

35th Annual Media and the Law Conference
April 20-21, 2023 in Kansas City, MO

Liars Who Lie and Naming Names

Moderator:

Leita Walker, Partner, Ballard Spahr, LLP, Minneapolis, MN

Panelists:

Elizabeth Williamson, Reporter for the *New York Times* and Author of *SANDY HOOK: An American Tragedy and the Battle for Truth*, Washington, D.C.

Clay Wirestone, Opinion Editor, *Kansas Reflector*, Lawrence, KS

Steve Zansberg, Law Office of Steven D. Zansberg, LLC, Denver, CO

PLEASE NOTE that all items listed that include a link are NOT physically included here. Items marked “ATTACHMENT” are physically included at the end of this outline in the order in which they appear.

1. The battle for truth in today’s America
 - a. Elizabeth Williamson, *SANDY HOOK: An American Tragedy and the Battle for Truth*, Penguin Random House, 2022, **available for purchase in the lobby after this session.**
 - b. Marc Hetherington and Jonathan M. Ladd, *Destroying trust in the media, science, and the government has left America vulnerable to disaster*, Brookings, May 1, 2020, <https://www.brookings.edu/blog/fixgov/2020/05/01/destroying-trust-in-the-media-science-and-government-has-left-america-vulnerable-to-disaster/>
 - c. Clay Wirestone, *What I learned by emailing with Kansas anti-vaxxers*, KANSAS REFLECTOR, February 15, 2022, <https://kansasreflector.com/2022/02/15/what-i-learned-by-emailing-with-kansas-anti-vaxxers/>
 - d. Clay Wirestone, *In Kansas abortion amendment debate, three big lies prevent honest exchanges*, KANSAS REFLECTOR, July 25, 2022, <https://kansasreflector.com/2022/07/25/in-kansas-abortion-amendment-debate-three-big-lies-prevent-honest-exchanges/>
 - e. Elizabeth Williamson, *Sandy Hook parents to testify against Alex Jones, and a culture of lies*, THE NEW YORK TIMES, July 26, 2022,

<https://www.sanjuandailystar.com/post/sandy-hook-parents-to-testify-against-alex-jones-and-a-culture-of-lies>

- f. Bryn Nelson, *How Stochastic Terrorism Uses Disgust to Incite Violence*, *Scientific American*, November 5, 2022, <https://www.scientificamerican.com/article/how-stochastic-terrorism-uses-disgust-to-incite-violence/>
- g. Ben Smith and Louise Matsakis, *Inside Harvard's misinformation meltdown*, *Semafor*, February 5, 2023, <https://www.semafor.com/article/02/05/2023/inside-harvards-misinformation-meltdown>
- h. Ron DeSantis, *Press Release: Governor Ron DeSantis Hosts Roundtable Discussion on Legacy Media Defamation Practices*, February 7, 2023, <https://www.flgov.com/2023/02/07/governor-ron-desantis-hosts-roundtable-discussion-on-legacy-media-defamation-practices/>
- i. Steven Lee Myers, *Free Speech vs. Disinformation Comes to a Head*, *THE NEW YORK TIMES*, February 9, 2023, <https://www.seattletimes.com/nation-world/free-speech-vs-disinformation-comes-to-a-head-in-federal-lawsuit/>
- j. Daisy Yuhas, *There's a Psychological 'Vaccine' against Misinformation*, *Scientific American*, March 13, 2023, <https://www.scientificamerican.com/article/theres-a-psychological-vaccine-against-misinformation/>

2. Facilitating the truth: journalistic solutions

- a. ABC News, *Video: Fox News and the Big Lie, Part 1*, August 31, 2021, <https://www.abc.net.au/news/2021-08-23/fox-and-the-big-lie-how-the-network-promoted/13510238>
- b. ABC News, *Video: Fox News and the Big Lie, Part 2*, August 31, 2021, <https://www.abc.net.au/news/2021-08-30/fox-and-the-big-lie---part-two/13520230>
- c. Clay Wirestone, *In Johnson County and Emporia, a sheriff and college president unravel the fabric of Kansas*, *KANSAS REFLECTOR*, September 19, 2022, <https://kansasreflector.com/2022/09/19/in-johnson-county-and-emporia-a-sheriff-and-college-president-unravel-the-fabric-of-kansas/>
- d. Clay Wirestone, *Flat tax fantasies: Senators pitch a most unlikely future for Kansas*, *KANSAS REFLECTOR*, February 22, 2023,

<https://kansasreflector.com/2023/02/22/flat-tax-fantasies-senators-pitch-a-most-unlikely-future-for-kansas/>

3. Facilitating the truth: legal solutions?

- a. Civil liability for incitement? See, e.g., *Thompson v. Trump*, 590 F. Supp. 3d 46, 115 (D.D.C. 2022) (Some of the words Trump uttered during his speech at the Ellipse on January 6, 2021, were “plausibly words of incitement not protected by the First Amendment.”), <https://casetext.com/case/thompson-v-trump-3>
- b. Injunctive relief in defamation cases?
 - i. “The no-injunction rule has been a fixture of Anglo–American law for more than three centuries. The rule's lineage can be traced to the backlash that arose from England's infamous Star Chamber....[T]he no-injunction rule appears in American cases not long after the nation was founded.” *Alahverdian v. Nemelka*, Case No. 3:15–cv–060, 2015 WL 1276453, at *3 (S.D. Ohio, March 19, 2015), referencing David S. Ardia, *Freedom Of Speech, Defamation, and Injunctions*, 55 Wm. & Mary L.Rev. 1, 18 (2013), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3494&context=wmlr>
 - ii. As recently as 2020, federal courts have issued rulings enjoining defendants “from repeating the statements...that have been held to be defamatory.” *B2Gold Corp. v. Christopher*, Case No. 1:18-cv-1202, 2020 WL 2846633, at *7 (E.D. Va. May 28, 2020), referencing *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208–09 (6th Cir. 1990) (Wellford, J., concurring) (announcing the court’s holding with respect to injunctive relief), https://scholar.google.com/scholar_case?case=6111974163195936762&q=Lothschuetz+v.+Carpenter&hl=en&as_sdt=2006; *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993) (“An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint.”), https://scholar.google.com/scholar_case?case=11425884653577655944&q=Auburn+Police+Union+v.+Carpenter&hl=en&as_sdt=2006
- c. Insurance coverage or a compensation fund for defamation victims? See Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. Miami L. Rev. 137, 218–19 (2008), <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1258&context=umlr>

- d. “Actual malice” standard under legislative attack in Florida
 - i. 2023 HB 991, Florida House of Representatives, <https://www.flsenate.gov/Session/Bill/2023/991/BillText/Filed/PDF>
 - ii. Ian Millhiser, *Ron DeSantis’s plan to strip First Amendment rights from the press, explained*, Vox, March 8, 2023, <https://www.vox.com/platform/amp/politics/23622299/ron-desantis-first-amendment-press-new-york-times-v-sullivan>
 - iii. Steve Contorno, *Ron DeSantis is targeting the free speech protections that might save Fox News*, CNN, March 29, 2023, <https://www.cnn.com/2023/03/29/politics/desantis-free-speech/index.html>

 - e. Prohibitions against “misinformation” related to voting in Minnesota
 - i. Democracy for the People Act, HF 3, https://www.revisor.mn.gov/bills/text.php?number=HF3&type=bill&version=2&session=ls93&session_year=2023&session_number=0&eType=EmailBlastContent&eId=886a24a1-e675-4a07-8db4-67bce8533a54
 - ii. Deena Winter, *Election bill would make it illegal to knowingly spread false information that impedes voting*, MINNESOTA REFORMER, March 7, 2023, <https://minnesotareformer.com/2023/03/07/election-bill-would-make-it-illegal-to-knowingly-spread-false-election-info-that-impedes-voting/>
 - iii. Briana Bierschbach, *Minnesota lawmakers target disinformation in election bill*, MINNEAPOLIS STAR TRIBUNE, March 29, 2023, <https://www.startribune.com/minnesota-lawmakers-target-disinformation-in-election-bill/600262931/>
4. *US Dominion, Inc. v. Fox News Network, LLC*, C. A. N21C-03-257 EMD (Del. Super. Ct.)
- a. Randall Chase, *Fox News claims Dominion defamation suit is assault on First Amendment*, Associated Press, February 16, 2023, <https://www.cpr.org/2023/02/16/fox-news-claims-dominion-defamation-suit-is-assault-on-first-amendment/>
 - b. Dominion’s Brief in Support of its Motion for Summary Judgment on Liability of Fox News Network, LLC and Fox Corporation, Public Version filed February 16, 2023, <https://int.nyt.com/data/documenttools/redacted-documents-in-dominion-fox-news-case/dca5e3880422426f/full.pdf>
 - c. Dominick Mastrangelo and Zach Schonfeld, *Five top revelations from Dominion’s explosive court filing in Fox News lawsuit*, The Hill, February 17, 2023, <https://thehill.com/homenews/media/3863605-five-top-revelations-from-dominions-explosive-court-filing-in-fox-news-lawsuit/>

- d. Defendant Fox News Network, LLC’s First Amended Counterclaim, February 16, 2023, <https://deadline.com/wp-content/uploads/2023/02/PUBLIC-VERSION-FNNs-First-Amended-Counterclaim-Accepted.pdf>
 - e. Order Denying Fox News’ MSJ and granting, in part, Dominion’s MSJ, March 31, 2023, <https://int.nyt.com/data/documenttools/summary-judgment-opinion-in-fox-dominion-case/f54475e2da851d41/full.pdf>
5. *Smartmatic U.S. Corp. v. Fox Corp.*, Case No. 2022-01291 (N.Y. Sup. Ct. Feb. 14, 2023) (affirming lower court’s denial of defendants’ motion to dismiss on anti-SLAPP grounds and holding that Plaintiff is not a limited purpose public figure) **ATTACHMENT**
6. *Reynaldo Gonzalez, et al., v. Google LLC*, U.S. Supreme Court Docket no. 21-1333 (oral arguments were held on February 21, 2023)
- a. *Gonzalez v. Google, LLC*, No. 18-16700 (9th Cir. 2021) (underlying ruling appealed to SCOTUS), <https://www.govinfo.gov/content/pkg/USCOURTS-ca9-18-17192/pdf/USCOURTS-ca9-18-17192-0.pdf>
 - b. Brief of *Amici Curiae* Reporters Committee for Freedom of the Press and the Media Law Resource Center in Support of the Respondents, https://www.supremecourt.gov/DocketPDF/21/21-1333/252661/20230119141213069_21-1333%20Amicus%20Brief%20of%20Reporters%20Committee%20for%20Freedom%20of%20the%20Press%20et%20al..pdf
 - c. Brief of *Amici Curiae* Prof. Eric Goldman in Support of Respondents, <https://deliverypdf.ssrn.com/delivery.php?ID=693102115122088126010006124100008124025033010045057018088108122064104127106064118014024027057111007030003083065081000001113024011048088035048127122005028112119111041015071017068029089076069104120117003117006101097024066126102001018074016124029098065&EXT=pdf&INDEX=TRUE>
 - d. Brief of *Amici Curiae* Internet Law Scholars in Support of Respondents, https://www.supremecourt.gov/DocketPDF/21/21-1333/252636/20230119131732602_21-1333_Internet%20Law%20Scholars%20Amici%20Brief.pdf

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Acosta, P.J., Webber, Moulton, Shulman, Higgitt, JJ.

17049	SMARTMATIC USA CORP., et al., Plaintiffs-Respondents-Appellants,	Index No. 151136/21 Case No. 2022-01291
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-against-

FOX CORPORATION, et al.,
Defendants-Appellants-Respondents,

JEANINE PIRRO,
Defendant-Respondent,

SIDNEY POWELL,
Defendant.

Mintz & Gold LLP, New York (Steven G. Mintz of counsel), and Clement & Murphy, PLLC, Alexandria, VA (Paul Clement of the bar of the District of Columbia, admitted pro hac vice, of counsel), for Fox Corporation, Fox News Network LLC, Lou Dobbs and Maria Bartiromo, appellants-respondents, and Jeanine Pirro, respondent.

Russo Law LLC, New York (Adam S. Katz of counsel), for Rudolph Giuliani, appellant-respondent.

Benesch, Friedlander, Coplan & Aronoff, LLP, New York (Edward C. Wipper and Joel Erik Connoly of the bar of the State of Illinois, admitted pro hac vice of counsel), for respondents-appellants.

Order, Supreme Court, New York County (David B. Cohen, J.), entered on or about March 8, 2022, which, to the extent appealed from (1) granted defendant Jeanine Pirro’s motion to dismiss all causes of action asserted against her; (2) granted, in part, defendant Rudolph Giuliani’s motion to dismiss all causes of action asserted against him to the extent of dismissing the third, fifth and ninth causes of action as against him; and

(3) denied the motions of defendants Fox Corporation, Fox News Network LLC, Lou Dobbs, and Maria Bartiromo to dismiss all causes of action asserted against them, unanimously modified, on the law, to dismiss the causes of action asserted against defendant Fox Corporation without prejudice to repleading, and to reinstate the causes of action that were dismissed as against defendants Giuliani and Pirro, and otherwise affirmed.

Supreme Court correctly declined to dismiss the defamation claims asserted against Fox News, Dobbs, Bartiromo, and Giuliani. Under New York's Anti-SLAPP statute (Civil Rights Law §§ 76-a[1][a], [2]), to withstand dismissal under CPLR 3211(g)(1), the claims pleaded must have "a substantial basis in law," which requires "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Golby v N & P Engrs. & Land Surveyor, PLLC*, 185 AD3d 792, 793-794 [2d Dept 2020]). The meticulously detailed complaint satisfied the requirements of CPLR 3211(g)(1).

The causes of action for defamation were based on significant allegations that defendant Giuliani (and defendant Powell, against whom the action has been dismissed) made defamatory statements about plaintiffs' involvement in the 2020 Presidential election while knowing that the statements were false, or at least with reckless disregard for the truth. Those causes of action also allege that defendants Fox News, Dobbs, and Bartiromo did not merely report the newsworthy fact that the President's campaign lawyers were recklessly making statements conveying false information. Rather, the complaint alleges in detailed fashion that in their coverage and commentary, Fox News, Dobbs, and Bartiromo effectively endorsed and participated in the statements with reckless disregard for, or serious doubts about, whether the assertions or implications

that plaintiffs had participated in election fraud had any basis in truth or were supported by any reliable evidence.

In fact, according to the allegations in the complaint, Fox News, Dobbs, and Bartiromo stated that Smartmatic's election technology and software were widely used in the 2020 election and in Dominion machines to switch votes, when they actually knew, or easily could have known had they not purposefully avoided publicly available knowledge, that in 2020, the Smartmatic technology was used only in Los Angeles County and that the vote switching claims otherwise had no support (*see Harte-Hanks Communications v Connaughton*, 491 US 657, 692 [1989]; *accord Dominion v Fox News*, 2021 WL 5984265, *22-24, 2021 Del Super LEXIS 706, *59-69 [Del Super Ct 2021, C.A. No.: N21C-03-257 EMD]; *Dominion v Newsmax*, 2022 WL 2208580, *26, 2022 Del Super LEXIS 256, *69 [Del Super Ct 2022, C.A. No.: N21C-08-063 EMD]). Based on the same reasoning, the claims against Pirro, which are based on similar allegations of defamatory statements made with actual malice, must be reinstated.

However, Supreme Court erred in dismissing the third and fifth causes of action as against defendant Giuliani, and we reinstate those claims. As pleaded, those causes of action allege defamatory statements forming the basis for defamation per se claims and do not sound in product disparagement or otherwise require the pleading of special damages. We need not consider plaintiffs' contention that Supreme Court erred in dismissing the ninth cause of action as against defendant Giuliani, as that claim was subsequently reinstated by the court.

We further find the Supreme Court should have granted Fox Corporation's motion to dismiss the claims asserted against it, without prejudice to plaintiffs' ability to replead the claims. With respect to Fox Corporation, which is a corporate entity separate

from Fox News, the complaint does not adequately allege that any Fox Corporation employee played an affirmative role in the publication of the challenged defamatory statements. Nor does the complaint adequately allege that Fox Corporation wholly dominated Fox News so as to liable for the acts of its subsidiary. Even if reasonable, the inference that Fox Corporation, merely by virtue of its ownership of Fox News and its profits, actively took part in the procurement, composition, and publication of the challenged statements, does not alone suffice to allege defamation claims against a corporate parent based on conduct by its wholly owned subsidiary.

We decline to find that plaintiffs should be deemed limited purpose public figures required to allege facts that, if true, would “clearly and convincingly” show defamation with actual malice (*see Gottwald v Sebert*, 193 AD3d 573, 578-579 [1st Dept 2021]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: February 14, 2023

A handwritten signature in black ink, appearing to read "Susanna M. Rojas". The signature is fluid and cursive, with the first name "Susanna" and the last name "Rojas" clearly legible.

Susanna Molina Rojas
Clerk of the Court