

MONDAY, APRIL 17, 2023

PERSPECTIVE

Will Dominion dominate Fox?

By Douglas E. Mirell

With opening statements scheduled to begin today, *Dominion Voting Systems v. Fox* has already become the highest profile public-figure defamation case since the U.S. Supreme Court first defined the judicial landscape for such lawsuits in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The forthcoming trial will determine whether Fox News Network (FNN) and its parent entity, Fox Corporation (FC), are to be held liable for providing a platform for guests that FNN's hosts knew would make false and defamatory on-air statements about how Dominion's voting machines helped "steal" the 2020 presidential election from former President Donald J. Trump, and whether those hosts themselves "affirmed, endorsed, repeated, and agreed with those false statements."

In his 130-page summary judgment ruling, Delaware Superior Court Judge Eric M. Davis has already determined that the 20 statements at issue are in fact false. *"The evidence developed in this civil proceeding demonstrates that [it] is CRYSTAL clear that none of the Statements relating to Dominion about the 2020 election are true. [Italicization, boldfacing and capitalization in original.]" US Dominion, Inc. v. Fox News Network, LLC, and Fox Corporation, Case Nos. N21C-03-257EMD and N21C-11-082 EMD, Order dated March 31, 2023.*

In that same ruling, Judge Davis rejected Fox's claim that these statements were protected by an asserted "neutral report" privilege which New York courts had pre-

viously refused to recognize and whose decisions were binding in this case. *See Freidman v. Buzzfeed, Inc.*, 2018 WL 2100452, *4-5 (N.Y. Sup. May 7, 2018), citing *Hogan v. Herald Co.*, 84 A.D.2d 470, 446 N.Y.S.2d 836 (4th Dept. 1982). The court also rebuffed Fox's argument that the statements about Dominion were immunized by the "fair report" privilege embodied in Section 74 of the New York Civil Rights Law. Akin to California Civil Code Section 47(d), the New York law applies only to substantially accurate reports about "proceedings"; in this case, "most of the contested statements were made before any lawsuit had been filed in a court" and only one statement from a Nov. 30, 2020, *Lou Dobbs Tonight* broadcast even referenced any official proceedings.

Finally, Judge Davis likewise spurned Fox's argument that the votecount manipulation allegations that Fox aired about Dominion's voting machines were non-actionable opinion, concluding instead that they were defamatory per se since they "strike at the basic integrity of its business ... [and] also seem to charge Dominion with the serious crime of election fraud."

Having cleared out this underbrush, and since Dominion previously conceded that it was a public figure for purposes of this litigation, the court was left to decide whether [to grant summary judgment as to *New York Times* "actual malice" – i.e., whether the challenged statements were published with knowledge of their falsity or with reckless disregard for their truth. In refusing to do so, Judge Davis concluded that there were "genuine issues of material fact" requiring a jury determination. That inquiry

could well be both prolonged and intensive since FNN and FC have argued that each one of the 20 challenged statements "should be examined individually, tracing each to determine whether someone responsible for the publication acted with actual malice as to the specific allegation of defamation."

While some commentators have characterized Judge Davis' refusal to enter summary judgment on the "actual malice" element as a win for Fox, other pundits have noted that it might prove to be a plaintiff-side blessing in disguise. Dominion's lawyers will now get to spend quality time explaining the full scope of Fox's intentional mendacity to a jury, rather than limiting the trial to the question of how much monetary damage Dominion's business suffered. In the recent retrial of *Diaz v. Tesla, Inc.*, Case No. 3:17-CV-06740-WHO (U.S.D.C., N.D. CA), former factory worker Owen Diaz saw his \$137 million hostile workplace verdict from 2021 reduced to \$3 million since the jury in his retrial no longer needed to adjudicate liability and evidence was limited to proof of the plaintiff's damages.

Speaking of damages, Fox has focused much of its fire upon the asserted outrageousness of Dominion's demand for \$1.6 billion – exclusive of amounts that might be awarded as general compensatory or punitive damages. Much of the reporting about this demand has ignored Dominion's breakdown of this aggregate amount in its complaint's prayer for relief – "lost profits" of \$600 million, \$1 billion in "lost enterprise value," \$600,000 in "security expenses," and \$700,000 in "expenses incurred combatting the disinformation campaign." It

is too early to tell whether these claims can withstand non-speculative scrutiny. However, given the evidence that may be adduced during the "actual malice" liability phase, it would not be unreasonable to expect an exemplary damages verdict that reaches the outer limits of what due process will allow. *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 n.22 (1996) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 425 (2003).

One of the unique aspects of this litigation is the extent to which discovery has permitted Dominion to adduce significant evidence of a plausible motive behind Fox's falsifications. As Harvard Law School Professor Laurence Tribe has noted, "Fox and its producers and performers were lying as part of their business model."

Specifically, beginning on the morning of Nov. 4, when FNN cor-

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rectly called Arizona for Joe Biden, Fox viewers became outraged and began switching their allegiance to the continued reports of a “stolen” election being aired by Newsmax and One America News. On Nov. 7, when FNN announced that Biden had been elected, primetime Fox host Tucker Carlson texted, “Do the executives understand how much credibility and trust we’ve lost with our audience? We’re playing with fire, for real an alternative like news-

max could be devastating to us.”

Finally, Fox’s trial team (which includes former U.S. Solicitor General Paul Clement) last week ran into a further buzzsaw. During a status conference leading up to this week’s trial, Judge Davis said he would appoint a special master to investigate the truth of Fox’s representations, including those made in December that it had complied with its discovery obligations. The court was par-

ticularly concerned about the late production of recordings of Fox host Maria Bartiromo’s phone conversations with Rudy Giuliani, Sidney Powell, and others. These recordings only came to light after Abby Grossberg, Bartiromo’s former producer, filed a separate lawsuit against Fox alleging that she had been instructed to give misleading deposition testimony in the Dominion lawsuit. Judge Davis was also upset by Fox’s belated

disclosure that Rupert Murdoch is an officer of FNN, in addition to his role as chairman of FC – a development the jurist said presented a “credibility problem.” Whether and how these latest issues will play out during the trial – including at any new mid-trial depositions and/or during the live trial testimony of Rupert and Lachlan Murdoch that Judge Davis has said he’d be prepared to allow – remains to be seen.