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Libel Developments Boutique

Anna Kadyshevich, Warner Bros. Discovery
Matthew Leish, Miller Korzenik Sommers Rayman
Kate Bolger, Davis Wright Tremaine
Matthew Schafer, Paramount

1. Actual Malice Developments

It has been a busy time for actual malice. After blistering attack from judges throughout the judicial system, the U.S. Supreme Court's affirmed its core principles of *Times v. Sullivan* in *Counterman* this past June. The standard also featured in Judge Rakoff's decision in *Palin v. NY Times*, and in the *Dominion v. Fox News* litigation holding that actual malice had to be presented to a jury.

Have we seen the end of the attacks and what should we be doing to keep the status quo? Relevant materials include:

- *Counterman v. Colorado*, 143 S. Ct. 2106 (2023)
https://www.supremecourt.gov/opinions/22pdf/22-138_43j7.pdf

In *Counterman*, Justice Kagan reasoned that a conviction for "true threats" requires a mens rea of "recklessness" to avoid a chilling effect on protected speech. Referencing, and reaffirming the vitality of *Sullivan*, Kagan wrote "To combat the kind of chill [defendant] references our decisions have often insisted on protecting even some historically unprotected speech through the adoption of a subjective mental state element. We follow the same path today, holding that the state must prove in true-threats cases that the defendant had some understanding of his statements' threatening character."

- Counterman v. Colorado: Good News for Sullivan Fans
MLRC Media Law Letter June 2023
https://medialaw.org/counterman-v-colorado-good-news-for-sullivan-fans/

And where does the Court find that subjective recklessness standard?

> Defamation is the best known and best theorized example. False and defamatory statements of fact, we have held, have "no constitutional value." Yet a public figure cannot recover for the injury such a statement causes unless the speaker acted with "knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U. S. 254, 280 (1964); see Garrison v. Louisiana, 379 U. S. 64, 74 (1964) (using the same standard for criminal libel). That rule is based on fear of "self-censorship"—the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers from making even truthful statements. Sullivan, 376 U. S., at 279. The First Amendment, we have concluded, "requires that we protect some falsehood in order to protect speech that matters."

Counterman, slip op. at 7-8. The majority went on to explain,

> Using a recklessness standard … fits with the analysis in our defamation decisions. As noted earlier, the Court there adopted a recklessness rule, applicable in both civil and criminal contexts, as a way of accommodating competing interests. … In the more than half-century in which that standard has governed, few have suggested that it needs to be higher—in other words, that still more First Amendment "breathing space" is required.

- Lee Levine and Matthew L. Schafer, *A Resounding Reaffirmation of Times v. Sullivan*, The Wall Street Journal (June 28, 2023) https://www.wsj.com/articles/a-resounding-reaffirmation-of-times-v-sullivan-libel-laws-supreme-court-journalists-defamation-first-amendment-bb846ad6.

  Writing that in *Counterman* the Court majority laid to rest the prospect that it would revisit *New York Times v. Sullivan*.

- *Dershowitz v. Cable News Network, Inc.*, No. 20-61872-CIV, 2023 WL 4851704 (S.D. Fla. Apr. 4, 2023) https://storage.courtlistener.com/recap/gov.uscourts.flsd.577926/gov.uscourts.flsd.577926.290.0_2.pdf

  The court dismissed on summary judgment Alan Dershowitz's defamation suit against CNN finding he failed to advance sufficient evidence of actual malice. Dershowitz had alleged that CNN's coverage of his Trump impeachment defense falsely portrayed him "as a constitutional scholar and intellectual who had lost his mind." In dicta, the court criticized Sullivan, arguing that "while laudable in a different era—that the First Amendment requires public figures to establish actual malice simply has no basis in and "no relation to the text, history or structure of

> the Constitution, and it baldly constitutionalized an area of law refined over centuries of common law adjudication…. The Sullivan case, decided at a time when people got their news from Walter Cronkite or David Brinkley as opposed to Twitter, is the law of the land and this Court is duty bound to follow it."
>
> Now on appeal to the 11th Circuit, Dershowitz argues he presented sufficient evidence of actual malice, and seizing on the dicta about Sullivan, asks the court to alternatively reconsider, reframe and perhaps overrule Sullivan.

Appellant's Brief: Dershowitz v. Cable News Network
https://storage.courtlistener.com/recap/gov.uscourts.ca11.82454/gov.uscourts.ca11.82454.21.0.pdf

> "While plaintiff believes he has amply met his burden to merit a trial under the prevailing case law, if this Court were to disagree, Dershowitz respectfully suggests that the Sullivan line of cases should be reconsidered, reframed and perhaps overruled. He recognizes that this Court cannot overrule Sullivan and its Supreme Court progeny. He makes this argument to preserve the issue if the case should reach the Supreme Court. He specifically challenges the requirement that he show "clear and convincing evidence" of malice at the summary judgment stage, as required by Anderson v. Liberty Lobby, 477 U.S. 242, 244 (1986). No other area of law requires evidence of a defendant's subjective state of mind, proven to such a high degree of certainty to ajudge rather than a jury—as Sullivan's author sagely observed."

CNN Brief
https://medialaw.org/wp-content/uploads/2023/09/09.13.23cnn.pdf

Quoting Dershowitz's own words that:

> "The most significant difference between freedom of the press in the United States and elsewhere" is the safeguard embodied in Sullivan. Alan M. Dershowitz, *Taking Liberties: A Decade Of Hard Cases, Bad Laws, and Bum Raps* 63 (1988). "And there can be no more important safeguard for the freedom of the American public to obtain information necessary to the functioning of a democracy."

- *Trump v. Cable News Network, Inc.*, No. 22-61842-CIV, 2023 WL 4845589 (S.D. Fla. July 28, 2023)
https://storage.courtlistener.com/recap/gov.uscourts.flsd.621239/gov.uscourts.flsd.621239.31.0_1.pdf

Trump sued CNN for $475 million alleging that CNN's references to his false stolen election claim as his "Big Lie" defamed him by comparing him to Hitler and the Nazi

regime. Trump further alleged that CNN failed to similarly challenge Democrat politicians who complained about election integrity. He argued that CNN's disparate treatment of public figures is evidence of malice. Granting a motion to dismiss, the court reasoned that being "Hitler-like" is not a verifiable statement of fact that would support a defamation claim.

- *US Dominion, Inc. v. Fox News Network, LLC*, No. N21C-03-257 EMD, 2023 WL 2730567 (Del. Super. Mar. 31, 2023) https://scholar.google.com/scholar_case?case=10543739267013148955&hl=en&as_sdt=6&as_vis=1&oi=scholarr

> "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."

- *Berisha v. Lawson*, 141 S. Ct. 2424, 2424-30 (2021) (Thomas & Gorsuch, J., dissenting from denial of certiorari) https://www.supremecourt.gov/DocketPDF/20/20-1063/167810/20210201150758875_40588 pdf Katriel br-1.pdf

In July 2021, the Supreme Court denied a petition for certiorari in Berisha v. Lawson. The Eleventh Circuit had affirmed summary judgment for the publisher, holding that the public figure plaintiff, the son of a former Albanian prime minister, failed to provide sufficient evidence of actual malice.

Plaintiff, inspired by Justice Thomas's 2019 criticism of *New York Times v. Sullivan*, asked the Supreme Court to overturn the landmark case, at least as it applies to public figures. The Court denied the petition with two dissents. Justice Thomas reiterated his position that the "Court's pronouncement that the First Amendment requires public figures to establish actual malice bears no relation to the text, history, or structure of the Constitution." But he added a new gloss to his criticism – the outrage over dangerous misinformation, such as the notorious Pizzagate conspiracy theory.

> "Our reconsideration is all the more needed because of the doctrine's real-world effects. Public figure or private, lies impose real harm. Take, for instance, the shooting at a pizza shop rumored to be "the home of a Satanic child sex abuse ring involving top Democrats such as Hillary Clinton." Or consider how online posts falsely labeling someone as "a thief, a fraudster, and a pedophile" can spark the need to set up a home-security system. Or think of those who have had job

> opportunities withdrawn over false accusations of racism or anti-Semitism. Or read about Kathrine McKee— surely this Court should not remove a woman's right to defend her reputation in court simply because she accuses a powerful man of rape. The proliferation of falsehoods is, and always has been, a serious matter. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires. I would grant certiorari."

Justice Gorsuch dissented as well, delivering a broad policy-based critique of New York Times v. Sullivan.

> "Since 1964, however, our Nation's media landscape has shifted in ways few could have foreseen. Back then, building printing presses and amassing newspaper distribution networks demanded significant investment and expertise. See Logan, Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan, 81 Ohio St. L. J. 759, 794 (2020) (Logan). Broadcasting required licenses for limited airwaves and access to highly specialized equipment. See ibid. Comparatively large companies dominated the press, often employing legions of investigative reporters, editors, and fact-checkers. See id., at 794-795. But "[t]he liberty of the press" has never been "confined to newspapers and periodicals"; it has always "comprehend[ed] every sort of publication which affords a vehicle of information and opinion." Lovell v. City of Griffin, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949 (1938); see also Sentelle, Freedom of the Press: A Liberty for All or a Privilege for a Few? 2013 Cato S. Ct. Rev. 15, 30-34. And thanks to revolutions in technology, today virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world. Logan 803 (noting there are 4 billion active social media users worldwide)…. The bottom line? It seems that publishing without investigation, fact-checking, or editing has become the optimal legal strategy. See id., at 778-779. Under the actual malice regime as it has evolved, "ignorance is bliss." Id., at 778. Combine this legal incentive with the business incentives fostered by our new media world and the deck seems stacked against those with traditional (and expensive) journalistic standards —and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth. See ibid. What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable. Id., at 804. As Sullivan's actual malice standard has come to apply in our new world, it's hard not to ask whether it now even "cut[s] against the very values underlying the decision." Kagan, A Libel Story: Sullivan Then and Now, 18 L. & Soc. Inquiry 197, 207 (1993) (reviewing A. Lewis, Make No Law: The Sullivan Case and the First Amendment (1991)). If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer merely tolerate but

encourage falsehoods in quantities no one could have envisioned almost 60 years ago?"

- *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 243 (D.C. Cir.) (Silberman, J., dissenting in part), *cert. denied*, 142 S. Ct. 427 (2021). https://www.cadc.uscourts.gov/internet/opinions.nsf/C5F7840A6FFFCF648525869D004ECAC5/$file/19-7132-1890626.pdf

  "There can be no doubt that the New York Times case has increased the power of the media. Although the institutional press, it could be argued, needed that protection to cover the civil rights movement, that power is now abused. In light of today's very different challenges, I doubt the Court would invent the same rule. As the case has subsequently been interpreted, it allows the press to cast false aspersions on public figures with near impunity."

2. Defamation as a Political Tool

The last few years have seen a substantial uptick in defamation claims against "the enemy of the people", i.e. traditional media organizations, that are designed to silence criticism or advocate for a particular political position, instead of trying to vindicate some degree of reputational harm. From hydroxychloroquine to Devin Nunes to the Flynn family, major media organizations throughout the country have been dealing with a spate of cases designed to punish their core political speech. Are there things we can do to prevent these types of cases and might seeing litigation funders be a way to proceed? Relevant materials include:

- *Immanuel v. Cable News Network, Inc.*, 618 F. Supp. 3d 557 (S.D. Tex. 2022), *appeal dismissed,* No. 22-20455, 2022 WL 18912180 (5th Cir. Sept. 27, 2022) https://scholar.google.com/scholar_case?case=9370622895018056794&hl=en&as_sdt=6&as_vis=1&oi=scholarr

  Falsity:
  "Because CNN reported what Dr. Immanuel had said, primarily using her own words and videos, the reports that she had said what she said are not materially false and cannot be the basis of a claim for defamation. The slight variations between Dr. Immanuel's precise words and CNN's paraphrases are not actionable…. CNN fairly reported what Dr. Immanuel had said about medical treatment of COVID and more general statements about medical treatment and science. Those reports are not defamatory, as a matter of law.

  Opinion:
  "Dr. Immanuel alleges that CNN defamed her by covering her statements advocating and promoting HCQ to treat COVID and by criticizing her views as disinformation supporting harmful medical treatments. Statements of different,

even conflicting, opinions, about unsettled matters of scientific or medical treatment that are the subject of ongoing public debate and deep public interest, cannot give rise to defamation claims. See, e.g., ONY Inc., v. Cornerstone Therapeutics Inc., 720 F.3d 490, 497-98 (2d Cir. 2013); Arthur v. Offit, Case No. 09-cv-1398, 2010 WL 883745, at *6 (E.D. Va. Mar. 10, 2010); cf. Ioppolo v. Rumana, 581 F. App'x 321, 330-31 (5th Cir. 2014). Courts do not use defamation law to decide or cut short arguments over unsettled questions of what medication best or most safely prevents or treats disease."

- *Nunes v. Lizza*, 12 F.4th 890 (8th Cir. 2021) https://scholar.google.com/scholar_case?case=14272764840535273426&hl=en&as_sdt=6&as_vis=1&oi=scholarr

> "The claims are based on an article published in Esquire magazine. Although we agree that there are insufficient allegations of express defamation, we conclude that the complaint does state a claim for defamation by implication as to a republication of the article….
>
> Nunes has plausibly alleged that Lizza and Hearst intended or endorsed the implication that Nunes conspired to cover up the farm's use of undocumented labor. The complaint points to the article's "click-bait headline" that Nunes is hiding a "politically explosive secret," its discussion of his efforts to conceal the farm's move to Iowa, and its claim that the farm employs undocumented labor. The manner in which the article presents the discussion of the farm's use of undocumented labor permits a plausible inference that Lizza and Hearst intended or endorsed the implication. Thus, the complaint states a plausible claim for defamation by implication.
>
> The complaint here adequately alleges that Lizza intended to reach and actually reached a new audience by publishing a tweet about Nunes and a link to the article. In November 2019, Lizza was on notice of the article's alleged defamatory implication by virtue of this lawsuit. The complaint alleges that he then consciously presented the material to a new audience by encouraging readers to peruse his "strange tale" about "immigration policy," and promoting that "I've got a story for you." Under those circumstances, the complaint sufficiently alleges that Lizza republished the article after he knew that the Congressman denied knowledge of undocumented labor on the farm or participation in any conspiracy to hide it."

- *Trump v. Cable News Network, Inc.*, No. 22-61842-CIV, 2023 WL 4845589 (S.D. Fla. July 28, 2023) https://scholar.google.com/scholar_case?case=12068352960315606325

Dismissing Trump's $475 million claim against CNN.

- *1st Amendment Praetorian v. Denver Lee Riggleman, IIC, et al.*, (W.D. Va. complaint filed Oct. 19, 2022) https://storage.courtlistener.com/recap/gov.uscourts.vawd.126626/gov.uscourts.vawd.126626.1.0.pdf

  Alleging that Esquire magazine article falsely portrayed plaintiff as Jan. 6 insurrectionist.

- *Nunes v. NBCUniversal Media, LLC*, No. 22-CV-1633 (PKC), 2022 WL 17251981 (S.D.N.Y. Nov. 28, 2022) https://scholar.google.com/scholar_case?case=5428622264255644330&hl=en&as_sdt=6&as_vis=1&oi=scholarr

  Devin Nunes defamation lawsuit over Rachel Maddow Show episode can proceed as to the assertion that "Congressman Nunes has refused to answer questions about what he received from Andriy Derkach. He has refused to show the contents of the package to other members of the intelligence community. He has refused to hand it over to the FBI which is what you should do if you get something from somebody who is sanctioned by the U.S. as a Russian agent."

  > "A refusal to turn over the package to the law-enforcement body tasked with investigating and enforcing the intelligence laws is factually distinct from declining to publicly answer questions raised in a public legislative proceeding, and could plausibly be understood by a reasonable viewer to suggest unlawful conduct on the part of Nunes."

- *Dershowitz v. Cable News Network, Inc.*, No. 0:20-cv-61872, ECF No. 302 (S.D. Fla. Aug. 11, 2023) https://storage.courtlistener.com/recap/gov.uscourts.flsd.577926/gov.uscourts.flsd.577926.302.0.pdf

  > "Costs are taxed in favor of Cable News Network, Inc., and against Alan Dershowitz in the amount of $46,814.82."

3. Neutral Report Privilege: Does the Privilege Survive After *Dominion*?

   Is the Neutral Report privilege dead and can anything be done to save it?

   US Dominion Inc. V. Fox News, (Del. Super. March 31, 2023) (denying summary judgment)

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

Newsworthiness/Neutral Reportage Privilege Fails to Shield Fox News Network 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."

- *Gubarev v. BuzzFeed, Inc.*, 340 F. Supp. 3d 1304 (S.D. Fla. 2018)

https://scholar.google.com/scholar_case?case=10172968720741387511&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Holding that BuzzFeed's publication of the so-called Steele Dossier about now debunked claims of Russian interference in the 2016 presidential election was protected by the fair report privilege but rejecting application of the neutral report privilege. Applying New York law, the court noted that New York State courts have rejected the neutral report privilege.

- *Croce v. N.Y. Times Co.*, 930 F.3d 787 (6th Cir. 2019)
https://scholar.google.com/scholar_case?case=18351550564527438834&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Affirming dismissal of defamation and related claims against the New York Times over an article discussing allegations of scientific misconduct.

> "Applying Ohio law, we conclude that a reasonable reader would construe the article as a standard piece of investigative journalism that presents newsworthy allegations made by others, with appropriate qualifying language…. To be sure, the article quotes several of Dr. Croce's critics, i.e., the article states that allegations and complaints have been lodged against Dr. Croce. Further, the article raises concerns about various errors in Dr. Croce's papers, as well as concerns about OSU's ability to investigate effectively allegations against him…. But stating that there are allegations against someone and raising these concerns does not necessarily imply guilt."

- *US Dominion, Inc. v. Fox News Network, LLC*, No. CV N21C-03-257 EMD, 2021 WL 5984265 (Del. Super. Ct. Dec. 16, 2021), *cert. denied*, No. CV N21C-03-257 EMD, 2022 WL 100820 (Del. Super. Ct. Jan. 10, 2022), *and appeal refused*, 270 A.3d 273 (Del. 2022) (order denying motion to dismiss)
  https://casetext.com/case/us-dominion-inc-v-fox-news-network-llc-1

  Denying Fox News' Motion to Dismiss

  > 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." 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."
  >
  > The neutral reportage defense was developed by a federal court of appeals; however, the defense seems to run contrary to United States Supreme Court precedent as it seems to create a nearly unqualified privilege. The United States Supreme Court has attempted to strike a balance between First Amendment freedoms and viable claims for defamation. In doing so, the United States Supreme Court has declined to endorse per se protected categories like newsworthiness. Instead, the determination of how much protection should be afforded the media has been left to the states.

One of New York's intermediate appellate courts, the Appellate Division, Fourth Department, recognized the tension between the neutral reportage doctrine and binding First Amendment precedent. In Hogan v. Herald Co., the Appellate Division determined the neutral report doctrine could not be reconciled with binding free speech precedent. As a result, the Appellate Division held the neutral reportage doctrine inapplicable under New York law. The New York Court of Appeals affirmed Hogan. Since then, the New York Court of Appeals has restated its rejection of the neutral reportage doctrine. Given this New York precedent, the Court questions whether Fox can raise neutral reportage doctrine or analogous newsworthiness privilege as an absolute defense to liability for defamation under New York law.

Fox attempts to distinguish Hogan on its facts, arguing Hogan rejected the neutral reportage doctrine in the context of "private figure" plaintiffs. As an initial matter, the parties do not discuss whether Dominion is a public or private figure, making this distinction not relevant at this time. Fox's argument, however, fails even if the neutral reportage defense only had been rejected as to private figure plaintiffs. 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. The actual malice standard also is the standard under New York's anti-SLAPP statute (if applicable). 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. Dominion's well-pleaded allegations, however, support the reasonable inference that Fox's reporting was not accurate or dispassionate."

4. Legislative Efforts to Bolster Defamation Plaintiffs – A Focus on Florida Senate Bill 1220:

This year, Florida legislators attempted to pass a statute that would have provided extraordinary protections to plaintiffs in a defamation action – including requiring that a negligence standard apply to a defamation claim whenever the challenged reporting comes from an unidentified source. Through the dogged efforts of legislators and MLRC members, the legislation was defeated. But is there more trouble brewing?

- Florida Senate Bill 1220: Defamation and Related Actions (https://www.flsenate.gov/Session/Bill/2023/1220)
- Free Speech in the "Free State": A Review of the State of the First Amendment in Florida
  MLRC Bulletin July 2023
  By Rachel Fugate and Sarah Papadelias
  https://medialaw.org/free-speech-in-the-free-state/

> If passed, the bills would have: (1) altered the definition of public figures to eliminate the actual malice standard in certain circumstances; (2) specified instances where actual malice would be presumed; (3) lowered the burden of proof for statements made by anonymous sources; (4) shifted attorney fee provisions to favor prevailing plaintiffs in defamation actions; (5) codified expansive venue provisions; (6) eliminated the reporters' privilege in defamation cases; and (7) expanded certain defamation and privacy torts….
>
> Although these bills are "dead" in Florida for the time being, there is a consensus that they could be easily revived in a subsequent session."

5. The Snowball Effect:

What happens when one defamation action spawns another defamation action? Will there ever be an end?

- *Nunes v. Lizza*, 12 F.4th 890 (8th Cir. 2021)
  https://scholar.google.com/scholar_case?case=14272764840535273426&hl=en&as_sdt=6&as_vis=1&oi=scholarr

- *Carroll v. Trump*, No. 20-CV-7311 (LAK), 2023 WL 5731152 (S.D.N.Y. Sept. 6, 2023)
  https://scholar.google.com/scholar_case?case=10834764695150259184&q=%E2%80%A2%09Carroll+v.+Trump&hl=en&scisbd=2&as_sdt=6,31&as_ylo=2023

  Granting summary judgment to E. Jean Carroll on liability in her defamation claim against Donald Trump for statements he made while in office accusing Carroll of fabricating her accusation that Trump sexually assaulted her for ulterior and improper purposes. The court gave preclusive effect (or "collateral estoppel") to a jury verdict issued in favor of Carroll in May 2023 finding that Trump defamed her by making the same accusation against Carroll on social media after he was out of office.

- Matthew L. Schafer, Jeff Kosseff, *Protecting Free Speech in A Post-Sullivan World*, 75 Fed. Comm. L.J. 1, 28 (2022)
  http://www.fclj.org/wp-content/uploads/2022/11/Vol.-75.1.5-Protecting-Free-Speech-in-a-Post-Sullivan-World_Proof-2-1.pdf

> [Trump's] comments appear to have politicized and publicized the law of libel. Throughout his presidency, many, including his own campaign, increasingly resorted to defamation lawsuits and threats. By early 2020, the Trump campaign filed four lawsuits against The New York Times, The Washington Post, CNN, and an unlucky local Wisconsin television station that ran a political ad attacking Trump's coronavirus response. As Neal Katyal and Joshua Geltzer observed in The Atlantic after the campaign sued the three national news organizations but before they turned their eye on Northern Wisconsin's WJFW-TV, "[E]ven if these lawsuits are unlikely to succeed, they can nevertheless do great harm" through self-censorship, especially by "local media outlets—whether newspapers, radio stations, TV news programs, or websites—that already are struggling to stay afloat." Devin Nunes, the former Congressman, has filed defamation lawsuit after defamation lawsuit against his critics, including the Rachel Maddow Show, *The Washington Post*, Twitter, CNN, *Esquire Magazine*, and a fake cow's Twitter account. …
>
> Joe Arapaio, the former Maricopa County Sheriff, sued CNN, Huffington Post, and Rolling Stone, alleging that inaccurate reporting ruined his chances at a 2020 run for Senate. And before that, he sued the Times for the same reasons. At that time, his lawyer called Michelle Cottle, a Times reporter individually named, a "hate-filled reporter" who worked for a "venomous leftist publication."
>
> In 2017, after the publication of an editorial that some read as implying that Sarah Palin motivated the assassination attempt on Gabby Giffords, Palin sued the Times. Palin argued that the editorial could be read as referring to her (although it did not name her) and further that it defamed her by implying that she had motivated the shooter (she had released a map with stylized cross-hairs over congressional districts). After the Times won a motion to dismiss, the Second Circuit reversed, allowing the case to go into discovery. At trial, both the judge and the jury sided with the Times.

- Lyrissa Lidsky, *Cheap Speech and the Gordian Knot of Defamation Reform*, 3 J. Free Speech L. 79, 86 (2023) https://www.journaloffreespeechlaw.org/lidsky.pdf

> "The Media Law Resource Center's data confirm the popular impression that more defamation lawsuits have been brought in the last few years than previously. Moreover, the ones that have been brought seem to be more visible. High-profile plaintiffs appear to have multiplied, with household names such as Sarah Palin, Devin Nunes, Roy Moore, and Donald Trump all suing for defamation.".

- Justin Jouvenal, *Va. legislature passes bills aimed at lawsuits by Devin Nunes, Johnny Depp*, THE WASHINGTON POST (Feb. 11, 2020), https://www.washingtonpost.com/local/public-safety/va-house-passes-bill-aimed-at-lawsuits-by-devin-nunes-johnny-depp/2020/02/11/865115f4-4cef-11ea-9b5c-eac5b16dafaa_story.html.

> The Virginia legislature passed bills Tuesday that would make it harder to pursue frivolous lawsuits designed to chill free speech, a response to a string of splashy defamation cases filed in state courts by Rep. Devin Nunes (R-Calif.), actor Johnny Depp and others.
>
> Free speech advocates cheered the legislation in the House and Senate, saying the state's weak anti-defamation law has made Virginia a magnet for dubious litigation aimed at punishing critics and blunting aggressive media coverage on topics of public concern.
>
> Nunes, Depp and other litigants have filed defamation cases seeking nearly $1 billion in damages in courts in Virginia over the past year. Their targets include CNN, the New York Times, Twitter, the actress Amber Heard, the Fresno Bee and a parody Twitter account in the voice of an imaginary cow.

6. The Line Between False Light and Defamation: The line between false light and defamation by implication is blurring. Is there any way to make stop the slide?

- *Valerie Flynn v. Cable News Network, Inc.*, No. 8:22-cv-00343-MSS-SPF, ECF No. 55 (Feb. 22, 2023) https://storage.courtlistener.com/recap/gov.uscourts.flmd.398562/gov.uscourts.flmd.398562.55.0.pdf

> Plaintiff claims that in Defendant's broadcast, CNN falsely accused her of being what she describes as a "'follower' of the 'dangerous', 'violent', 'racist', 'extremist', 'insurrectionist','domestic terrorism' movement – QAnon."… To the extent Plaintiff is pleading defamation by implication under an "omission of facts" theory, such a claim is also insufficiently pleaded. While she alleges that Defendant omitted facts, Plaintiff fails to explain how the inclusion of the allegedly improperly omitted facts would have negated the alleged false implication. The challenged Publication states, "Where we go one, we go all is an infamous QAnon slogan promoted by Michael Flynn." It then cuts to an edited video of Plaintiff repeating the same phrase with her hand raised. Plaintiff admits that she "did repeat the words, 'where we go one, we go all'," that her "hand was raised," and that "[s]he was taking an oath." All of these are true facts, alleged by Plaintiff, that were included in the Publication.

- *Lori Flynn v. Cable News Network, Inc.*, No. 8:22-cv-00343-MSS-SPF, ECF No. 59 (Mar. 17, 2023) https://storage.courtlistener.com/recap/gov.uscourts.flmd.398562/gov.uscourts.flmd.398562.59.0.pdf

> As a preliminary matter, Florida law does not recognize the tort of false light, in part, because it is largely duplicative of defamation by implication. See e.g., Jews for Jesus, Inc. 997 So. 2d at 1100 …. However, Florida does recognize the tort of

> defamation by implication as a concept by which "literally true statements can be defamatory where they create a false impression." Jews For Jesus, Inc., 997 So. 2d at 1106…. A defamation by implication claim can arise in two instances: where a defendant (1) "juxtaposes a series of facts so as to imply a defamatory connection between them" or (2) "creates a defamatory implication by omitting facts . . . even though the particular facts are correct." Jacoby v. Cable News Network, Inc., No. 21-12030, 2021 WL 5858569, at *3 (11th Cir. Dec. 10, 2021) (citing to Jews for Jesus, Inc., 997 So.2d at 1108). In the first instance, courts can find a defamatory implication when a defendant uses true facts to imply a defamatory connection between them.
>
> In the second instance, the defendant omits facts that would negate the alleged defamatory implication. To prevail on such a claim, "the plaintiff must ultimately show that the [alleged] false implication would be contradicted by the inclusion of the allegedly improperly omitted facts."

- *Netflix v. Barina*, No. 22-0914, Tex. Sup. (pending) https://scholar.google.com/scholar_case?case=4500283256746070424&hl=en&as_sdt=6&as_vis=1&oi=scholarr

> On appeal from denial of an anti-SLAPP motion, the court affirmed that jurors could find that an episode of the show "Dirty Money" falsely portrayed plaintiff as an exploitative guardian. "Viewers were led to believe that Barina took advantage of an elderly but capable millionaire, wrongly sold his assets, and used his estate for personal gain. The official proceedings for Thrash's guardianship do not support these conclusions."

Other Cases of Note

Fairstein v. Netflix, No. 20-CV-8042 (PKC), 2023 WL 6125631 (S.D.N.Y. Sept. 19, 2023) (denying summary judgment to Netflix in defamation suit over docudrama "When They See Us" finding sufficient evidence of actual malice for case to go to trial). https://storage.courtlistener.com/recap/gov.uscourts.nysd.545262/gov.uscourts.nysd.545262.216.0.pdf

> "There is evidence that, by opting to portray Fairstein as the series villain who was intended to embody the perceived injustices of a broader system, defendants reverse-engineered plot points to attribute actions, responsibilities and viewpoints to Fairstein that were not hers and are unsupported in defendants' substantial body of research materials."

Sandmann v. New York Times (6th Cir. Aug. 16, 2023) (affirming dismissal of defamation claims against news outlets for reporting of viral incident at Lincoln Memorial). https://www.opn.ca6.uscourts.gov/opinions.pdf/23a0180p-06.pdf

> Phillips's statements are opinion, not fact. In making this finding, we are not engaging in speculation or reading improper inferences into Phillips's statements, as the dissent suggests. Rather, we are engaging in the task required of us: a legal interpretation of Phillips's statements in their context within the News Organizations' articles. The statements' opinion-versus-fact status is "not a question for the jury."

Gaprindashvili v. Netflix, Inc., No. 221CV07408VAPSKX, 2022 WL 363537 (C.D. Cal. Jan. 27, 2022), *appeal dismissed*, No. 22-55143, 2022 WL 18635797 (9th Cir. Oct. 4, 2022) (denying motion to dismiss defamation claim by prominent female chess player challenging scene in Netflix series *The Queen's Gambit*, which the plaintiff argued falsely stated that she had never faced male players)

Williams v. Netflix, Inc., No. 1:22-cv-01132 (D. Del. filed Aug 29, 2022) (Netflix's motion to dismiss defamation claim by Rachel Williams, whose friendship with prominent fraudster Anna Sorokin was depicted in the Netflix series *Inventing Anna*, pending in federal court in Delaware).

Defamation Liability for AI Hallucinations?

Walters v. OpenAI (Ga. Super. complaint filed June 5, 2023)
https://www.courthousenews.com/wp-content/uploads/2023/06/walters-openai-complaint-gwinnett-county.pdf

In the first known defamation complaint filed over content generated by ChatGPT, Mark Walters, a Georgia gun rights advocate, sued OpenAI over a so-called "hallucination" result. A third-party journalist queried ChatGPT about a federal court case in the state of Washington. ChatGPT generated a false response stating that plaintiff was a defendant in that case "accused of defrauding and embezzling funds." When asked for additional substantiation, ChatGPT allegedly provided a fabricated paragraph from the complaint implicating plaintiff.

See also

Large Libel Models: Liability for AI Output
Prof. Eugene Volokh
https://www2.law.ucla.edu/volokh/ailibel.pdf

> Should, then, the AI programs' creators and operators, such as OpenAI (for ChatGPT6) or Google (for Bard) be liable for defamation, based on their programs' output?7 Part I will analyze this question under the current rules of U.S. defamation law. I will

tentatively argue that, when the "actual malice" standard applies, the standard might be satisfied if an AI company has received actual notice of particular spurious information being produced by its software but has refused to act. This would in practice require such companies to implement a "notice-and-blocking" system, loosely similar to "notice-and-takedown" systems required under the DMCA as to copyright and trademark infringements. And I will also discuss the possibility of negligence liability, when such liability is authorized under libel law, by analogy to negligent design product liability.