Recent Case Studies in Libel and Defamation Law

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I. Introduction – Defamation is so hot right now.

Now that it is 2024 and we look back to the year that was, some debate lingers over who should have been the person of the year or what should have been the word of the year. But when it comes to tort claims, there was a clear winner. Defamation was all over the news in 2023. Setting the stage for the "Year of Defamation," Amber Heard and Johnny Depp settled their crossclaims for defamation in December of 2022 after a verdict in Mr. Depp's favor. 2023 got off to a bang in January when singer Cardi B obtained a verdict of $4 million in a lawsuit against a blogger who claimed she had contracted herpes and had been a prostitute. The lawsuit by Dominion against Fox News was perhaps the most notable defamation case last year, ending in a $787 million settlement. In October, a bankruptcy judge ruled that Alex Jones could not use personal bankruptcy to avoid paying $1.1 billion in defamation damages related to his lies about the Sandy Hook Elementary School shooting. Former President Trump had his days in court as well, losing a defamation trial brought by E. Jean Carroll and then facing a second defamation claim brought by Ms. Carroll. In a year when artificial intelligence burst on the scene, a radio host also sued Open AI for allegedly false statements generated by ChatGPT. Finally, 2023 concluded with a $148 million verdict against America's mayor, Rudy Giuliani, after he falsely accused two poll workers in Georgia of ballot tampering.

What do these cases tell us about contemporary America? Traditional news media has been mortally fractured. The days when the morning newspaper and national nightly news programs provided the country with a consensus viewpoint on world and national events are over. Political polarization has created siloed news consumption. Worse, many Americans get their "news" from individuals posting on social media who have no idea what they are talking about. As a practical matter, social media leads to more statements, true and false, being shared across the internet in a way that can be shared, copied, and sourced. More statements mean more defamation and more defamation means more litigation. And, despite the well-publicized lawsuits described herein, many users of social media continue to refuse to believe that there could ever be consequences to what they say on-line. Some would also say defamation claims have also been weaponized in a way that chills free speech. Others ask whether the rise in defamation claims may be related to national zeitgeist of resentment and self-righteous anger. Regardless, one of the few things that still seems to unite red and blue Americans is faith that the U.S. legal system will vindicate their position. Americans have always been litigious. But in the current post-truth, fake news environment Courts sometimes end up serving as the last bastion to determine what is false and what is true, while at the same time balancing the protections of the First Amendment.

II. *Tomczyk v. Wausau Pilot and Review*

A defamation lawsuit against an independent, online news outlet based in Wausau, Wisconsin attracted national attention for showcasing the cost small news providers potentially

face from defamation lawsuits, even when they win. The legal dispute arose after an open meeting of the Marathon County Board on August 21, 2021. Members of the community had gathered to discuss a resolution to promote diversity and inclusion. One of the attendees later posted on Facebook that Cory Tomczyk (who is now a Republican State Senator but was not at the time) referred to her 13-year-old son with a homophobic slur. After some investigation, the Wausau Pilot and Review ran a story about the incident. Tomczyk sued for defamation. The Court dismissed the case on summary judgment, finding that Tomczyk was a "limited purpose public figure" and thus "must show that the media defendant acted with actual malice in order to prevail in a defamation action." *See Tomczyk v Wausau Pilot and Review Corp.*, Case No. 21-CV-625, (April 29, 2023) Decision on Summary Judgment at 2, citing *Wiegel v. Capitol Times Co.*, 426 N.W.2d 43 (Wisc. Ct. App. 1988). "Actual malice means either the defendant knew the statement was false, or made the statement with reckless disregard for whether it was true or false." *Tomczyk* at 4, citing *Biskupic v. Cicero*, 313. Wis. 2d 225 ¶ 27, 756 N.W.2d 649 (Wisc. Ct. App. 2008). The Court held that Tomczyk was not able to meet that burden.

The only close question was whether Tomczyk was a "limited-purpose public figure." The Circuit Court Judge noted that:

> He was a local business owner who spoke out against the resolution at two public meetings on the issue . . . Both his public comments and the alleged use of a slur toward another person making public comment were newsworthy, making his role in the controversy more than trivial or tangential. And, given the stated purpose of the "Community for All" resolution was to promote inclusivity, his alleged use of the slur would be germane to the resolution and to his participation in the controversy.

Id. Note that this holding refers to the subject matter and context of the alleged speech, a matter of public interest, as further discussed in Section III, below. (Defendant also pointed out that Tomczyk had served on the School Board, as vice-chair of the Republican Party of Marathon County, the Chamber of Commerce board, and a member of the board of directors of Get Involved Wisconsin.) Tomczyk appealed the decision, arguing that he was not a public figure at the time. The appeal is still pending as of the preparation of these materials.

The New York Times ran a story on the lawsuit, emphasizing how the $150,000 legal bill threatened to put the on-line news outlet out of business even though it was successful in getting the case dismissed. *See* Jeremy W. Peters, *Report on Anti-Gay Slur Could Put Local News Site Out of Business*, N.Y. Times Aug. 15, 2023. The Times noted that "politicians have grown more comfortable condemning media outlets they view as hostile – banning reporters from covering events, attacking them on social media [and] accusing them of being the 'enemy of the people.'" It also noted that a federal judge had recently thrown out a defamation lawsuit by Donald Trump against CNN and referenced similar claims by former Republican Congressman Devin Nunes. The *Tomczyk* case stands as an example of how defendants can be forced to spend

a great deal of money to defend themselves in a defamation action, even if they are successful in having the case dismissed.

III. *Johnson v. Freborg* (Minnesota Supreme Court)

In order to discuss the fascinating holding in *Johnson v. Freborg,* it is instructive to first review the history of both federal and Minnesota state law when it comes to defamation and the First Amendment. The First Amendment (1791) states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." For almost 175 years, the U.S. Supreme Court avoided weighing in on the constitutional limitations of state law defamation actions.[1] Then, in the seminal case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), the U.S. Supreme Court held that if a plaintiff in a defamation lawsuit is a public official or candidate for public office, then not only must they prove the normal elements of defamation—publication of a false defamatory statement to a third party—they must also prove that the statement was made with "actual malice", meaning the defendant either knew the statement was false or recklessly disregarded whether it might be false.

Note that *Sullivan* involved a claim (A) against a media defendant (the New York Times) by (B) a public official (The Montgomery Alabama Police Commissioner). We remember this decision from law school, therefore, as placing limits on defamation claims *by public officials*. But the impetus for the holding was deeper than that – it concerned the right to discuss issues of public concern. The Court wrote that Sullivan's defamation claims had to be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 270. The holding in *Sullivan* has continued to evolve since 1964 and, as set forth below, the Minnesota Supreme Court has now expanded the doctrine to protect discussions of public concern, *whether or not the defendant is a member of the media*, and *whether or not the plaintiff is a public figure*.

In *Gertz v. Robert Welch*, 418 U.S. 323 (1974), the U.S. Supreme Court placed another limitation on state law defamation claims. It held that a plaintiff could not seek or obtain "presumed damages," in other words, *per se* defamation, even against a non-public figure. In

[1] "For most of the first half of the twentieth century, the press had been able, to a remarkable degree, to avoid and defeat libel suits through strategic navigation of the libel law landscape. By combining a tactical accommodation of libel law with a dedicated resistance to it, the press had learned to "liv[e] with the law of libel." By the 1940s, most of the nation's major newspapers faced only a handful of libel suits each year, and the amount paid in judgments and settlements was low. The upset of that equilibrium, starting in the 1950s, put libel on the Supreme Court's radar, and it spurred the Court to contemplate more aggressive intervention into the state law of libel." Barbas, S., *The Press and libel before New York Times v. Sullivan*, Columbia Journal of Law and Arts, V. 44, No. 4 (April 6, 2021)

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), however, the U.S. Supreme Court held that First Amendment interests were less controlling in matters of a purely private concern than matters which are a "public interest." The Court declined to overturn Vermont state law allowing awards of presumed and punitive damages absent a showing of "actual malice" thus limiting *Gertz* to "matters of public concern." The upshot, at least as of 1974, was that (A) a claim by a public figure must show actual malice to establish liability (*Sullivan*) and (B) a plaintiff in a claim involving a matter of public concern (even though they are a non-public figure) must show actual damages and cannot assert *per se* liability. (*Gertz* and *Dun & Bradstreet*).

Turning to Minnesota jurisprudence, in *Maethner v. Someplace Safe, Inc.*, 907 N.W.2d 665 (Minn. 2018), the Minnesota Court weighed in the scope of First Amendment Protection and *per se* damages. In that case, Maethner sued ex-wife (Jorud) and Someplace Safe (an advocacy organization) after Jorud was featured in a Someplace Safe newsletter as a survivor of "domestic abuse." Although the article did not name Maethner, he claimed defamation. Maethner did not show actual harm to reputation in discovery but asserted that it was defamation *per se*. Trial Court dismissed on summary judgment on the basis of qualified privilege. The Minnesota Court of Appeals reversed, holding that the statement by Jorud was not protected by qualified privilege and Someplace Safe had a duty to exercise reasonable care. The Minnesota Supreme Court affirmed in part, reversed in part, and remanded.

The Court held that "A plaintiff pursuing a defamation claim must prove that the defendant made (a) a false and defamatory statement about the plaintiff; (b) in an unprivileged publication to a third party; (c) that harmed the plaintiff's reputation in the community." This is now the legal standard in Minnesota.

The Court also held that whether speech involves a matter of public concern is based on the "[c]ontent, form, and context of the speech as revealed by the whole record." If the topic is a matter of public concern, the Court found, the plaintiff must show malice. Malice is present when the statement is made "with the knowledge that it was false or with reckless disregard of whether it was false or not." If the topic is a matter of public concern, the plaintiff ***also*** must show evidence of actual harm and cannot rely on *per se* liability. "[I]t is the private or public concern of the statements at issue—not the identity of the speaker—that provides the First Amendment touchstone for determining whether a private plaintiff may rely on presumed damages in a defamation action."

The Supreme Court held that Maethner could not survive summary judgment on the question of malice by arguing there was a duty to investigate. The Supreme Court reversed the Court of Appeals and dismissed the defamation claim against Someplace Safe.

Johnson v. Freborg, 995 N.W.2d 374 (Minn. 2023) is a recent Minnesota Supreme Court case that further extends the reach of "a matter of public concern." Freborg, the defendant in the lawsuit, posted the following on her Facebook account: "Feeling fierce with all these women dancers coming out. So here goes…I've been gaslighted/coerced into having sex, sexual

assaulted, and/or raped by the following dance instructors:" she then named three individuals, including Johnson, and included the hashtag #metoo. She edited her post two days later to remove the word "rape."

Johnson sued for defamation. The district court granted summary judgment for Freborg, finding that the post was true and, even if it were false, Johnson failed to show malice, which is required to recover presumed damages for defamatory statements that involve a matter of "public concern." The Court of Appeals reversed, finding a genuine issue of material fact as to the veracity of the post and holding that the speech was a matter of private, not public concern.

The Minnesota Supreme Court accepted review only on the question of whether the post was a matter of "public concern." It held that the post was a matter of public concern. It held, "In sum, weighing the content, form, and context of Freborg's statements in light of the whole record, we conclude that the overall thrust and dominant theme of the posts involved a matter of public concern. We therefore hold that Freborg's speech is subject to heightened protection under the First Amendment. Accordingly, to prevail on his defamation claim for presumed damages, Johnson must show that Freborg's posts not only were false, but that they were made with actual malice."

Chief Justice Gildea wrote a 25-page dissent, joined by Justices Anderson and Hudson. Chief Justice Gildea noted that the *New York Times v. Sullivan* case was premised on the connection of the speech to principles necessary for a successful democracy, such as the citizenry's ability to comment freely on the performance of their government. The fact pattern in *Freborg* certainly seems far removed from the *Sullivan* case. Johnson is not a public figure, the case did not involve traditional "media" (although it was posted on social media), and the topic did not involve the government. The majority responded, noting that the narrow holding in *Sullivan* had been expanded over the five decades following that landmark decision.

IV. The case of the Marion County Record (Kansas)

Another small-town news outlet faced backlash and what some have characterized as heavy-handed state censorship in 2023 in the case of the Marion County Record (the "Record"). On August 9, 2023, the Record ran a story alleging that Kari Newell had inappropriately obtained a liquor license even though she had a felony DUI conviction. Newell claimed that the Record obtained her information illegally and shared it with the Vice Mayor. Newell then went to the police. The Marion police department then obtained a search warrant from a County Court Magistrate Judge based on allegations of "identity theft and unlawful acts concerning computers." The police then raided the home of the owner of the record, the Vice Mayor, and the office of the Record, seizing computers, cell phones, and reporting materials. The Kansas Bureau of Investigation is looking into whether the actions violated civil rights.

A reporter for the Record, Deb Gruver sued Police Chief Gideon Cody for more than $150,000 in compensatory and punitive damages for "emotional distress, mental anguish, and

physical injury" in violating her First and Fourth Amendment rights. The lawsuit alleges that Cody seized her personal cell phone while his application for the search warrant did not mention her or her phone as evidence of a crime. Gruver also said her finger had been injured when police grabbed her cell phone out of her hand. The case drew widespread attention as an act of oppression of press freedom. It also led to the Kansas state legislature to debate enacting an anti-SLAPP (Strategic Lawsuit Against Public Participation) statute to protect against these types of situations in the future.

V. *Dominion v. Fox News Network LLC*

In the months following the 2020 presidential election, the Fox News Network ("Fox") featured many stories suggesting that the election had been rigged or at least plagued by questionable irregularities. Documents uncovered in the discovery process of the Dominion lawsuit support the theory that Fox felt compelled to provide its audience with what it wanted, rather than simply the truth. In other words, post-election coverage was motivated by money but soon took on a life of its own. In the midst of this coverage, an obscure company that sold voting machines, Dominion, quickly found itself thrust into the maelstrom as it was accused of manufacturing faulty equipment, or worse. Conspiracy theorists lumped Dominion in along with space lasers and Fox was there to cover it. Dominion sued for defamation in Delaware state court.

Politics aside, what lessons, if any, can attorneys learn from the Dominion litigation? After all, it was not a precedent-setting case that broke any new ground in jurisprudence. It was litigated only as far as the district court and then settled.

First, the case was notable for the strength and nature of the evidence. Suing a media defendant for defamation is usually difficult, and especially so if the story concerns the operation of government and elections. This is because the U.S. Supreme Court has repeatedly held that the right to free speech under the First Amendment of the Constitution limits the ability of plaintiffs to sue the media for defamation under state law unless they can meet the high standard that the false statement was made with "malice." *New York Times v. Sullivan, supra*. In this case, there was no evidence that the Dominion machines were faulty in any way. More importantly, however, there *was* evidence that Fox executives and television personalities knew this story was false but persisted in covering the story in a way that suggested there was some truth or could be some truth. In fact, the Court ruled in favor of Plaintiffs on the question of falsity on summary judgment, leaving determination of malice and damages for trial. *See US Dominion, Inc. v. Fox News Network, LLC*, 293 A. 3d 1002, 2023 Del. Super. LEXIS 161 (2023) (applying New York law).

Second, the amount of the settlement did not in any way reflect the actual damages incurred by the Plaintiff. Dominion initially announced that it was seeking $1.6 billion in damages, which was not a number tethered to reality. In fact, investors purchased the entire Dominion company for all of $80 million in 2018. (Dominion could not have sought emotional

distress damages, but it was asking for punitive damages.) Fox settled for $787.5 million, approximately half of the made up $1.8 billion demand (which perhaps supports the maxim of "start high.") The investors made a 1,500% return on their investment, which is quite a windfall. The huge settlement instead reflected the damage that Fox would have incurred if the trial had gone forward. Plaintiff attorneys know that large corporations abhor invasive litigation that can expose internal emails and communications, require executives to testify on the stand, and embarrass the company, its brand, and its executives. It remains to be seen if this case results in more nine or even ten-figure demands from coalitions of contingency plaintiff firms akin to product liability, anti-trust, and securities lawsuits, or if this was a *sui generis* event. It also remains to be seen if the huge verdict will have any effect on large media companies as they weigh how to cover political conspiracy theories in the current environment.

Third, the Dominion lawsuit provides a road map for defamation claims by companies, as contrasted with individuals. In most states, defamation claims by corporations are referred "trade defamation" and may be held to different legal standards. In the end, the case did not provide the cathartic revelation that some non-parties had invested in it and was resolved in a settlement like any other civil litigation.

VI. *E. Jean Carroll v. Donald J. Trump*

Former President Donald J. Trump has been the target of more than one defamation actions which might be characterized as "don't-call-me-a-liar" cases. These are cases in which the plaintiff makes an allegation about the defendant, the defendant calls the plaintiff a liar, and the plaintiff sues for defamation to establish the truth of their underlying allegation. For example, Stephanie Clifford, a/k/a Stormy Daniels, sued Trump in 2018 for tweeting that Ms. Clifford's claim that she had been approached by a stranger in a parking lot to "leave Trump alone," presumably regarding their alleged affair, was a "con job" and suggesting that she was a liar. Ms. Clifford lost her claim. The Court found that President Trump's tweet, though it referred to something that might eventually be proven true or false, was an example of "political hyperbole" — which is protected speech under the First Amendment. A former contestant on The Apprentice television show, Summer Zervos, also sued Trump for calling her a liar for making allegations that he groped her at the Beverly Hills Hotel. That case was later dropped.

E. Jean Carroll's case had a different outcome. E. Jean Carroll published an article in New York magazine in 2019 in which she alleged that Trump sexually assaulted her in late 1995 or early 1996 in the Bergdorf Goodman department store in New York City. She provided further details of the incident in her 2019 book "What Do We Need Men For?: A Modest Proposal." Carroll alleged that they ended up in a dressing room together and Trump forcefully kissed her, pulled down her tights and raped her before she was able to escape. In an official government statement, Trump denied that he had ever met Carroll, accused her of trying to sell books, implied she had a political agenda, Trump also said that Carroll was "totally lying," "she's not my type" and "I have no idea who she is."

Carroll sued Trump for defamation in New York state court in November 2019. The case was later removed to federal court in 2020. *Carroll v. Trump*, No. 20-cv-07311 (S.D.N.Y) (*Carroll I*) In 2022, Carroll filed a second lawsuit, *Carroll v. Trump*, No. 22-cv-10016 (S.D.N.Y) (*Carroll II*) The second lawsuit included another claim for defamation as well as a claim for sexual assault and battery, based on the Adult Survivors Act enacted in 2022 which extended the deadline for such claims.

The second case, *Carroll II,* went to trial first, on April 25, 2023. On May 9, 2023, the jury returned a unanimous verdict finding that Carroll had proven that Trump sexually abused her and that Trump defamed Carroll with false statements made in 2022 with actual malice. The jury awarded Carroll a total of $5 million in damages.

Carroll then sought to amend her complaint in *Carroll I* to include additional comments made by Trump after the verdict in *Carroll II*. The court granted her motion and dismissed a counterclaim by Trump that he had been defamed because Carroll claimed she had been "raped" and the jury's verdict was for "sexual abuse." The court then granted summary judgment on behalf of Carroll on the question of liability in *Carroll I*. *Carroll I* was set for trial in early 2024 on the question of damages related to Trump's comments in 2019. The two cases are unusual in that Carroll already obtained damages for comments in 2022 that were similar to those made in 2019.

Other than the fact that Carroll was successful in obtaining a verdict against Trump unlike some of the other "don't-call-me-a-liar" cases, the Carroll case has few lessons for litigators except perhaps that representing a client as outspoken and uncontrollable as the former president can be a challenge. Defendants in defamation cases who double down on their allegations may suffer the consequences.
