Dominion v. Fox Libel Suit Continues to Capture Public Attention After Settlement

On April 18, 2023, Dominion Voting Systems settled its defamation lawsuit against Fox News Network and Fox Corporation. *US Dominion v. Fox News Network*, No. N21C-03-257 (Del. Super. Ct. March 26, 2021). According to a report from *The New York Times* that same day, Fox agreed to pay $787.5 million in the settlement. The case stemmed from Fox's coverage of the 2020 United States presidential election. Dominion, a supplier of election technology, had sued the Fox Corporation and its subsidiaries in March 2021 in Delaware state court. The complaint alleged that Fox had libeled the company through television broadcasts that accused Dominion of election fraud. Because Dominion is a "limited" public figure — as determined by presiding Judge Eric Davis in January 2023 — the actual malice standard applied in this case. Established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the actual malice standard requires public figures to prove that defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity. Supreme Court Justices Clarence Thomas and Neil Gorsuch have both indicated a desire to revisit this standard.

(For more information on *Dominion v. Fox* and scholarly responses to the settlement, see *Fox Settles to Avoid High-Stakes Defamation Trial with Dominion Voting Systems* in "Dominion Lawsuit Against Fox Sparks Debate About Boundaries of Actual Malice" in the Winter/Spring 2023 issue of the Silha *Bulletin*.)

In the aftermath of the *Dominion v. Fox* lawsuit and settlement, the consequences for the parties and for the broader media landscape continue to unfold. More lawsuits are on the horizon for both litigants. Dominion has pending defamation lawsuits against conservative news networks One America News Network and NewsMax, former Trump lawyers Sidney Powell and Rudy Giuliani, MyPillow CEO Mike Lindell, and Patrick Byrne, the founder of Overstock.com. Following the *Dominion v. Fox* settlement, Stephen Shackelford, a partner at Susman Godfrey LLP and attorney for Dominion in the case, reflected on the outcome in an interview with *Axios*: "[The Fox lawsuit] should send a big signal to the other defendants that we are serious about exposing the truth, and we are serious about accomplishing full compensation and justice for Dominion."

Fox also faces continuing defamation suits. "The Dominion settlement has emboldened other targets of Fox's coverage to sue, and that's not good news for Fox," said Tom Wienner, a retired corporate litigator, in a statement to National Public Radio (NPR).

On May 11, 2023, Nina Jankowicz, the former head of the US Department of Homeland Security's (DHS) disinformation group, filed a defamation suit against Fox News Network, LLC and Fox Corporation, also in Delaware. J*ankowicz v. Fox News Network, LLC et al*, no. 1:2023cv00513 (D. Del. 2023). The DHS disinformation group was formed in April 2022; however, after a harsh backlash from conservative Republicans, the group was dissolved on August 24, 2022 and Jankowicz resigned on the same day, according to a *CNN Politics* report. In the complaint, Jankowicz alleged that multiple Fox News on-air personalities spread false claims that she was fired and wanted to censor speech. The complaint continues: "Fox's defamatory coverage has caused Jankowicz and her family immense suffering. Jankowicz has been doxxed, threatened, harassed and even cyber-stalked." Jankowicz's complaint against Fox is available online at: https://www.documentcloud.org/documents/23809394-jankowicz-v-fox-complaint.

On July 12, 2023, Ray Epps, a former U.S. Marine who was in Washington at the time of the Jan. 6, 2021 insurrection, filed a defamation suit against Fox News Network, LLC. *Epps v. Fox News Network, LLC*, no. 1:23-cv-00761 (D. Del. 2023). The lawsuit alleges that in the coverage following the January 6 U.S. Capitol attack, Fox News "turned on one of their own, telling a fantastical story in which Ray Epps — a Trump supporter who participated in the protests on January 6th — was an undercover FBI agent and was responsible for the mob that violently broke into the Capitol and interfered with the peaceful transition of power for the first time in this country's history." Epps alleges that he faced harassment and threats from Fox viewers as a result of the coverage. Epps' lawsuit is available online at: https://int.nyt.com/data/documenttools/epps-fox-lawsuit/68619a81058ced05/full.pdf.

Additionally, Fox continues to defend against a $2.7 billion lawsuit from Smartmatic, another voting systems company. *Smartmatic USA Corp. v. Fox Corporation*, 2022 WL 685407 (N.Y. Sup. 2022). (For more information on the lawsuit, see *New York Judge Rules that Much of Smartmatic Defamation Case Against Fox News Can Continue* in "Courts Continue to Grapple with Defamation Cases

Involving Sarah Palin, Former President Trump, and Election Misinformation" in the Winter/Spring 2022 issue of the Silha *Bulletin*.)

Interest in the discovery documents from the case, particularly the correspondence of Fox executives and on-air personalities, remains high. On April 24, 2023, Fox News announced that Tucker Carlson and the network were parting ways and that Carlson's primetime show was canceled. The network offered no further details on this decision. Both Fox and Dominion have stated that Carlson's cancellation was not required by the lawsuit settlement agreement. However, a report from *The New York Times* on May 2, 2023 suggested that the content of Carlson's private messages, revealed through the discovery process in *Dominion v. Fox*, played a large role in this decision. Internal communications of Fox executives and on-air personalities discussing Fox's coverage of United States elections were released as exhibits on March 7, 2023. On May 1, 2023, *The New York Times*, NPR, and *The Associated Press* renewed a request to the court to lift the redactions in *Dominion v. Fox* discovery documents. David McCraw, deputy general counsel for *The New York Times*, argued that the full record of this historic case should not be kept secret. (McCraw was the 2017 Silha Lecturer. For more about his lecture, see "32nd Annual Silha Lecture Addresses Freedom of the Press During Trump Presidency" in the Fall 2017 issue of the Silha *Bulletin*.)

Legal counsel for Fox urged the Court to keep the redactions in place. "Fox agreed to settle this case, with this Court's encouragement, in large part to bring to an end the continued media spectacle, and chill on First Amendment rights, that this case had become," Katherine Mowery, an attorney representing Fox, wrote in a letter to the court on May 3, 2023. She argued that releasing the redacted content would "create profoundly perverse incentives the next time parties are encouraged to settle a high-profile trial. After all, if $787.5 million is not enough to buy peace, parties will certainly think twice before settling in the future." So far, no redactions have been reversed.

It remains unclear how the *Dominion v. Fox* settlement will affect the media landscape and Fox's position within it. On July 3, 2023, The Media and Democracy Project (MAD), a non-profit advocacy organization that describes its mission as "fighting for a more informative and pro-democracy media operating in the public interest," filed a petition with the Federal Communications Commission (FCC) asking it to deny the broadcast license renewal of FOX 29, a Fox Corporation-owned TV station in Philadelphia. The petition argues that Fox Corporation's conduct, as revealed in *Dominion v. Fox*, warranted denial of the application. "Owning a broadcast station is more than a business — it is a public

trust," the petition states. "It is crucial to our democracy that broadcasting remain a trusted source of news. A company that knowingly and repeatedly presents false news just to placate its core viewers undermines that sense of trust. The false news presented by Fox has done grievous damage to our country and its citizens."

On Aug. 2, 2023, Fox Corporation filed an objection, asking the FCC to dismiss MAD's petition. "It is sadly ironic that an organization purportedly focused on the role of media in a healthy democracy would seek to convert a government agency that has long respected the First Amendment into a roving censor of news and other content," Fox Corporation stated. As the *Bulletin* went to press, the FCC has not taken action on this petition.

However, Fox has expressed confidence in their continuing success, despite legal hurdles. On an earnings call after releasing financial results for Q4 of fiscal year 2023, Lachlan Murdoch, now executive chairman and CEO of Fox Corporation, stated: "These results demonstrate that Fox's differentiated strategy continues to deliver engaged audiences at scale for our advertising and distribution partners across our sports and news verticals. [...] At Fox News Media we continued to lead in both ratings and engagement."

Kim Bisheff, a journalism lecturer at Cal Poly, speculated that the *Dominion v. Fox* settlement will have a limited effect on misinformation in journalism: "At the risk of sounding pessimistic, I think it will take more than just this settlement to stop the spread of misinformation among entities whose business model depends on fueling outrage and tribalism. Content that triggers strong, negative emotions drives traffic, which is why misinformation thrives." However, she noted that misinformation-focused strategies are not the norm: "Most journalism professionals prioritize accuracy and transparency and have been working especially hard in recent years to regain audience trust. In general, deliberately spreading misinformation is not a formula for media success."

— Mallory Harrington
Silha Center Research Assistant