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Defamation and the Corporate Plaintiff

By Bo Pearl & Kiaura Clark

Dominion Voting Systems' defamation claims may proceed against MyPillow CEO Mike Lindell, President Trump's personal lawyer Rudy Giuliani, and pro-Trump lawyer and media personality Sidney Powell, per D.C. District Court Judge Carl Nichols' August 11 order denying defendants' motions to dismiss. Consequently, Dominion's early 2021 suits may proceed in seeking $1.3 billion each from MyPillow Inc., and Lindell, Defending the Republic, Inc., and Sidney Powell, and Rudy Giuliani. This order signaled how courts might in the future analyze defenses to defamation claims surrounding issues of public concern, and inform Dominion's defamation suits in Delaware against various news and media outlets seeking $1.6 billion in damages.

Under most state laws, the elements required of a defamation claim are "a false statement, published without privilege or authorization to a third party, constituting fault . . . and it must either cause special harm or constitute defamation per se." *Peters v. Baldwin Union Free Sch. Dist.*, 320 F.3d 164, 169 (2d Cir. 2003), citing *Dillon v. City of New York*, 261 A.D.2d 34 (1999). To balance the need for public discourse, recovery in a defamation suit may depend on the status of a particular plaintiff. In *Gertz*, the Supreme Court provided that "public figures" can either attain such status "by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention," or limited-purpose public figures, who "thrust [themselves] into the vortex of a public issue [or] engage the public's attention to affect the outcome." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Relevant to how a court might ultimately assess each of Dominion's defamation claims is the existing—albeit limited—jurisprudence on the *corporate* "public figure" plaintiff. Unfortunately, the standard in *Gertz*, which is tailored to assessing whether a person is a public figure, does not necessarily lend itself to analyzing the status of a corporation, such as Dominion. Courts have deployed very different methodologies in determining the status of corporate plaintiffs. Some have remained true to *Gertz,* justifying public-figure status for corporate plaintiffs based on the degree of fame the particular plaintiff corporation has acquired. *See Lundell Manufacturing Co., Inc. v. ABC, Inc.,* 98 F.3d 351 (8th Cir. 1996). Some have required a nexus between the subject matter of a corporation's advertising—placing that corporation in the public eye—and the defamatory statements at issue. *See Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273–74 (3d Cir. 1980). Others, however, routinely find that corporations are *per se* public figures without a distinct analysis. *See, e.g., Jadwin v. Minneapolis Star & Tribune Co.,* 367 N.W.2d 476 (Minn. 1985).

This determination is important, because plaintiffs who are "public figures" must demonstrate the defendant had a higher level of culpability than would private plaintiffs. Public figure plaintiffs must prove the defendant acted with "actual malice" such that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S.

254, 280 (1964). Plaintiffs must also provide clear and convincing evidence that the statement was made with malice, whereas private persons need only show, by the preponderance of the evidence, the statement was made negligently. The justification for this distinction is that the First Amendment safeguards our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *Tah v. Global Witness Publ'g, Inc.*, 991 F.3d 231, 240 (D.C. Cir. 2021) (quoting *N.Y. Times Co.,* 376 U.S. at 270), by limiting viable defamation claims to provably false statements made with actual malice. Dominion in its opposition had argued that it, as a private company, was *not* a public figure required to prove actual malice (but nevertheless alleged that it met that standard, too). In his order, however, Judge Nichols seemed to accept as true that Dominion "must plead actual malice"—therefore at least suggesting that he considered the company a public figure for purposes of the defamation claims.

Relying on the heightened public figure standard in support of the motions to dismiss, both Powell and Lindell argued that Dominion failed to state a defamation claim because Dominion failed to plead actual malice. Lindell added that his statements were protected as "debate on public issues." Powell argued her statements were only statements of opinion, not fact. The Court, however, determined that Plaintiff adequately pleaded that Defendants acted with "actual malice" when making the statements, and that those statements were of fact, not opinion.

"Actual Malice" for Corporate Plaintiffs

Much of the Court's analysis of "actual malice" (i.e., knowledge that the statements were false or with reckless disregard of whether they were false or not) involved an assessment of Defendants' evidence of truth of the statements, and whether they in fact harbored subjective doubt about the veracity of their statements based on that evidence.

Dominion had cited to the many statements made by Defendants, including that Dominion was connected to Venezuela and was formed "by three Venezuelans" "in order to fix elections," that "the founder of [Dominion] admits he can change a million votes, no problem at all" and "had stolen Trump votes "by massive election fraud." In support of the motion to dismiss, Powell, for example, stated she could not have "entertained serious doubts as to the truth" or acted with a "high degree of awareness" of the "probable falsity" of her claims because she relied on sworn declarations and other evidence that supported her statements.

The Court rejected Powell's arguments, however, emphasizing that she relied on anonymous declarations, unproduced or altered evidence, and reasoned that the evidence was not only unreliable but also incapable of supporting the allegations that Dominion "flipped, stole, weighted, or injected any votes into a U.S. election." "There is no rule that a defendant cannot act in reckless disregard of the truth when relying on sworn affidavits—especially sworn affidavits that the defendant had a role in creating," the judge wrote. The Court indicated that it would scrutinize the legitimacy of the evidence presented at the motion to dismiss stage to attack a plaintiff's defamation claim.

The Court's criticism in this case also informs the type of evidence defendants could provide to support subjective belief of their statements, which ultimately *could* be insurmountable for a plaintiff to rebut on a motion to dismiss. For example, the criticism of Lindell's evidence included that it did not appear in Dominion's complaint, that Powell offered evidence that did not *directly* support the veracity of the statements, and that much of the evidence was cherry-picked or came from experts with prior questionable and unsupportable claims (i.e., that George Soros, President George H.W. Bush's father, the Muslim Brotherhood, and "leftists" helped form the "Deep State" in Nazi Germany in the 1930s—

which would have been a remarkable feat for Soros, who was born in 1930). Clearly, the evidence presented—and whether a defendant could have a subjective belief based on that evidence—will be closely scrutinized by the courts.

Statements of Fact or Opinion

The Court also rejected Defendants' argument that the statements were somehow protected as opinion on a matter of public concern because they related to the 2020 presidential election. Rather, it held that there is no blanket immunity for statements that are "political" in nature: as the Court of Appeals has put it, the fact that statements were made in a political "context" does not indiscriminately immunize every statement contained therein. "It is true that courts recognize the value in some level of 'imaginative expression' or 'rhetorical hyperbole' in our public debate," Judge Nichols said. "But it is simply not the law that provably false statements cannot be actionable if made in the context of an election."

In the opinion, Judge Nichols looked to whether a reasonable juror could conclude that Powell's statements expressed or implied a verifiably false fact about Dominion. Although statements may not be actionable if the "defendant provides the facts underlying the challenged statements, [and] it is 'clear that the challenged statements represent [her] own interpretation of those facts,' . . . leav[ing] the reader free to draw his own conclusions" the Court reiterated Dominion's attacks on Defendants' evidence relating to each of the defamatory statements and found that a juror could conclude they were either statements of fact or opinion that implied or relied upon facts that are provably false.

Anti-SLAPP Statutes

The anti-SLAPP ("strategic lawsuits against public participation") statute provides an avenue for the dismissal of defamation claims where the speech at issue relates to a matter of public concern. However, an unresolved circuit split exists as to whether these statutes comply with federal procedural rules and thus implicates their use in federal court. Although Defendants raised anti-SLAPP defenses to Dominion's suits, Judge Nichols declined to analyze the defense, as the D.C. Circuit does not recognize the special motion to dismiss provision of that statute in federal court. *Abbas v. Foreign Policy Grp.*, 783 F.3d 1328, 1334, 1337 (D.C. Cir. 2015); *Tah*, 991 F.3d at 239 (confirming that *Abbas* remains circuit law).

This recent opinion demonstrates not only a court's willingness to analyze the evidence behind defamatory statements at the motion to dismiss stage, but also the limits of the First Amendment's protection on political speech. The current political climate provides a soap box for critical speech, but it comes with a risk of ruined reputations and vast economic consequences. Moreover, the elements of defamation and the procedural and statutory protections for defendants are complex; familiarity with this area of law, and preparedness for potential claims, is vital.

The cases are *U.S. Dominion Inc. et al. v. Sidney Powell et al.*, case number 1:21-cv-00040; *US Dominion Inc. et al. v. Rudolph W. Giuliani*, case number 1:21-cv-00213, and *US Dominion Inc. et al. v. MyPillow Inc. et al.*, case number 1:21-cv-00445, all in the U.S. District Court for the District of Columbia.

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If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings Century City lawyer:

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