
ILLINOIS BUSINESS LAW JOURNAL

RAGE AGAINST THE VOTING MACHINE: DOMINION'S DEFAMATION LAWSUIT AGAINST SIDNEY POWELL

❖ Article ❖

*Dr. Michael Conklin**

I. INTRODUCTION

On January 8, 2021, Dominion Voting Systems, Inc., filed a defamation lawsuit against Sidney Powell.¹ The 124-page complaint—drafted by the law firm of noted libel attorney Tom Clare—is based on Powell's claims that Dominion rigged the 2020 presidential election.² This Article examines the relevant issues of false statement of fact, damages, causation, and actual malice. Additionally, a unique privilege that may be available to Powell is considered.

II. FALSE STATEMENT OF FACT

Some of Powell's statements could be dismissed as either opinion or partial truths. Her claim that "there's no way there was anything but widespread election fraud"³ could be classified as opinion since the word "widespread" is highly subjective and "election fraud" can refer to different occurrences. Additionally, recounts in Georgia did find discrepancies in the originally reported totals.⁴ So in a literal sense, the exact vote tallies originally reported were incorrect. However, the discrepancies

* Powell Endowed Professor of Business Law, Angelo State University.

1. Complaint, *US Dominion, Inc. v. Powell*, No. 1:21-cv-00040 (D.D.C. Jan. 8, 2021).

2. *Id.*

3. *Id.* at 26.

4. Joe Walsh, *Recount Trims Biden's Lead in Georgia by over 1,000 Votes*, FORBES (Nov. 17, 2020, 5:37 PM), <https://www.forbes.com/sites/joewalsh/2020/11/17/recount-trims-bidens-lead-in-georgia-by-over-1000-votes/?sh=4d9080df9b84>.

were not large enough to substantiate Powell’s claims that Trump was the rightful winner.⁵ And furthermore, these discrepancies were the result of human error and not any actions by Dominion.⁶

Some of Powell’s other statements are likewise outside the realm of a factual claim. For example, she stated that the 2020 presidential election was the “greatest crime of the century if not the life of the world.”⁷ This could be dismissed as hyperbole. And the reference to “crime” could be dismissed as hyperbole similar to when someone claims the results of a sporting event or awards show were “criminal.”

Dominion also accuses Powell of presenting “cherry-picked” information.⁸ For example, Powell presented statements made by Princeton professor Andrew W. Appel regarding a decades-old voting machine not created by Dominion and not used in any of the states in question in the 2020 election.⁹ Powell presented the Appel statement in a manner that implicates Dominion, but it does not.¹⁰ Despite the popular notion that truth is an absolute defense to defamation,¹¹ there is case law to suggest that factually accurate statements presented in a misleading manner nonetheless implicate defamation liability.¹² An assessment would need to be made as to what the “gist” of the communication was.¹³

The potentially non-defamatory nature of the previously mentioned statements is largely a moot point, however, because Powell also made objectively false statements of fact. She falsely accused Dominion of paying kickbacks to Georgia Republicans.¹⁴ She falsely claimed to be in possession of a video of Dominion’s founder bragging about how he could “change a million votes, no problem at all.”¹⁵ And she falsely asserted that Dominion was “created in Venezuela at the direction of Hugo Chávez to make sure he never lost an election.”¹⁶

“Substantial truth” is a defense to a defamation claim.¹⁷ But when the contexts of Powell’s communications are considered, it becomes clear that this defense would

5. *See id.*
 6. *Id.*
 7. Complaint, *supra* note 1, at 48.
 8. *Id.*
 9. *Id.* at 34.
 10. *Id.* at 34–35.
 11. 50 AM. JUR. 2D LIBEL AND SLANDER § 252 (2020).
 12. Dallas Morning News, Inc. v. Tatum, 554 S.W.3d 614, 628 (Tex. 2018).
 13. *Id.*
 14. Complaint, *supra* note 1, at 36–39.
 15. *Id.* at 20.
 16. *Id.* at 21–22.
 17. 50 AM. JUR. 2D *Libel and Slander* § 253 (2020) (“[S]ubstantial truth [is] an absolute defense.”).

not be successful. The totality of her statements is more than just a “slight discrepancy of facts” or only false based on a “semantic hypertechnicality.”¹⁸

III. DAMAGES

As evidenced by the \$1.3 billion request, Dominion is claiming it suffered “enormous” harm.¹⁹ Dominion’s damages, however, were largely either incurred by its employers or are speculative. Some employees working at Dominion have received threatening tweets, voicemails, and emails.²⁰ Dominion will likely not be able to recover compensation on behalf of its employees—defamation is a personal right that cannot be asserted by third parties.²¹ Even if the defamatory statement “indirectly inflicts some injury upon the party seeking recovery,” such a plaintiff is nevertheless barred from recovering for the defamation of another.²² There is no exception to this principle for corporations suing on behalf of their employees.²³

Dominion estimates that it has incurred reputational harm that will result in lost profits of \$200 million.²⁴ But this amount is largely speculative. The only itemized damages provided in the complaint are \$565,000 spent on private security.²⁵ Plaintiffs may seek compensation for prospective damages in defamation cases if the future injury is more than speculative or remote.²⁶ Dominion points out that many state legislators have stated their intent to reassess existing Dominion contracts.²⁷ One Congressman even said he was actively drafting legislation to ban the use of Dominion voting machines in his home state of Arizona.²⁸ Dominion claims that “elected officials, insurers, and potential investors have been deterred from dealing with Dominion, putting Dominion’s contracts in more than two dozen states and hundreds of counties and municipalities in jeopardy and significantly hampering Dominion’s ability to win new contracts.”²⁹

18. Reed v. Gallagher, 204 Cal. Rptr. 3d 178, 193 (Cal. Ct. App. 2016).

19. Complaint, *supra* note 1, at 49.

20. *Id.* at 57–58.

21. Morgan v. Hustler Mag., Inc., 653 F. Supp 711, 719 (N.D. Ohio 1987).

22. Johnson v. KTBS, Inc., 889 So. 2d 329, 333 (La. Ct. App. 2004).

23. R. H. Bouligny, Inc. v. United Steelworkers of Am., 154 S.E.2d 344, 353 (N.C. 1967)

(“Of course, a corporation may not maintain an action for damages for libel or slander of its stockholders, officers, employees or representatives.”).

24. Complaint, *supra* note 1, at 60.

25. *Id.* at 58.

26. 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 289 (2020).

27. See, e.g., Complaint, *supra* note 1, at 59.

28. *Id.*

29. *Id.* at 60.

But when confronted, the Dominion CEO could not produce an example of a jurisdiction deciding to no longer use Dominion voting machines.³⁰ Given the infrequent nature of selecting voting machines after an election with false accusations of voter fraud, it is difficult to predict a jury's determination on the probability of these future damages materializing.

Dominion provides evidence that false claims have led to its brand name acquiring a negative connotation.³¹ In just a three-hour period on December 21, 2020, the terms "dominion" and "fraud" were tweeted out together by more than 2,200 users who had almost 9 million followers.³² Given this negative association, even assuming that every state politician knows Powell's claims against Dominion are false, it may nevertheless be rational behavior to choose a Dominion competitor. This is because doing so would avoid potential issues from the politician's constituents who believe Powell's accusations. Furthermore, as time goes on people may misremember the Powell–Dominion incident. They may only recollect a vague notion that Dominion was in some way associated with fraud.³³ This association could result in damages, but it is presently unclear if this will ultimately be the case.

Although not mentioned in the complaint, Dominion could make the related claim that this negative publicity will likely result in difficulty hiring employees in the future. After all, a potential employee who googles Dominion will easily find the reports of how its employees are harassed and require private security to ensure their safety.³⁴

IV. CAUSATION

Dominion attempts to connect Powell's false claims of how the Dominion voting systems rigged the election to public support for the notion.³⁵ However, a close examination demonstrates the tenuous nature of this claim. Dominion asserts that the expenses it incurred are "a direct result of the viral disinformation campaign" from

30. *Dominion Voting Systems Sues Ex-Trump Lawyer over False Claims*, NPR (Jan. 12, 2021), <https://www.npr.org/2021/01/12/955938741/dominion-voting-systems-sues-ex-trump-lawyer-over-false-claims> (hereinafter *Dominion Voting Systems*).

31. Complaint, *supra* note 1, at 50.

32. *Id.*

33. See, e.g., Ian Skyrnik, Carolyn Yoon, Denise C. Park & Norbert Schwarz, *How Warnings About False Claims Become Recommendations*, 31 J. CONSUMER RSCH. 713 (2005).

34. See, e.g., Olivia Rubin, Lucien Bruggeman & Matthew Mosk, *Dominion Employees Latest to Face Threats, Harassment in Wake of Trump Conspiracy*, ABC NEWS (Nov. 19, 2020, 4:17 AM), <https://abcnews.go.com/Politics/dominion-employees-latest-face-threats-harassment-wake-trump/story?id=74288442>.

35. Complaint, *supra* note 1, at 58.

Powell.³⁶ It also points to polls that find high levels of agreement with the claim that the election was “rigged.”³⁷ While these polls were conducted after Powell began promoting her false claims, that does not necessarily prove causation. Additionally, high levels of support for the notion of a rigged election are not uncommon by the losing side of a presidential election. Yes, as Dominion points out, 68% of Republicans stated that they are concerned the election was rigged.³⁸ But following the 2016 election, 66% of Democrats voiced support for the notion that Russia switched vote tallies.³⁹ Such evidence supports the notion that these partisan beliefs following an election are the norm rather than an anomaly caused by Powell. Additionally, measuring public support for belief in a rigged election is not per se evidence that the public believes Dominion voting systems were actively involved.

An issue that is likely to emerge regarding causation is that Powell was not the first—and far from the only—person making false accusations about Dominion. Even Dominion acknowledges that Powell “[a]ct[ed] in concert with allies and media outlets that were determined to promote a false preconceived narrative about the 2020 election”⁴⁰ And Dominion seems to acknowledge that it does not know who is ultimately responsible for spreading misinformation about the company.⁴¹ The CEO of Dominion stated, “One of the goals of our legal action is to really understand where the impetus behind these lies originated from”⁴² Journalistic accounts of the issue provide a wide range of culprits for voter fraud misinformation.⁴³ In an interview with the Dominion CEO, journalist Noel King stated that it was President Trump who “launched this attack on [Dominion].”⁴⁴ Another source claimed it was J. Christian Adams, Hans von Spakovsky, and Kris Kobach—three former members of the Presidential Advisory Commission on Election Integrity—who enabled Trump’s voter fraud lies.⁴⁵ Still others claim that the voter fraud lies were the result of a deliberate

36. *Id.*

37. *Id.* at 56.

38. *Id.*

39. Kathy Frankovic, *Russia’s Impact on the Election Seen Through Partisan Eyes*, YOUGov (Mar. 9, 2018, 9:00 AM), <https://today.yougov.com/topics/politics/articles-reports/2018/03/09/russias-impact-election-seen-through-partisan-eyes>.

40. Complaint, *supra* note 1, at 122.

41. *See id.*

42. *Dominion Voting Systems*, *supra* note 30.

43. *Id.*

44. *Id.*

45. Sam Levine & Spenser Mestel, *Just Like Propaganda’: The Three Men Enabling Trump’s Voter Fraud Lies*, GUARDIAN (Oct. 26, 2020, 9:00 AM), <https://www.theguardian.com/us-news/2020/oct/26/us-election-voter-fraud-mail-in-ballots>.

strategy implemented by Republicans years ago, long before Powell first made her claims.⁴⁶

Dominion also accuses Powell of inciting the attack on the Capitol Building on January 6, 2021.⁴⁷ It is unclear what the purpose of including this in the complaint is, as Dominion cannot seek damages for the Capitol attack. This may be an attempt by Dominion to establish the context used to point out that even “Trump loyalist” Mitch McConnell acknowledged Powell’s accusations are “sweeping conspiracy theories” made “without any evidence.”⁴⁸ The context of the Capitol riot may also function to paint Powell in a negative light, as she continued to promote her false narrative even after the riot.⁴⁹

As this section demonstrates, this case contains potential issues of causation. Furthermore, the Dominion complaint could have been worded differently to more clearly connect Powell’s false statements with Dominion’s damages. Regardless, Powell’s false accusations are certainly the kind of accusations that caused Dominion harm and there is precedent for imposing joint and severable liability for defamatory statements.⁵⁰

V. ACTUAL MALICE

Actual malice is required for a defamation suit not just against a public official, but also against public figures.⁵¹ Determining what entities qualify as public figures has been described as “trying to nail a jellyfish to the wall.”⁵² State courts and lower federal courts have implemented increasingly divergent standards for determining when a corporation qualifies as a public figure.⁵³ This ambiguous determination is moot in the present case, however, because Powell’s behavior likely satisfies actual malice. Therefore, even if Dominion is considered a public figure for defamation purposes, the additional requirement is satisfied.

46. Sam Levine, *How the Republican Voter Fraud Lie Paved the Way for Trump to Undermine Biden’s Presidency*, GUARDIAN (Jan. 18, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/jan/18/trump-republican-voter-fraud-lie-biden-presidency>.

47. Complaint, *supra* note 1, at 66.

48. *Id.*

49. *Id.* at 66–67.

50. 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 173 (2020) (“As a general rule, all persons who cause or participate in the publication of libelous or slanderous matter are personally responsible for the publication, and may be sued jointly or severally.”).

51. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967).

52. *Rosanova v. Playboy Enters, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976).

53. Matthew D. Bunker, *Corporate Chaos: The Muddled Jurisprudence of Corporate Public Figures*, 23 COMM’N L. & POL’Y 1, 2 (2017).

Actual malice requires the publication be made “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.”⁵⁴ Powell is an accomplished attorney. She was accepted to the University of North Carolina Law School at the age of nineteen, was a federal prosecutor, and founded her own appellate firm.⁵⁵ While an accomplished career in a demanding field does not prove one is immune to false conspiracy theories, it does suggest that Powell would have a difficult time proving ignorance. And the fact that Powell was explicitly notified that her statements were false but nevertheless continued to promote them⁵⁶ at least shows a “reckless disregard” for the truth, which also satisfies the actual malice requirement.⁵⁷ Powell’s use of doctored evidence and lies about the existence of evidence also support either a knowledge of falsity or reckless disregard for the truth.⁵⁸

VI. POTENTIAL IMMUNITY AS TRUMP’S ATTORNEY

One potential affirmative defense that Powell could assert is that her statements are protected by privilege because of her legal representation of President Trump. Many states recognize a privilege whereby an attorney announcing the position of her client cannot be held liable in defamation law for such communication.⁵⁹ Therefore, the issue of whether Powell was making statements on behalf of herself or on behalf of her client Donald Trump and the Trump campaign is relevant.

On November 14, 2020, Donald Trump tweeted that Powell, among others, was part of “a truly great team, added to our other wonderful lawyers and

54. *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964) (quoting *Sullivan*, 376 U.S. 254, 279–80 (1964)).

55. Keith Kloor, *The #MAGA Lawyer Behind Michael Flynn’s Scorched-Earth Legal Strategy*, POLITICO (Jan. 17, 2020, 5:09 AM), <https://www.politico.com/news/magazine/2020/01/17/maga-lawyer-behind-michael-flynn-legal-strategy-098712>.

56. Complaint, *supra* note 1, at 5. Powell responded to the notice by saying that she “retracts nothing.” *Id.* at 60–61.

57. See *Zimmerman v. Al Jazeera America, LLC*, 246 F. Supp. 3d 257, 280–81 (D.D.C. 2017) (“A defendant acts with reckless disregard if ‘the defendant in fact entertained serious doubts as to the truth of his publication[,]’ or acted ‘with a high degree of awareness of probable falsity.’” (alteration in original) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968))).

58. Complaint, *supra* note 1, at 36–38, 20.

59. Colin Kalmbacher, *Legal Experts Explain Defamation Lawsuit Threat Made by Dominion Voting Systems Against Sidney Powell*, L. & CRIME (Dec. 17, 2020, 4:54 PM), <https://lawandcrime.com/2020-election/legal-experts-explain-defamation-lawsuit-threat-made-by-dominion-voting-systems-against-sidney-powell/>.

representatives!”⁶⁰ And on November 19, 2020, Powell stated in a press conference that Rudy Giuliani (who was present) and herself were “representing President Trump and we’re representing the Trump campaign.”⁶¹ However, just three days later the Trump campaign issued a statement saying, “Sidney Powell is practicing law on her own. She is not a member of the Trump Legal Team.”⁶² Powell continued to make her false claims after it was clear she was not working for the Trump campaign. Therefore, it is unlikely that a court would find all of Powell’s statements privileged.

VII. CONCLUSION

The Dominion lawsuit against Powell brings up interesting issues involving defamation jurisprudence. Predicting the outcome of such a case is complicated by the novel nature of predicting future reputational harm to a voting machine company. Additionally, the political undertones of such a case add uncertainty. Regardless, a neutral assessment of applicable case law suggests that Powell is liable for defamation. The outcome of this lawsuit could have far-reaching ramifications. For example, the discovery process could uncover damning communications between Powell and either the Trump campaign or conservative media outlets. And this lawsuit could be the first of many. Dominion is considering similar legal action against others, including Donald Trump.⁶³ Dominion has already sent document-retention letters to Rudy Giuliani and Fox News.⁶⁴ The ramifications of such subsequent lawsuits could be even greater if they reach the Supreme Court and it takes the opportunity to revisit *Sullivan*, as recently advocated for by Justice Thomas.

60. Complaint, *supra* note 1, at 20 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 14, 2020, 10:11 PM), <https://twitter.com/realdonaldtrump/status/1327811527123103746>).

61. *Id.* at 21.

62. *Id.* at 25.

63. *Dominion Voting Systems*, *supra* note 30.

64. Jacob Shamsian, *Dominion Is Ramping Up Its Defamation Lawsuits for Election Conspiracy Theories. Trump and His Right-Wing Media Allies Could Be Their Next Target*, BUS. INSIDER (Jan. 11, 2021, 11:01 AM), <https://www.businessinsider.com/dominion-trump-fox-news-newsmax-oan-sidney-powell-defamation-lawsuits-2021-1>.