irregularities. Tell me about that'.⁴

Dominion contended that these statements were untrue, supporting its contention with substantial evidence.⁵ However, enough people believed that the election was stolen and as a result a 'Save America' rally in Washington DC on 6 January 2021 culminated in a violent assault on the United States Capitol by more than 2000 people.⁶

¹ *U.S. Dominion, Inc. v Fox News Network, LLC*, 293 A.3d 1002, 1019 (Sup. Ct. Del. 2023).

² *ibid* 1022, 1065–1102.

³ *ibid* 1065.

⁴ *ibid*.

⁵ *ibid* 1023–24.

⁶ Jim Rutenberg and others, '77 Days: Trump's Campaign to Subvert the Election', *New York Times*, 31 January 2021, <<https://www.nytimes.com/2021/01/31/us/trump-election-lie.html>; Ryan Lucas>, 'Where the Jan. 6 insurrection investigation stands, one year later', *NPR.org*, 6 January 2022, <<https://www.npr.org/2022/01/06/1070736018/jan-6-anniversary-investigation-cases-defendants-justice>>.

In March 2021, Dominion sued Fox News Network and Fox Corporation for defamation in the Superior Court of Delaware, seeking \$1.6 billion in damages.⁷ Both Fox and Dominion filed motions for summary judgment, arguing that the judge could rule as a matter of law on some or all of the elements of defamation. On 31 March 2023, the judge denied Fox's motion and granted part of Dominion's motion, setting the stage for a jury trial on the remaining issues.⁸ However, on 18 April 2023 – right before the trial was due to begin, and after a jury was selected – the parties settled, with Fox News agreeing to pay Dominion \$787.5 million.⁹ This is the largest publicly known defamation settlement in United States history.¹⁰ The dollar amount is arguably a vindication of the Rule of Law and of the ability of the judicial system, at least sometimes, to determine what is true and what is false.¹¹

II. DEFAMATION LAW IN THE UNITED STATES

Defamation law in the United States consists of two components: the elements developed by States through statute or common law in order to protect individuals' reputations and Constitutional requirements imposed by the United States Supreme Court in order to protect free speech. The former include (1) a false and defamatory statement, (2) of or concerning the plaintiff, (3) publication, and (4) special harm or defamation *per se*.¹² A statement is defamatory if it 'tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him'.¹³ Statements

⁷ Merrit Kennedy & Bill Chappell, 'Dominion Voting Systems Files \$1.6 Billion Defamation Lawsuit Against Fox News', *NPR.com*, 26 March 2021, <<https://www.npr.org/2021/03/26/981515184/dominion-voting-systems-files-1-6-billion-defamation-lawsuit-against-fox-news>>. Dominion's suit 'was one of about twenty lawsuits filed as a result of allegations of fraud in the conduct of the 2020 presidential election'. John Bruce Lewis & Bruce L. Ottley, 'New York Times v Sullivan at 60: Where Does Defamation Law Go Now?', 73 *DePaul L. Rev.* 995, 1000 (2024).

⁸ *US Dominion, Inc.*, 293 A.3d, 1063.

⁹ Marshall Cohen & Oliver Darcy, 'Fox News settles with Dominion at the last second, pays more than \$787 million to avert defamation trial over its 2020 election lies', *CNN.com*, 19 April 2023, <<https://www.cnn.com/2023/04/18/media/fox-dominion-settlement/>>.

¹⁰ *ibid.*

¹¹ See Gregory Tardi, 'The Truth Shall Set Democracy Free', 18 *J. Parliamentary & Pol. L.* 1, 8-9 (2024) (stating that '[t]he impact of disinformation and fake news is particularly virulent in regard to elections, meaning that it should also be studied as a factor in democracy' and referencing the Dominion lawsuit).

¹² *US Dominion, Inc.*, 293 A.3d, 1035.

¹³ *MacElree v. Philadelphia Newspapers, Inc.*, 544 Pa. 117, 124-25 (1996).

that accuse someone of serious crime or tend to harm their business constitute defamation *per se*.¹⁴

The state law elements of defamation are quite similar to the principles of defamation law in the United Kingdom.¹⁵ U.S. defamation law began to differ dramatically from that of England in 1964, when the U.S. Supreme Court decided the case of *New York Times v Sullivan*.¹⁶ *The New York Times* had published an advertisement that made accusations of police misconduct in the State of Alabama in connection with the civil rights movement.¹⁷ Some of the details in the accusation were incorrect.¹⁸ The police commissioner of Montgomery, Alabama sued the individuals who placed the advertisement and *The New York Times*, saying that they defamed him.¹⁹ An Alabama jury agreed and ordered that the plaintiff be paid the full amount of damages claimed.²⁰

The Supreme Court noted that it would violate the First Amendment of the U.S. Constitution,²¹ protecting free speech, for a State to make it a crime to criticize public officials, even if the criticism contained some factual errors, because to do so would greatly mitigate such speech.²² The Court reasoned that a State allowing a civil action for damages against those who criticize public officials, where the criticism contained some factual errors, would also unduly inhibit important political speech.²³ The Court stated, ‘A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable ‘self-censorship’.²⁴

Accordingly, the Supreme Court held that courts could award damages in defamation cases brought by public officials only if the plaintiff could prove actual malice, meaning that the defendant made the defamatory statement with

¹⁴ *US Dominion, Inc.*, 293 A.3d, 1053.

¹⁵ Vincent R. Johnson, ‘Comparative Defamation Law: England and the United States’, 24 U. Miami Int’l & Comp. L. Rev. 1, 4–6, 11–16 (2017).

¹⁶ 376 U.S. 254 (1964).

¹⁷ *ibid* 256.

¹⁸ For example, the advertisement stated that the police had arrested Dr. Martin Luther King, Jr. seven times, when it was actually only four. *ibid* 259.

¹⁹ *ibid* 256.

²⁰ *ibid*.

²¹ The First Amendment provides that ‘Congress shall make no law ... abridging the freedom of speech, or of the press’ <<https://constitution.congress.gov/constitution/amendment-1/>>.

²² 376 U.S. 277. The Court stated, ‘we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and government officials’. *ibid* 270.

²³ *ibid* 277–78.

²⁴ *ibid* 279.

knowledge that it was false or with reckless disregard as to its falsity.²⁵ ‘Reckless disregard’ means that ‘the defendant in fact entertained serious doubts as to the truth of his publication’.²⁶ In a later case, the Supreme Court held that public figures – as well as public officials – must prove actual malice to recover for defamation.²⁷ The Court reasoned that such figures, while not holding public office, ‘are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large’.²⁸ A party will constitute a public figure if they have thrust themselves or have been drawn into a public controversy and sought to influence its outcome.²⁹

III. MOTIONS FOR SUMMARY JUDGMENT

A. STATE LAW ELEMENTS

Dominion’s defamation claim was based on twenty statements made by Fox hosts or Trump attorneys, Sidney Powell and Rudy Guiliani.³⁰ The Superior Court of Delaware, applying New York law, concluded easily that the challenged statements were ‘of and concerning’ Dominion, noting that the statements mentioned Dominion by name.³¹ The court also found that statements constituted defamation *per se* because they attacked the ‘basic integrity’ of Dominion’s voting systems business.³²

The issue of publication was more challenging. Publication means communication of the challenged statement to at least one third party, and each person who repeats it is responsible for any resulting damages.³³ Moreover, anyone who participated in the creation of the statement or who directed or participated in its communication satisfies the publication element.³⁴ The court concluded that Fox

²⁵ *ibid* 279–80.

²⁶ *St. Amant v Thompson*, 390 U.S. 727, 731 (1968).

²⁷ *Curtis Pub. Co. v Butts*, 388 U.S. 130 (1967).

²⁸ *ibid* 164 (Warren, C.J., concurring). The Court reasoned, ‘Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of ‘public officials’.

²⁹ *Hutchinson v Proxmire*, 443 U.S. 111, 134–135 (1979); *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

³⁰ *U.S. Dominion, Inc.*, 293 A.3d, 1014.

³¹ *ibid* 1039.

³² *ibid* 1053.

³³ *ibid* 1039.

³⁴ *ibid* 1040.