

MLRC Media Law Conference  
October 4-6, 2023  
Lansdowne Resort Hotel, Leesburg, VA

PLENARY 2 Oct. 4<sup>th</sup> 7:30 – 8:30pm

**Dominion v. Fox: What's Its Impact:**  
A discussion of what happened in the case, the legal decisions and strategies, the settlement, and the case's ramifications.

With Floyd Abrams, Cahill Gordon; Professor RonNell Andersen Jones; Lee Levine; Tom Clare, Clare Locke; Charles Babcock, Jackson Walker.  
Moderator: George Freeman, MLRC Executive Director

**CASE BACKGROUND**

**US Dominion v. Fox News (Del. Super. Settlement April 18, 2023)**

On April 18, on the eve of trial in Delaware Superior Court, the Dominion v. Fox News case settled for a record \$787.5 million. Two years earlier, Dominion sued Fox News and several of its on-air hosts and guests for \$1.6 billion over a series of statements made in the aftermath of the 2020 presidential election accusing Dominion of “stealing the election” from Trump.

According to the Complaint, Starting November 8, and continuing for months after, on-air guests Rudy Giuliani, Sydney Powell and Mike Lindell promoted a wide-ranging false conspiracy theory that Dominion's voting machines “flipped votes” from Trump to Biden. Dominion further alleged that Fox News hosts Lou Dobbs, Maria Bartiromo, Tucker Carlson, Jeanine Piro, and Sean Hannity republished and endorsed the false conspiracy theory.

During pretrial litigation, Fox News consistently defending itself on the ground that the allegations about Dominion made by Trump representatives were newsworthy and Fox News' coverage was protected by the First Amendment. The trial court denied Fox News's motions to dismiss and for summary judgment. The court held the statements about Dominion were false and were not protected by a neutral report privilege or a fair report privilege. Questions of fact, however, existed over whether Fox News acted with actual malice.

Shortly before the trial was to start, Dominion publicly released a raft of Fox's internal communications obtained during discovery. These included communications with Rupert Murdoch, and on-air talent such as Tucker Carlson, suggesting they knew the allegations of

voting machine fraud were false, but they continued to air those allegations for competitive reasons, namely that regular viewers would defect to other right wing news outlets sympathetic to Trump's false claims of election fraud. The key issue at trial would have been the state of mind of the Fox News' defendants and whether they knew the allegations about Dominion were false or were reckless in broadcasting them. It was thought that the disclosure of internal communications influenced the decision to settle. The settlement, however, did not include an apology to Dominion.

### **Key Questions**

- Why did the case settle on the eve of trial?
- Was the public disclosure of internal Fox News communications obtained in discovery the impetus to settle?
- Could Fox News have mounted a successful lack of actual malice defense at trial? Or won an appeal on this issue?
- Was this case a lost opportunity to recognize a neutral report defense even if the defense would fail under the facts of the case?
- Has the size of the settlement affected damage demands and settlements in other cases?
- Will the settlement chill reporting of newsworthy allegations?
- How come the settlement did not include an apology?
- How will the settlement affect the other "election denial" case pending against Fox News brought by voting software company Smartmatic?
- Will the Smartmatic case settle for a similar amount or could it go to trial in New York?
- Would a New York Court be more sympathetic to the defenses of neutral reportage, fair report & actual malice?
- Several other "election denial" defamation cases are pending against rightwing media news organizations: One America News, Newsmax and Gateway Pundit. Do those cases present identical issues?
- Going forward how much leeway should the media have to report false – but newsworthy statements – by public figures?

- Will the Dominion settlement chill news reports about controversial allegations made in election campaigns?

## **Commentary on the Case and Settlement**

### **Long-Run Effects of Dominion v. Fox - Neutral Reportage Dismissed Out of Hand, But Sullivan Gets a Boost**

MediaLawLetter George Freeman (April 2023)

Fox's public position in the case was that it was protected by the First Amendment: simply broadcasting/repeating newsworthy statements by the president and his acolytes about the presidential election – what is more newsworthy than that? Of course, we know that the First Amendment doesn't protect all speech, and that the doctrine of republication – almost always strictly followed by judges – holds that a repeater of a libelous statement is as liable for it as the original speaker. Put more pithily, "Tale bearers are as bad as tale makers." But what the Fox PR folks were saying, translated to legalese, is that the neutral reportage privilege ought to apply, and that newsworthiness is an important factor when weighing liability in a fact situation such as this. ... Note that this defense is hardly absolute. Even if the accusation is newsworthy, it hinges on two conditions: first, that the original speaker is prominent and responsible, and second, that the media repeated the charges accurately and disinterestedly, that is neutrally, not endorsing or supporting them. What should have happened in Dominion, even in the run-up to trial, is that the judge should have allowed the neutral reportage defense to be argued as a perfect fit for the facts of this case and with the secondary result of bringing much-needed recognition to a badly-needed defense. That would have left it to the jury to decide whether sources such as Rudy Giuliani and Sydney Powell were "responsible" (love to be a bug on the wall for that discussion) and whether Fox endorsed their accusations or reported them neutrally.

<https://medialaw.org/long-run-effects-of-dominion-v-fox/>

### **Dominion's suit exposed how Fox damages democracy with its lies**

The Guardian (Margaret Sullivan) April 19

As a longtime critic of Fox, and as someone who cares deeply about the role of a truth-telling media in our democracy, I wanted to see the case proceed. But I'm not surprised that it didn't. And I never thought that even a verdict for the full damages of \$1.6bn would put the hugely profitable cable network out of business or make any lasting difference in how it functions.

<https://www.theguardian.com/commentisfree/2023/apr/19/dominions-suit-exposed-how-fox-damages-democracy-with-its-lies>

### **There's a big hole in the Dominion-Fox News settlement**

Washington Post (Erik Wemple) April 18

The size of the payout, however, speaks to both the journalistic atrocities and the reams of internal correspondence that Dominion pried from Fox News during the pretrial maneuvering. And yet: It all feels a bit empty.... In its statement, Fox News demonstrated that not even a court record bulging with evidence of perfidy is enough to shame the organization into genuine contrition.

<https://www.washingtonpost.com/opinions/2023/04/18/dominion-fox-settlement-apology/>

### **Dominion vs. Fox News: The case against conspiracy theories**

CBS News (April 16, 2023)

Lee Levine, a retired First Amendment lawyer who has litigated on behalf of major media companies (including CBS and Fox), said the case was the strongest he'd ever seen in terms of evidence: "I have never seen a case involving a public figure where the evidence of actual malice that they will have to put before a jury is stronger."

<https://www.cbsnews.com/news/dominion-voting-systems-vs-fox-news-the-case-against-conspiracy-theories/>

### **The Fox/Dominion Settlement Highlights the Importance of Discovery in Proving Actual Malice**

Reason (April 20, 2023)

Even as Fox lent credence to election conspiracy theorists such as Rudy Giuliani and Sidney Powell, communications revealed during discovery showed, Fox executives, producers, hosts, and reporters were privately dismissing their claims as "really crazy," "comic book stuff," "MIND BLOWINGLY NUTS," "insane," "unbelievably offensive," and "complete bullshit." They described Powell, a frequent Fox guest who accused Dominion of helping Joe Biden steal the election but never presented any evidence to support that charge, as a "crazy would be lawyer," a liar, and "a complete nut" who was telling a story that "doesn't make sense" and seemed to be "losing her mind."

<https://reason.com/2023/04/20/the-fox-dominion-settlement-highlights-the-importance-of-discovery-in-proving-actual-malice/>

### **The Dominion-Fox case has clear lessons—whether or not it settles**

Columbia Journalism Review (April 17, 2023)

Some observers have argued that a trial and finding in Dominion's favor could undermine the protections on which all journalists rely—not least Fox itself, which has dressed its defense in the musty robes of First Amendment jurisprudence, but also some experts and journalists who aren't in the network's corner. Many others see something like the opposite as being true: a trial, they say, would test whether US defamation law is adequate to hold accountable the purveyors of malicious lies, which are not in any way the currency of credible journalism. Whatever the outcome, a trial could be seen as a prominent reminder to right-wingers of the costs to their own media ecosystem of weakening libel protections, which some right-wing politicians want to do.

[https://www.cjr.org/the\\_media\\_today/dominion\\_fox\\_trial\\_settlement.php](https://www.cjr.org/the_media_today/dominion_fox_trial_settlement.php)

### **Why Fox Will Settle the Dominion Case. And why that's okay**

Richard Tofel (March 15, 2023)

Fox’s legal theory—protection for “neutral reportage” of statements by newsmakers—has enjoyed limited judicial support since being most clearly announced more than 45 years ago, and is dramatically undermined here by the fact that Trump & Co. were, we now know, understood by Murdoch and others to be making the statements in question in bad faith.

[https://dicktofel.substack.com/p/why-fox-will-settle-the-dominion?utm\\_source=profile&utm\\_medium=reader2](https://dicktofel.substack.com/p/why-fox-will-settle-the-dominion?utm_source=profile&utm_medium=reader2)

## **Key Documents in US Dominion Inc. V. Fox News**

### **Denial of Summary Judgment (March 31, 2023)**

<https://s3.documentcloud.org/documents/23737043/dominionrlg033123.pdf>

Fox News Network (FNN) argues that the Statements are not defamatory as a matter of law. FNN contends that no reasonable viewer would understand that FNN’s coverage and commentary on the Dominion allegations as presenting information that FNN determined to be true. Instead, FNN asserts that the reasonable viewer would understand that FNN is merely “fulfilling its journalistic duty to ‘present[] newsworthy allegations made by others.’”

Additionally, FNN argues that under New York common-law principles and the First Amendment, the reporting of a newsworthy allegation by the press is not defamatory, even if the allegations are later found to be false. FNN cites to caselaw to argue that when the press repeated allegations which are later proven to be false, even if the allegations are from “questionable” sources, a reasonable viewer would understand the allegations as mere claims, not reports of facts.

FNN also maintains that the Statements are not actionable under the neutral report privilege, the fair report privilege, and opinion privilege. FNN posits that FNN’s coverage of former President Trump’s allegations regarding Dominion and election fraud was newsworthy. As such, the FNN hosts “informed their audiences at every turn that the allegations were just allegations that would need to be proven in court . . . [a]nd to the extent some hosts commented on the allegations, that commentary is independently protected as opinion.” FNN makes a hypothetical argument that if Dominion had their way, anyone who repeats a false allegations by a public official would have committed defamation, which contradicts the First Amendment and its embodiment of a “profound national commitment to the principle that debate on public issues should be uninhabited, robust, and wide-open.” Furthermore, FNN contends that a defamation cause of action requires the plaintiff to produce “clear and convincing” evidence showing that the statements in question were made with actual malice. FNN asserts that Dominion fails to show that FNN made or published the Statements with actual malice. FNN argues that it provided a forum for newsworthy claims and denials to be debated on, and the FNN hosts did not take the allegations at face value when their guests presented the allegations. Finally, FNN argues that it is entitled to summary judgment because Dominion failed to

show that (i) that Dominion actually suffered any economic injury, and (ii) FNN's actions were the cause of any economic harm. FNN notes that this is true even if the Court finds a triable issue of fact as to one or more of the contested statements, and the jury could reasonably find evidence of actual malice.

While the Court must view the record in the light most favorable to Fox, the record does not show a genuine issue of material fact as to falsity. Through its extensive proof, Dominion has met its burden of showing there is no genuine issue of material fact as to falsity. Fox therefore had the burden to show an issue of material fact existed in turn. Fox failed to meet its burden. The evidence developed in this civil proceeding demonstrates that is CRYSTAL clear that none of the Statements relating to Dominion about the 2020 election are true. Therefore, the Court will grant summary judgment in favor of Dominion on the element of falsity.

[M]ultiple genuine issues as to material facts and that no party is entitled to judgment as a matter of law on the element of actual malice.

#### *Newsworthiness/Neutral Reportage Privilege Fails to Shield FNN from Liability*

The neutral report privilege bars recovery for defamation when the challenged statements, even if defamatory, are "newsworthy." The sheer making of an allegation may be newsworthy. FNN claims that the key question in determining when the neutral report privilege applies is whether a reasonable viewer, viewing the statement in the "over-all context in which the assertions were made," would understand the statements as mere allegations to be investigated, rather than facts. FNN asserts that similar to those cases, here FNN neutrally reported the allegations.

Hogan is binding on this Court. Hogan rejects the neutral report privilege and, therefore, the Court will not apply the privilege here.

[In *Hogan v. Herald Co.* (84 AD2d 470, 446 NYS2d 836 [4th Dept 1982], the Appellate Division concluded that New York courts do not recognize a neutral report privilege. The Court of Appeals affirmed the Fourth Department's decision without an opinion (see *Hogan v. Herald Co.*, 58 NY2d 630, 458 NYS2d 538 (Mem) [1982]). Although defendants argue that "New York courts, while not using the words 'neutral report,' have acted to protect neutral reports on allegations about public figures by applying other doctrines in defamation law." The fact is that defendant failed to cite any binding New York cases that expressly contradict Hogan.]

Even if the neutral report privilege did apply, the evidence does not support that FNN conducted good-faith, disinterested reporting.

#### **Related Briefs**

Mar 21, 2023 [Dominion Summary Judgment Hearing Slides](#)

Mar 8, 2023 [Dominion Summary Judgment Reply Brief](#)

Feb 27, 2023 [Dominion Opposition Brief to Fox Opening for Summary Judgment - Accompanying exhibits](#)

Feb 16, 2023 [Dominion Brief In Support Of Motion For Summary Judgment - Accompanying exhibits](#)

**Denial of Motion to Dismiss (Dec. 16, 2021)**

[https://www.dominionvoting.com/download/court-denial-to-dismiss-fox-corporation/?wpdmdl=68573&masterkey=H65upHskFTDNI3DSZQGAcze\\_vC-AMq8RIX32rUzxOU9D3T6MsltJB4VmwGFhWDUrMM9IIEGzoZG7crK4yp\\_xsmmKFQLoM-CwCyq7MkjP13Y](https://www.dominionvoting.com/download/court-denial-to-dismiss-fox-corporation/?wpdmdl=68573&masterkey=H65upHskFTDNI3DSZQGAcze_vC-AMq8RIX32rUzxOU9D3T6MsltJB4VmwGFhWDUrMM9IIEGzoZG7crK4yp_xsmmKFQLoM-CwCyq7MkjP13Y)

Fox argues that multiple constitutional doctrines protect Fox’s alleged defamatory speech. First, Fox contends that truthfully reporting newsworthy allegations made by a sitting president and his legal team on matters of public concern is not actionable. Second, Fox claims that the media is completely protected when reporting and commenting about allegations made in government proceedings. Third, Fox asserts that opinion and hyperbolic rhetoric about newsworthy allegations are constitutionally protected. Finally, Fox claims that none of the challenged individual statements identifies actionable defamation against Fox.

*1. The “Neutral Reportage” Defense Does Not Support Dismissal.*

Fox invokes the neutral reportage privilege—also characterized as the neutral reportage doctrine. Fox argues that it was free to broadcast, without liability, allegations made against Dominion by the Trump Campaign and its attorneys on a matter of public concern. The neutral reportage defense bars recovery for defamation when the challenged statements, even if defamatory, are “newsworthy.”<sup>217</sup> Under the neutral reportage doctrine, the press need not “suppress newsworthy statements merely because it has serious doubts regarding their truth.” Instead, under the doctrine, the press enjoys “immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made.

Fox’s argument, however, fails even if the neutral reportage defense only had been rejected as to private figure plaintiffs.<sup>227</sup> Just because the neutral reportage privilege may have been denied in the context of private figure plaintiffs does not mean, by inference, the defense is available against public figure plaintiffs. Indeed, New York subjects public figure plaintiffs to the actual malice standard, not to a newsworthiness test.<sup>228</sup> The actual malice standard also is the standard under New York’s anti-SLAPP statute (if applicable).<sup>229</sup> Fox’s private figure argument, at most, reveals New York law has not spoken directly on the issue. It does not establish a neutral reportage defense as a matter of New York law. The neutral reportage defense would not warrant dismissal here even if the defense were available. To assert and benefit from this defense, a defendant must show that the defendant accurately and dispassionately reported the newsworthy event. As such, Fox’s reporting must have been neutral, not “a personal attack” on Dominion, to succeed on this defense.

**Complaint: Del. Super. filed March 2021**

<https://hamiltonps.app.box.com/s/j42odhy4cxflxjuw324o72zmx7v7oy8/file/791755207455>

Fox, one of the most powerful media companies in the United States, gave life to a manufactured storyline about election fraud that cast a then-little-known voting machine company called Dominion as the villain. After the November 3, 2020 Presidential Election, viewers began fleeing Fox in favor of media outlets endorsing the lie that massive fraud caused President Trump to lose the election. They saw Fox as insufficiently supportive of President Trump, including because Fox was the first network to declare that President Trump lost Arizona. So Fox set out to lure viewers back—including President Trump himself—by intentionally and falsely blaming Dominion for President Trump’s loss by rigging the election.

Fox endorsed, repeated, and broadcast a series of verifiably false yet devastating lies about Dominion. These outlandish, defamatory, and far-fetched fictions included Fox falsely claiming that: (1) Dominion committed election fraud by rigging the 2020 Presidential Election; (2) Dominion’s software and algorithms manipulated vote counts in the 2020 Presidential Election; (3) Dominion is owned by a company founded in Venezuela to rig elections for the dictator Hugo Chávez; and (4) Dominion paid kickbacks to government officials who used its machines in the 2020 Presidential Election.

Fox took a small flame and turned it into a forest fire.

**Other Pending Cases**

**Smartmatic v. Fox News, Lou Dobbs, Maria Bartiromo, Jeanine Pirro, Rudolph Giuliani, And Sidney Powell (N.Y. Sup. filed February 2021)**

**Complaint**

<https://www.courthousenews.com/wp-content/uploads/2021/02/SMARTMATIC-fox.pdf>

**Fox News Motion to Dismiss**

<https://s3.documentcloud.org/documents/20475431/fox-news-moves-to-dismiss-smartmatic-complaint.pdf>

“If the mere fact that a statement is made is itself newsworthy, then the reporting of that statement by the press is protected expression, regardless of whether the statement is defamatory and false, and the press is not bound to verify the truth of the statement.” While that doctrine is sometimes described as a common-law one, it is firmly rooted in the First Amendment, as “[t]he public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.” (Edwards v. Natl.



Audubon Socy., Inc., 556 F2d 113, 120 [2d Cir 1977].) Indeed, while the neutral-report doctrine is often described as a “privilege,” properly speaking, such coverage is not merely “privileged”; it is not defamatory at all, because a reasonable viewer would understand that the publication is not presenting information that it has determined to be true, but rather is fulfilling its journalistic duty to “present[] newsworthy allegations made by others.” (Croce v. N.Y. Times Co., 930 F3d 787, 793 [6th Cir 2019].)

Core First Amendment protections are also reflected in doctrines that protect the press when reporting on judicial proceedings, as “the public has the right to be informed as to what occurs in its courts,” (Estes v. Texas, 381 US 532, 541-542 [1965]), regardless of the accuracy of the underlying allegations, (Freeze Right Refrig. & Air Conditioning Servs., Inc. v. City of New York, 101 AD2d 175, 181-182 [1st Dept 1984]). The fair-report doctrine is “broad.” (Cholowsky v. Civiletti, 69 AD3d 110, 114 [2d Dept 2009]; Larreal v. Telemundo of Fla., 2020 WL 5750099, \*8 [SD Fla Sept. 25, 2020, No. 19-22613].) It does not confine the press to reporting the precise contents of legal documents; it covers reports on attorney remarks too. (Larreal, 2020 WL 5750099, \*7; Lacher v. Engel, 33 AD3d 10, 17 [1st Dept 2006]; Jamason v. Palm Beach Newspapers, Inc., 450 So 2d 1130, 1132 [Fla Dist Ct App 1984].) And a report need not be “technically precise,” (Rasmussen v. Collier County Publ. Co., 946 So 2d 567, 570 [Fla Dist Ct App 2006]); the press is free to use “colorful language” or coverage phrased to grab attention, (Folta v. N.Y. Times Co., 2019 WL 1486776, \*4 [ND Fla Feb. 27, 2019, No. 1:17cv246]; see Holy Spirit Assn. for the Unification of World Christianity v. N.Y. Times Co., 49 NY2d 63, 68 [1979] (“language used” should “not be dissected and analyzed with a lexicographer’s precision”))

Those core First Amendment principles present an insurmountable obstacle to Smartmatic’s claims. The statements challenged here—the overwhelming majority of which were made by guests appearing on Fox shows—all concerned a matter of profound public importance: the legitimacy of the 2020 election. In the election’s aftermath, the President and his allies repeatedly claimed the election had been affected by fraud. Regardless of their accuracy, those claims “directly implicate[d] matters of public concern,” (Page v. Oath Inc., 2018 WL 1474620, \*2 [SD NY Mar. 26, 2018, No. 17 Civ. 6990])—as evidenced by the fact that virtually every news outlet in the nation (if not the world) consistently covered them. Those claims took on even greater importance—and the press acquired even greater First Amendment protection in covering them—once the President promised to (and, indeed, did) challenge the election results in court. Simply put, the public has an undeniable right to know, and the press has an undeniable right to cover, both the fact that the sitting President has refused to accept the outcome of a presidential election, and the grounds on which the President and his allies are planning to challenge that election, regardless of the strength of those claims.....

Smartmatic’s claims against Fox thus fail at the threshold, for Smartmatic fails to identify any statements that could form the basis of a defamation claim against Fox. Smartmatic does not (and cannot) allege that Fox was running exposés in which it purported to have independently uncovered election manipulation or fraud by Smartmatic. Virtually all the challenged statements occurred during interviews in which Fox hosts were providing a

forum for the President’s advocates to inform the public of the allegations they intended to press. The hosts did not introduce Giuliani and Powell by announcing that Fox had discovered election fraud and was bringing on independent experts to explain its discoveries. They made crystal clear they invited Giuliani and Powell onto their shows because they were the best source of information about the content of their own unquestionably newsworthy allegations of voting fraud and the evidence they had to substantiate those allegations. And the questions Fox hosts posed elicited their claimed evidence. A reasonable viewer would readily have understood that the information Fox was imparting was the fact that the President, Giuliani, and Powell were making certain allegations—not that those allegations were necessarily true. The bulk of Smartmatic’s allegations thus fail for the simple reason that Fox said nothing defamatory. To be sure, not every statement Smartmatic challenges was made by Giuliani or Powell. But to the extent hosts themselves described the allegations that the President, Giuliani, and Powell were making, they did so in the context of asking guests to comment on them. That of course cannot be grounds for defamation, as the press could not cover a public controversy if it could be sued just for repeating a third party’s potentially defamatory allegations when asking others to react to, comment on, or prove or disprove them. If that were enough to allow a defamation claim to go forward, Smartmatic could sue virtually every news outlet in the nation. Beyond that, Smartmatic simply points to instances in which hosts offered the kind of colorful commentary they can be expected to provide when conducting an interview. Some (but by no means all) of those comments were encouraging, while others expressed considerable doubt that the allegations could be proven. But the line between protected speech and actionable defamation cannot turn on whether a commentator expresses doubt versus hope that a guest can prove her newsworthy claims. In fact, sometimes the most damning statements are elicited by an interviewer who is egging the interviewee on, either sincerely or as part of her craft. Either way, whether the interviewer is guileful or gullible, she is protected by the First Amendment; the liability for defamation (if any) lies with the interviewee. Nor does it make any difference that Giuliani, Powell, and other guests and hosts were discussing their allegations generally or colloquially and not necessarily quoting their pleadings verbatim. Newsworthy statements or allegations need not be conveyed with technical precision. So long as the “ordinary reader” (or, here, viewer) would conclude the press was covering the content (or anticipated content) of newsworthy allegations or official proceedings, (*Fridman v. BuzzFeed, Inc.*, 172 AD3d 441, 442 [1st Dept 2019]), the press has “no duty to further investigate or verify” those allegations, (*Folta*, 2019 WL 1486776, \*4; see *Gillings v. N.Y. Post*, 166 AD3d 584, 586 [2d Dept 2018] (fair-report doctrine applies unless context makes it impossible for ordinary viewer to determine whether defendant was reporting on official proceeding)). What Fox provided viewers was a “substantially correct account” of the claims the President and his surrogates were pressing. (*Larreal*, 2020 WL 5750099, \*8.)<sup>13</sup> Just as the press could not be held liable for interviewing a prosecutor about a newsworthy prosecution if the charges ultimately turn out to be bogus, nor can it be held liable for interviewing the lawyers challenging a presidential election at the President’s behest, even if those allegations ultimately prove unsubstantiated.

In short, Fox’s coverage of this “newsworthy controversy,” (*Lasky v. Am. Broadcasting*

Companies, Inc., 631 F Supp 962, 971 [SD NY 1986]), was exactly the kind of expression that the press must be “afforded the freedom to” provide without fear of liability, (Edwards, 556 F2d at 120). “If the mere fact that a statement is made is itself newsworthy, then the reporting of that statement by the press is protected expression, regardless of whether the statement is defamatory and false, and the press is not bound to verify the truth of the statement.” (DeLuca, 109 Misc 2d at 345-346.) That holds equally true whether the press is reporting newsworthy statements or allegations made elsewhere, or allowing a newsmaker to explain the allegations herself. Either way, the press is not required to “suppress newsworthy statements merely because it has serious doubts regarding their truth.” (Edwards, 556 F2d at 120.) After all, when “[w]hat is newsworthy about ... accusations is that they were made,” (id.), that is every bit as newsworthy (if not sometimes more so) if they prove unsubstantiated. Smartmatic’s effort to impose billions of dollars of liability on Fox for keeping the public informed of the unquestionably newsworthy claims of unquestionably newsworthy figures strikes at the very heart of—and is squarely foreclosed by – the First Amendment

### **Smartmatic Brief in Opposition**

<https://www.medialaw.org/images/medialawdaily/04.13.21smartmatic.pdf>

### **Denial of Motion to Dismiss (March 8, 2022)**

[https://scholar.google.com/scholar\\_case?case=3783349586818919511&2](https://scholar.google.com/scholar_case?case=3783349586818919511&2)

Denying Fox’s motion to dismiss, the trial court noted that the neutral report privilege has only been recognized in New York federal court, not in state court. Even if the privilege were applicable in state court, Fox failed to establish its applicability because Smartmatic was not a public figure within the meaning of the privilege.

Moreover, Smartmatic sufficiently pled that Fox News acted with actual malice to overcome the protections of the New York State anti-SLAPP statute.

This Court finds that plaintiffs have adequately pleaded that their claims against Fox News have a sufficient basis in law so as to withstand the burden imposed by CPLR 3211(g). They allege that Fox News acted with actual malice by broadcasting information proffered by Powell, Giuliani, and the Fox anchor defendants which it knew was false and that, even if Fox News did not know the information was false, it had reason to doubt the veracity of the same since it was unsupported by any facts and was refuted by election specialists and officials. Plaintiffs also plead that Fox News acted with ill will towards them by making them scapegoats for President Trump's loss of the election and by broadcasting material intended to bolster its ratings at the expense of their reputation (See *Greenberg v Spitzer*, 155 AD3d 27, 55 [2d Dept 2017])....

Fox News attempts to distance itself from the allegedly defamatory statements made by Powell and Giuliani by claiming that it repeatedly asked those defendants for proof

substantiating their accusations about plaintiffs and they failed to produce any. However, this fact can also support plaintiffs' claim that Fox News had reason to suspect that what it was broadcasting was false, and nevertheless continued to allow Powell and Giuliani to appear on its network, specifically on shows hosted by Dobbs, Bartiromo, and Pirro, to promote completely unfounded claims that plaintiffs' software enabled President Biden to steal the election.[21] Even assuming that Fox News did not intentionally allow this false narrative to be broadcasted, there is a substantial basis for plaintiffs' claim that, at a minimum, Fox News turned a blind eye to a litany of outrageous claims about plaintiffs, unprecedented in the history of American elections, so inherently improbable that it evinced a reckless disregard for the truth.

### **New York Appellate Division Affirms Denial of Fox's Motion to Dismiss**

[https://www.nycourts.gov/courts/ad1/calendar/List\\_Word/2023/02\\_Feb/14/PDF/Smartmatic%20v%20Fox%20Corp%20\(2022-01291\).pdf](https://www.nycourts.gov/courts/ad1/calendar/List_Word/2023/02_Feb/14/PDF/Smartmatic%20v%20Fox%20Corp%20(2022-01291).pdf)

[T]he 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 ....

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.