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***DOMINION VOTING SYSTEMS V FOX NEWS NETWORK:
DEFAMATION ACTIONS AS A TOOL FOR THE RULE
OF LAW IN TURBULENT TIMES***

Abstract

When we think about areas of law that are most essential to advancing the Rule of Law in turbulent times, constitutional law and its limits on the power of government might be the first thing that comes to mind. Injury or tort law is probably not at the top of the list. Yet the law of defamation, one type of tort law, arguably played a significant role in counteracting false statements about the 2020 Presidential Election in the United States, false statements that led to a violent assault on the U.S. Capitol.

Dominion Voting Systems, the manufacturer of electronic voting machines, sued Fox News for defamation based on statements asserting that Dominion rigged the election and committed election fraud. After a judge rejected several of Fox's main defenses raised in a summary judgment motion, Fox agreed to pay Dominion \$787.5 million to settle the case. This Article explains the court's summary judgment decision. It concludes by arguing that controversial aspects of U.S. defamation law – such as the high bar of the actual malice standard and the trend against recognizing the privilege of neutral reportage – helped advance the Rule of Law in this case.

KEYWORDS

defamation, actual malice, neutral reportage, election fraud

SŁOWA KLUCZOWE

zniesławienie, typowa złośliwość, neutralny reportaż, oszustwo wyborcze

I. INTRODUCTION

One recent example of turbulent times in the United States is the controversy over the legitimacy of the 2020 Presidential Election. In November 2020, Donald Trump, the President of the United States, said repeatedly that the 2020 Presidential Election had been stolen from him due to fraud by, among others, Dominion Voting Systems, the manufacturer of electronic voting machines used in numerous states.¹ Over the next few months, two of his lawyers appeared repeatedly on Fox News television programs, asserting that Dominion committed election fraud by rigging the election and that Dominion's software and algorithms manipulated vote counts in the election.²

One example involves Trump's attorney Sidney Powell's appearance on Fox News with Host Maria Bartiromo on 8 November 2020. Powell stated, 'There has been a massive and coordinated effort to steal this election from We the People of the United States of America, to delegitimize and destroy votes for Donald Trump, to manufacture votes for Joe Biden. They used an algorithm to calculate the votes they would need to flip and they used computers to flip those votes from Trump to Biden.'³ Bartiromo responded, 'Sidney, I want to ask you about these algorithms and the Dominion software. Sidney, we talked about the Dominion software. I know that there were voting irregularities. Tell me about that'.⁴

Dominion contended that these statements were untrue, supporting its contention with substantial evidence.⁵ However, enough people believed that the election was stolen and as a result a 'Save America' rally in Washington DC on 6 January 2021 culminated in a violent assault on the United States Capitol by more than 2000 people.⁶

¹ *U.S. Dominion, Inc. v Fox News Network, LLC*, 293 A.3d 1002, 1019 (Sup. Ct. Del. 2023).

² *ibid* 1022, 1065–1102.

³ *ibid* 1065.

⁴ *ibid*.

⁵ *ibid* 1023–24.

⁶ Jim Rutenberg and others, '77 Days: Trump's Campaign to Subvert the Election', *New York Times*, 31 January 2021, <<https://www.nytimes.com/2021/01/31/us/trump-election-lie.html>; Ryan Lucas>, 'Where the Jan. 6 insurrection investigation stands, one year later', *NPR.org*, 6 January 2022, <<https://www.npr.org/2022/01/06/1070736018/jan-6-anniversary-investigation-cases-defendants-justice>>.

In March 2021, Dominion sued Fox News Network and Fox Corporation for defamation in the Superior Court of Delaware, seeking \$1.6 billion in damages.⁷ Both Fox and Dominion filed motions for summary judgment, arguing that the judge could rule as a matter of law on some or all of the elements of defamation. On 31 March 2023, the judge denied Fox's motion and granted part of Dominion's motion, setting the stage for a jury trial on the remaining issues.⁸ However, on 18 April 2023 – right before the trial was due to begin, and after a jury was selected – the parties settled, with Fox News agreeing to pay Dominion \$787.5 million.⁹ This is the largest publicly known defamation settlement in United States history.¹⁰ The dollar amount is arguably a vindication of the Rule of Law and of the ability of the judicial system, at least sometimes, to determine what is true and what is false.¹¹

II. DEFAMATION LAW IN THE UNITED STATES

Defamation law in the United States consists of two components: the elements developed by States through statute or common law in order to protect individuals' reputations and Constitutional requirements imposed by the United States Supreme Court in order to protect free speech. The former include (1) a false and defamatory statement, (2) of or concerning the plaintiff, (3) publication, and (4) special harm or defamation *per se*.¹² A statement is defamatory if it 'tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him'.¹³ Statements

⁷ Merrit Kennedy & Bill Chappell, 'Dominion Voting Systems Files \$1.6 Billion Defamation Lawsuit Against Fox News', *NPR.com*, 26 March 2021, <<https://www.npr.org/2021/03/26/981515184/dominion-voting-systems-files-1-6-billion-defamation-lawsuit-against-fox-news>>. Dominion's suit 'was one of about twenty lawsuits filed as a result of allegations of fraud in the conduct of the 2020 presidential election'. John Bruce Lewis & Bruce L. Ottley, 'New York Times v Sullivan at 60: Where Does Defamation Law Go Now?', 73 *DePaul L. Rev.* 995, 1000 (2024).

⁸ *US Dominion, Inc.*, 293 A.3d, 1063.

⁹ Marshall Cohen & Oliver Darcy, 'Fox News settles with Dominion at the last second, pays more than \$787 million to avert defamation trial over its 2020 election lies', *CNN.com*, 19 April 2023, <<https://www.cnn.com/2023/04/18/media/fox-dominion-settlement/>>.

¹⁰ *ibid.*

¹¹ See Gregory Tardi, 'The Truth Shall Set Democracy Free', 18 *J. Parliamentary & Pol. L.* 1, 8-9 (2024) (stating that '[t]he impact of disinformation and fake news is particularly virulent in regard to elections, meaning that it should also be studied as a factor in democracy' and referencing the Dominion lawsuit).

¹² *US Dominion, Inc.*, 293 A.3d, 1035.

¹³ *MacElree v. Philadelphia Newspapers, Inc.*, 544 Pa. 117, 124-25 (1996).

that accuse someone of serious crime or tend to harm their business constitute defamation *per se*.¹⁴

The state law elements of defamation are quite similar to the principles of defamation law in the United Kingdom.¹⁵ U.S. defamation law began to differ dramatically from that of England in 1964, when the U.S. Supreme Court decided the case of *New York Times v Sullivan*.¹⁶ *The New York Times* had published an advertisement that made accusations of police misconduct in the State of Alabama in connection with the civil rights movement.¹⁷ Some of the details in the accusation were incorrect.¹⁸ The police commissioner of Montgomery, Alabama sued the individuals who placed the advertisement and *The New York Times*, saying that they defamed him.¹⁹ An Alabama jury agreed and ordered that the plaintiff be paid the full amount of damages claimed.²⁰

The Supreme Court noted that it would violate the First Amendment of the U.S. Constitution,²¹ protecting free speech, for a State to make it a crime to criticize public officials, even if the criticism contained some factual errors, because to do so would greatly mitigate such speech.²² The Court reasoned that a State allowing a civil action for damages against those who criticize public officials, where the criticism contained some factual errors, would also unduly inhibit important political speech.²³ The Court stated, ‘A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable ‘self-censorship’.²⁴

Accordingly, the Supreme Court held that courts could award damages in defamation cases brought by public officials only if the plaintiff could prove actual malice, meaning that the defendant made the defamatory statement with

¹⁴ *US Dominion, Inc.*, 293 A.3d, 1053.

¹⁵ Vincent R. Johnson, ‘Comparative Defamation Law: England and the United States’, 24 U. Miami Int’l & Comp. L. Rev. 1, 4–6, 11–16 (2017).

¹⁶ 376 U.S. 254 (1964).

¹⁷ *ibid* 256.

¹⁸ For example, the advertisement stated that the police had arrested Dr. Martin Luther King, Jr. seven times, when it was actually only four. *ibid* 259.

¹⁹ *ibid* 256.

²⁰ *ibid*.

²¹ The First Amendment provides that ‘Congress shall make no law ... abridging the freedom of speech, or of the press’ <<https://constitution.congress.gov/constitution/amendment-1/>>.

²² 376 U.S. 277. The Court stated, ‘we consider this case 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 government officials’. *ibid* 270.

²³ *ibid* 277–78.

²⁴ *ibid* 279.

knowledge that it was false or with reckless disregard as to its falsity.²⁵ ‘Reckless disregard’ means that ‘the defendant in fact entertained serious doubts as to the truth of his publication’.²⁶ In a later case, the Supreme Court held that public figures – as well as public officials – must prove actual malice to recover for defamation.²⁷ The Court reasoned that such figures, while not holding public office, ‘are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large’.²⁸ A party will constitute a public figure if they have thrust themselves or have been drawn into a public controversy and sought to influence its outcome.²⁹

III. MOTIONS FOR SUMMARY JUDGMENT

A. STATE LAW ELEMENTS

Dominion’s defamation claim was based on twenty statements made by Fox hosts or Trump attorneys, Sidney Powell and Rudy Guiliani.³⁰ The Superior Court of Delaware, applying New York law, concluded easily that the challenged statements were ‘of and concerning’ Dominion, noting that the statements mentioned Dominion by name.³¹ The court also found that statements constituted defamation *per se* because they attacked the ‘basic integrity’ of Dominion’s voting systems business.³²

The issue of publication was more challenging. Publication means communication of the challenged statement to at least one third party, and each person who repeats it is responsible for any resulting damages.³³ Moreover, anyone who participated in the creation of the statement or who directed or participated in its communication satisfies the publication element.³⁴ The court concluded that Fox

²⁵ *ibid* 279–80.

²⁶ *St. Amant v Thompson*, 390 U.S. 727, 731 (1968).

²⁷ *Curtis Pub. Co. v Butts*, 388 U.S. 130 (1967).

²⁸ *ibid* 164 (Warren, C.J., concurring). The Court reasoned, ‘Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of ‘public officials’.

²⁹ *Hutchinson v Proxmire*, 443 U.S. 111, 134–135 (1979); *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

³⁰ *U.S. Dominion, Inc.*, 293 A.3d, 1014.

³¹ *ibid* 1039.

³² *ibid* 1053.

³³ *ibid* 1039.

³⁴ *ibid* 1040.

News Network satisfied the element of publication because it communicated the statements throughout its media network, including on its television broadcasts and social media platforms.³⁵

It was less clear, however, that Fox Corporation, the parent company of Fox News, participated in the publication of the statements. Fox News hosts, employees, and executives testified that Fox Corp. was not involved in creating or communicating the statements.³⁶ Dominion contended that Rupert Murdoch and Lachlan Murdoch, the Chairman and Chief Executive Officer of Fox Corp., were fundamentally involved in the daily operations of Fox News through phone calls and emails about hosts, guests, topics, and narratives, including how to cover the 2020 election and the conspiracy claims.³⁷ Given this factual dispute, the court concluded that it would be up to a jury to determine whether Dominion had proved publication as to Fox Corp.³⁸

On the element of falsity, Fox first attempted to argue that it was true that President Trump, through his attorneys Sidney Powell and Rudy Giuliani, claimed that Dominion had committed election fraud.³⁹ This is not the way falsity is determined under U.S. defamation law, however. What matters is whether the content of the allegedly defamatory statement – ‘Dominion committed election fraud’ – is false, not whether Fox accurately reported others’ allegations about election fraud.⁴⁰ The rule in defamation law is that, unless some privilege applies, the party repeating the defamatory statement is liable himself for the publication, even if he states the source.⁴¹

³⁵ *ibid.*

³⁶ *ibid* 1041.

³⁷ *ibid* 1042.

³⁸ *ibid.*

³⁹ *ibid* 1035, 1038.

⁴⁰ *ibid* 1038, 1039.

⁴¹ *Restatement (Second) of Torts* § 578 (1997) (‘one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it’); Jeffrey Standen, ‘Republication Liability on the Web’, 105 *Marq. L. Rev.* 669, 687 (2022) (‘The republication standard requires each successive publisher to conduct a reasonable investigation into the veracity of the statements it intends to make, or to risk liability for reliance on the previous publisher.’); Dan B. Dobbs, *The Law of Torts* 1150 n.23 (2000) (stating that ‘the repeater is liable for the defamatory statement and does not escape this liability merely because he has repeated the statement with precision’). This concept is sometimes stated as ‘tale bearers are as bad as tale makers’. George Freeman, ‘Long-Run Effects of Dominion v Fox’, *Media Law Resource Center*, April 2023, <<https://medialaw.org/long-run-effects-of-dominion-v-fox/>>. The Communications Decency Act created a significant exception to this rule, providing that ‘no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider’. 47 U.S.C. § 230 (2018).

The court looked at each challenged statement and found that it was false.⁴² The court noted that state audits and recounts, certification and testing of Dominion's machines, sworn testimony by the United States Election Assistance Commissioner, sworn testimony by Dominion, Dominion's source code, and the report of two independent testing laboratories all demonstrated that the statements were false, as did Fox's lack of evidence of the truth of its statements.⁴³ The court ended this section of the opinion by stating in italics: *'The evidence developed in this civil proceeding demonstrates that it is CRYSTAL clear that none of the [s]tatements relating to Dominion about the 2020 election are true.'*⁴⁴

B. CONSTITUTIONAL LAW ELEMENTS: ACTUAL MALICE

In many defamation cases, the parties vigorously dispute whether the plaintiff is a public figure and thus must prove actual malice, or instead is a private figure and can prove a lesser amount of fault by the defendant.⁴⁵ In this case, while Dominion did not want the court to find it was a public figure, it nonetheless conceded that the actual malice standard applied to its claims against Fox.⁴⁶ The court noted that there was a public controversy over the 2020 election and Dominion was drawn into, and participated in that controversy.⁴⁷ Given that Dominion agreed to the application of the actual malice standard, the court concluded that it would treat Dominion as a public figure for the purpose of these defamation claims.⁴⁸

The high bar of the actual malice standard is the reason that most defamation lawsuits in the United States fail.⁴⁹ Accordingly, it is somewhat surprising that Dominion conceded that the actual malice standard applied. Dominion contended, however, that this was 'the rare defamation case with extensive direct evidence of actual malice'.⁵⁰ Evidence revealed through the discovery process indicated

⁴² *U.S. Dominion, Inc.*, 293 A.3d, 1036–1039.

⁴³ *ibid.*

⁴⁴ *ibid* 1039.

⁴⁵ Matthew D. Bunker, 'Corporate Chaos: The Muddled Jurisprudence of Corporate Public Figures', 23 *Comm. L. & Pol'y* 1, 1 (2018) (noting that 'the divide between public and private status for a defamation plaintiff can be – and frequently is – the determinative factor in whether a plaintiff can succeed').

⁴⁶ *US Dominion, Inc. v Fox News Network, LLC*, 2023 WL 568869, at *1 (Del. Super. Ct 27 January, 2023).

⁴⁷ *ibid* *2 (stating that 'the nature and degree of Dominion's participation in that particular controversy is extensive').

⁴⁸ *ibid.*

⁴⁹ *Berisha v Lawson*, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting) (stating that 'the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability').

⁵⁰ *US Dominion, Inc.*, 293 A.3d, 1044.

that many people at Fox doubted the truth of the election fraud allegations against Dominion.⁵¹ Fox's Political Editor testified in a deposition that 'he did not believe the allegations, that 'no reasonable person' would have believed them, and confirmed that this was a widely held belief among the news people he talked with'.⁵²

Beginning on 20 November 2020, Dominion sent numerous 'Setting the Record Straight' emails to Fox News' reporters and producers, providing facts and links debunking Fox's statements.⁵³ On the same day, the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Agency issued a statement calling the 2020 election 'the most secure in American history' and attesting that '[t]here is no evidence that a voting system deleted or lost votes, changed votes, or was in any way compromised'.⁵⁴ Fox reporters, producers, and hosts were aware of that statement, and – after receiving it – some of them exchanged emails debunking the election fraud claims.⁵⁵ One producer on the Lou Dobbs show, which repeatedly featured Trump attorney Sidney Powell, texted others at Fox that Powell was 'doing lsd and cocaine and heroin and shrooms'.⁵⁶ Before Powell appeared on Fox Host Maria Bartiromo's show on 8 November 2020, she sent Bartiromo an email from one of her sources for the proposition that Dominion machines flipped votes. The source stated that she has visions and was 'internally decapitated', and that her information came from a combination of dreams and time travel.⁵⁷ Despite the clear unreliability of this source, neither Bartiromo nor her producers questioned Powell on this point.⁵⁸

Fox, in contrast, asserted that its hosts believed the allegations, or at least did not flatly disbelieve them because they were made by the United States President and his attorneys.⁵⁹ Fox emphasized the 'critical difference between not knowing whether something is true and being highly aware that is probably false'.⁶⁰ More-

⁵¹ *ibid*, 1044 n.362 (citing deposition testimony of numerous Fox employees who stated that they never believed the allegations).

⁵² *ibid* 1044–45.

⁵³ *ibid* 1023–24.

⁵⁴ *ibid* 1025.

⁵⁵ *ibid* 1046.

⁵⁶ *ibid*.

⁵⁷ *ibid* 1045; Jim Rutenberg, Michael S. Schmidt & Jeremy W. Peters, 'Missteps and Miscalculations: Inside Fox's Legal and Business Debacle', *New York Times*, 27 May 2023, <<https://www.nytimes.com/2023/05/27/business/media/fox-news-dominion-voting.html>>. The source also stated, 'The wind tells me I'm a ghost but I don't believe it'. A First Amendment lawyer said that 'if he ever stumbled upon such an email in a client's files, he would 'physically wrest my client's checkbook away from them and settle before the police arrive'.

⁵⁸ *US Dominion, Inc.*, 293 A.3d, 1045.

⁵⁹ *ibid* 1049–50 (stating that 'a publisher's reliance on elected officials ... shows an absence of actual malice').

⁶⁰ *ibid* 1049.

over, Fox contended that Dominion's 'Setting the Record Straight' emails were 'self-serving denials' about which Fox employees were appropriately skeptical, and thus were insufficient to prove that those employees actually entertained serious doubts about the truth of the election fraud allegations.⁶¹ Fox also argued that the allegations were not inherently implausible 'because in the past, experts and politicians alike have raised concerns about electronic voting systems' vulnerabilities'.⁶²

The court found that genuine issues of material fact remained as to which Fox employees were responsible for publication of each defamatory statement and if such individuals acted with actual malice.⁶³ Accordingly, the court declined to grant summary judgment to either party on the issue of actual malice.⁶⁴ Actual malice would be an issue for the jury to decide.

Why, then, did Fox agree to settle the case for \$787.5 million, rather than taking their chances with a jury? One major reason is the court's rejection of Fox's remaining three defenses.

C. REMAINING DEFENSES: PRIVILEGES OF OPINION, FAIR REPORT, AND NEUTRAL REPORTAGE

Fox asserted that it could not be held liable for defamation based on the challenged statements because they were statements of opinion, not fact.⁶⁵ Under the U.S. Constitution, there is no absolute constitutional protection from defamation actions for expressions of opinion.⁶⁶ New York law applied to this case, however, and the New York Constitution does protect 'expressions of "pure" opinion'.⁶⁷ If a statement reasonably implies an assertion of fact, and can be proven false, it is not a pure opinion, and it can be the basis of a defamation action.⁶⁸ Moreover, 'mixed opinions', statements of opinion which imply that they are based on facts unknown to the viewer or listener, are also actionable in defamation.⁶⁹ The distinction between constitutionally-protected opinion and unprotected statements of fact or mixed opinions is a question for the court to decide as a matter of law; it is not a matter for the jury to decide.⁷⁰

⁶¹ *ibid* 1051.

⁶² *ibid* 1050.

⁶³ *ibid* 1052–53.

⁶⁴ *ibid*.

⁶⁵ *ibid* 1061.

⁶⁶ *Milkovich v Lorain Journal Co.*, 497 U.S. 1, 21 (1990).

⁶⁷ *US Dominion, Inc.*, 293 A.3d,1063.

⁶⁸ *ibid* 1064.

⁶⁹ *ibid* 1065.

⁷⁰ *ibid* 1060.

The task for the court was to determine whether the challenged expressions reasonably appeared to state or imply assertions of objective fact about Dominion.⁷¹ Fox contended that a reasonable viewer would not understand its hosts' statements about Dominion to convey facts because this was 'spirited debate on opinion shows' and involved 'loose, figurative, and hyperbolic language'.⁷² In a voluminous Appendix to its decision, the court examined all twenty challenged statements, in context, and concluded that each was either a statement of fact or a mixed opinion.⁷³ For example, regarding the exchange between Trump attorney Sidney Powell and Fox News Host Maria Bartiromo referenced in the Introduction, the court noted that language such as 'Sidney, we talked about the Dominion software. I know there were voting irregularities' 'indicates to the reasonable viewer that the events in question actually occurred, and Bartiromo's questioning of her guests is an inquiry of *what* the evidence is, not whether the evidence *exists* in the first place'.⁷⁴ According to the court, the statement 'use[d] precise and readily understood language to assert facts that are capable of being proven true or false'.⁷⁵

The court also reasoned that the context of the statements – 'made by newscasters holding themselves out to be sources of accurate information' – did not indicate that the statements were pure opinion.⁷⁶ Fox News hosts claimed to be engaged in truth-seeking and to base their interview questions on evidence and judicial proceedings.⁷⁷ Finally, to the extent that the statements allege that Dominion committed the crime of election fraud, '[a]ccusations of criminal activity, even in the form of opinion, are not constitutionally protected'.⁷⁸

Fox also asserted the privilege of fair report. First developed through common law, this privilege is an exception to the general rule that a party repeating a defamatory statement is liable himself for the publication.⁷⁹ A reporter is privileged to provide a fair and accurate report of public proceedings, public documents, and information of public concern uttered at public meetings.⁸⁰ The rationale behind the privilege is that the reporter is 'a conduit for information that citizens have

⁷¹ *ibid* 1061.

⁷² *ibid* 1061.

⁷³ *ibid* 1063–1102.

⁷⁴ *ibid* 1067.

⁷⁵ *ibid*.

⁷⁶ *ibid* 1062.

⁷⁷ *ibid*.

⁷⁸ *ibid* 1063.

⁷⁹ Dobbs, *supra* note 41, 1162.

⁸⁰ *ibid* 1162–64.

a right to see for themselves'.⁸¹ The privilege applies even when the reporter knows that the underlying facts – such as statements in a legal document – are false.⁸²

Under New York law, the fair report privilege was codified as applying to a fair and true report of an official proceeding.⁸³ For the privilege to apply, the report must 'comment[] on a proceeding, not the underlying events of such a proceeding'.⁸⁴ The privilege would apply, for example, to an accurate report of a lawsuit. Fox contended that the fair report privilege should apply to all the challenged statements because they involved the press covering or commenting on investigations and proceedings.⁸⁵

Trump attorneys Powell and Guiliani filed several lawsuits challenging the results of the 2020 election. If the statements only accurately reported those lawsuits, the fair report privilege would apply. The court noted, however, that most of the statements were made before any lawsuit was filed.⁸⁶ Only one of the statements referred to an official proceeding, and the court found that the fair report privilege did not apply to that statement.⁸⁷ The statement involved Powell appearing on *Lou Dobbs Tonight* and alleging that 'all the machines are infected with the software code that allows Dominion to share votes', describing Dominion's actions as 'the most massive and historical egregious fraud the world has ever seen'.⁸⁸ Because the statement was about the underlying facts behind the lawsuit/proceeding, and was not an accurate report of the lawsuit itself, the fair report privilege did not apply.⁸⁹

Fox appears to have believed that its strongest defense to Dominion's defamation lawsuit was the privilege of neutral reportage. This privilege shields unbiased reports of newsworthy defamatory statements, even when the reporter knows that the statements are untrue.⁹⁰ Fox began its first motion to dismiss Dominion's defamation lawsuit with the following paragraph: 'A free press must be able to report both sides of a story involving claims striking at the core of our democracy, especially when those claims prompt numerous lawsuits, government investigations, and election recounts. When a sitting President of the United States and his legal team challenge a presidential election in litigation throughout the nation,

⁸¹ *ibid* 1162.

⁸² *ibid* 1162–63.

⁸³ *US Dominion, Inc.*, 293 A.3d, 1060.

⁸⁴ *ibid* 1058.

⁸⁵ *ibid* 1059.

⁸⁶ *ibid* 1060.

⁸⁷ *ibid*.

⁸⁸ *ibid*.

⁸⁹ *ibid*.

⁹⁰ Dan Laidman, 'When the Slander Is the Story: The Neutral Reportage Privilege in Theory and Practice', 17 *UCLA L. Rev.* 74, 76 (2010).

the media can truthfully report and comment on those allegations under the First Amendment without fear of liability. Plaintiffs' defamation lawsuit against Fox News threatens to stifle the media's free-speech right to inform the public about newsworthy allegations of paramount public concern'.⁹¹

The privilege of neutral reportage was first recognized in 1977 in the case of *Edwards v National Audubon Society*.⁹² The National Audubon Society had accused several prominent scientists of being paid by the pesticide industry to minimize the effect of the pesticide DDT on the bird population, and *The New York Times* published an article reporting the accusation that the scientists were paid liars.⁹³ The court did not focus its reasoning on whether *The New York Times* reporter knew that the 'paid liar' accusation was false. Rather, the court held that 'when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity'.⁹⁴ According to the court, '[w]hat is newsworthy about such accusations is that they were made', and '[t]he public interest in being fully informed about controversies that often range around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them'.⁹⁵

The U.S. President accusing a company that makes electronic voting machines of election fraud that changed the result of the 2020 Presidential Election certainly seems newsworthy, regardless of the truth of the accusations. The problem for Fox, however, is that the U.S. Supreme Court has never directly addressed the privilege of neutral reportage,⁹⁶ only a minority of courts have recognized the privilege,⁹⁷ and the trend is against recognizing it.⁹⁸ Perhaps most significantly, the privilege is not recognized under New York law, the law that applied to Dominion's defamation claim.⁹⁹

Numerous commentators have argued that courts should recognize the privilege of neutral reportage as protecting important speech of great concern

⁹¹ *US Dominion, Inc. v Fox News Network, LLC*, Defendant's Brief in Support of Its Rule 12(b) (6) Motion to Dismiss for Failure to State a Claim, 2021 WL 10330903 (18 May 2021).

⁹² 556 F.2d 113 (2nd Cir. 1977).

⁹³ *ibid* 116–18.

⁹⁴ *ibid* 120.

⁹⁵ *ibid*.

⁹⁶ Laidman, *supra* note 90, 76.

⁹⁷ Victor Schwartz, Kathryn Kelly & David Partlett, *Prosser, Wade, and Schwartz's Torts Cases and Materials* 2020, 14 ed., 1010.

⁹⁸ Christine Mazzeo, 'Neutral Reportage Privilege: The Libel Defense Needed in a Struggling Democracy', Master's Theses (2009–) 548, <https://epublications.marquette.edu/theses_open/548> 62.

⁹⁹ *US Dominion, Inc.*, 293 A.3d, 1056 (citing *Hogan v Herald*, 84 A.D.2d 470 [4th Dept. 1982]).

to the public.¹⁰⁰ In support of that contention, they often cite the case of *Norton v Glenn*.¹⁰¹ Following a city council meeting, city council member William Glenn characterized another member, James Norton, and the mayor as ‘queers and child molesters’.¹⁰² A newspaper reporter who heard the comments wrote an article headlined ‘Slurs, insults drag town into controversy’, which included the quotes from Glenn and described Norton and the mayor as denying the charges and calling the comments ‘bizarre’ and ‘sad’.¹⁰³ Norton and the mayor sued Glenn, the reporter, and the newspaper for defamation.¹⁰⁴

The reporter and the newspaper’s editors did not believe that Glenn’s accusations were true, so the actual malice standard would provide them with no protection against the plaintiffs’ defamation claims. Rather, the editors reasoned that voters should know that an elected official was making unhinged, unsupported accusations about his colleagues,¹⁰⁵ in other words, the statements said much more about Glenn than they said about the plaintiffs. Moreover, the article may have succeeded in conveying that information to voters – in the next election, voters chose to remove Glenn from office and retain the plaintiffs.¹⁰⁶ The trial court instructed the jury about the privilege of neutral reportage, and they found that, ‘because the Article accurately conveyed the gist of the statements Glenn made and did not imply that the Media Defendants adopted or concurred in those statements’, the reporter and the newspaper were not liable for defamation.¹⁰⁷

The Pennsylvania Supreme Court reversed, holding that the neutral reportage privilege was not encompassed within the First Amendment of the U.S. Constitution.¹⁰⁸ The court reasoned that, throughout its defamation jurisprudence, the U.S. Supreme Court has never granted media defendants blanket immunity for publishing defamatory statements.¹⁰⁹ Instead the Court has strived to strike a balance ‘between the First Amendment’s guarantee of freedom of expression and the states’ right to offer protection to a citizen’s reputation via a defamation action’.¹¹⁰ The Court has

¹⁰⁰ See, e.g., Laidman, *supra* note 90; Mazzeo, *supra* note 98; Naomi Sosner & George Freeman, ‘The Neutral Reportage Doctrine: MIA. Doesn’t Good Journalism Demand It?’, 33-WTR Comm. Law 14 (2018).

¹⁰¹ 580 Pa. 212 (2004)

¹⁰² *ibid* 215.

¹⁰³ *ibid* 215–16.

¹⁰⁴ *ibid* 216.

¹⁰⁵ Sosner & Freeman, *supra* note 100, 15.

¹⁰⁶ *ibid*.

¹⁰⁷ 580 Pa. 217. The jury found that Mr. Glenn had made the statements with actual malice and held him liable for defamation. *ibid*.

¹⁰⁸ *ibid* 215. The court also found that the Pennsylvania Constitution did not support such a privilege.

¹⁰⁹ *ibid* 225.

¹¹⁰ *ibid* 226.

recognized the importance of defamation actions, stating that ‘[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential worth of every human being – a concept at the root of any decent system of ordered liberty’.¹¹¹

For speech about public officials and public figures, the Court has struck that balance via the actual malice standard, which ‘forbid[s] imposition of liability even in those instances where the defendant negligently publishes false, defamatory statements’.¹¹² The *Norton* court concluded that ‘[i]n light of the high Court’s consistent application of the actual malice standard in these types of cases, and its cautions that free expression law should be balanced against, and not be allowed to obliterate, state law protections to reputation’, the Court would not ‘jettison the actual malice standard in favor of the neutral reportage doctrine’.¹¹³ The media defendants in *Norton* sought to appeal to the U.S. Supreme Court – giving the Court an opportunity to state definitively whether the First Amendment required recognition of the privilege of neutral reportage – but the Court refused to hear the case.¹¹⁴

The *Dominion* court cited with approval the *Norton* court’s reasoning that ‘the neutral report privilege is not necessary because the actual malice standard provides considerable protection to the media in defamation actions’ and that the privilege would ‘eliminate a state’s power to provide protection to person’s reputation through a defamation lawsuit’.¹¹⁵

The *Dominion* judge’s rulings on summary judgment rendered Fox unable to argue to the jury that its statements were constitutionally protected opinion, fair report of public proceedings, or neutral newsworthy accusations made by President Trump and his lawyers.¹¹⁶ *Dominion v Fox* could have given the U.S. Supreme Court another opportunity to rule on the privilege of neutral reportage, but Fox decided to settle the case on the eve of trial instead.

IV. CONCLUSION

What does *Dominion v Fox* mean for the Rule of Law? Amid all the controversy over the 2020 U.S. Presidential Election, there is a value in having a judicial

¹¹¹ *ibid* 225–26 (quoting *Milkovich*, 497 U.S., 22).

¹¹² *ibid*.

¹¹³ *ibid* 226–27.

¹¹⁴ Laidman, *supra* note 90, 76–77.

¹¹⁵ *US Dominion, Inc.*, 293 A.3d, 1058.

¹¹⁶ Jeremy W. Peters, ‘Judge Limits Fox’s Options for Defense in Dominion Trial’, *New York Times*, 11 April 2023, <<https://www.nytimes.com/2023/04/11/business/fox-news-dominion-trial.html>>.

opinion declaring that – at least as far as Dominion was concerned – there was no election fraud. While Fox did not apologize to Dominion as part of the settlement, it did say in a statement: ‘We acknowledge the Court’s rulings finding certain claims about Dominion to be false’.¹¹⁷

This case arose at a time when U.S. defamation law has faced considerable criticism. It is often criticized as overprotecting false speech and under-protecting individuals’ reputations, particularly when compared to defamation law elsewhere.¹¹⁸ Two Justices of the United States Supreme Court have expressed the view that *New York Times v Sullivan*, the seminal case constitutionalizing U.S. defamation law, should be overruled.¹¹⁹ Both scholars¹²⁰ and politicians¹²¹ have asserted that, while defamation law could serve a valuable role in combatting disinformation, the actual malice standard presents too great an obstacle.¹²²

The circumstances under which the *Dominion* case arose, however, serve as a reminder of the value of the actual malice standard. Like *Dominion*, *New York Times v Sullivan* itself took place in a tense political climate.¹²³ Public officials in the southern United States were using defamation law to silence media coverage

¹¹⁷ Matt Taylor, ‘Fox News reaches \$787.5 million settlement in Dominion’s defamation lawsuit’, Politico, 18 April 2023, <<https://www.politico.com/news/2023/04/18/fox-news-reaches-settlement-with-dominion-in-defamation-lawsuit-00092621>>.

¹¹⁸ See, e.g., Jeannie Suk Gersen, ‘The Dark Side of Defamation Law’, *The New Yorker*, 11 May 2023, <<https://www.newyorker.com/magazine/2023/05/22/the-dark-side-of-defamation-law>>; Michal Lavi, ‘Publish, Share, Re-Tweet, and Repeat’, 54 U. Mich. J.L. Reform 441, 471–72 (2021).

¹¹⁹ *Berisha v Lawson*, 141 S.Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting from denial of certiorari) (stating that constitutionalizing defamation law not only has ‘evolved into a subsidy for published falsehoods on a scale no one could have foreseen, it has come to leave far more people without redress than anyone could have predicted’); *McKee v Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari) (stating that ‘*New York Times* and the Court’s decisions extending it were policy-driven decisions masquerading as constitutional law’ and did not ‘simply apply[] the First Amendment as it was understood by the people who ratified it’).

¹²⁰ See, e.g., David A. Logan, ‘Rescuing Our Democracy by Rethinking *New York Times v Sullivan*’, 81 Ohio St. L. J. 759 (2020).

¹²¹ During his first term in office, President Trump stated, ‘We are going to take a strong look at our country’s libel laws, so that when somebody says something that is false and defamatory about someone, that person will have meaningful recourse in our courts’. Michael M. Grynbaum, ‘Trump Renews Pledge to “Take a Strong Look” at Libel Laws’, *New York Times*, 10 January 2018, <<https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html>>.

¹²² Lewis & Otley, *supra* note 7, 998 (stating that the actual malice standard ‘is being challenged more now by political figures, judges, and scholars than at any time since *Sullivan* was decided’).

¹²³ Amy Kristin Sanders, ‘Revisiting *Rosenbloom*: Can a Return to the “Matter of Public Concern” Standard in Defamation Cases Quiet *Sullivan* Skeptics?’, 88 Mo. L. Rev. 769, 774 (2023) (noting that ‘[m]any parallels can be found between the decade leading up to *Sullivan* and the current times once *Sullivan* is examined in its full context as a civil rights case’).

about the civil rights movement, which was critical of those officials.¹²⁴ Evidence suggests that political leaders in the United States today are similarly interested in using defamation law to attack media criticizing them.¹²⁵ The activities of a free press are central to a flourishing democracy.¹²⁶ The actual malice standard provides breathing room for political speech, allowing media defendants space to reveal information about public officials and figures without fearing that an inadvertent factual error will expose them to ruinous liability.¹²⁷ As noted by one commentator arguing in support of the actual malice standard, ‘A nation’s defamation law can be a strong indicator of how it accepts political dissent and whether it respects or safeguards wide-open discourse’.¹²⁸

Even though a media defendant, by agreeing to pay an enormous sum of money, lost the *Dominion* case, that loss ultimately benefits the media as a whole.¹²⁹ Critics of the actual malice standard had argued that the standard made it impossible for public officials or figures to win a defamation case,¹³⁰ and *Dominion* proved that was untrue.¹³¹ Finding that a defamation plaintiff is a public official or figure – and thus that the actual malice standard applies – does not

¹²⁴ (n 123) 777.

¹²⁵ David Enrich, ‘Trump and His Picks Threaten More Lawsuits About Critical Coverage’, *New York Times*, 14 December 2024, <<https://www.nytimes.com/2024/12/15/business/media/trump-defamation-lawsuit-abc-hegseth-cnn.html>>; First Amendment Watch, ‘Trump Suing for Defamation’, <<https://firstamendmentwatch.org/tag/trump-suing-for-defamation/>> (accessed 11 March 2025) (listing the defamation lawsuits against media defendants filed by Donald Trump), accessed 11 March 2025 (listing the defamation lawsuits against media defendants filed by Donald Trump).

¹²⁶ *New York Times v U.S.*, 403 U.S. 713, 717 (1971) (Black., J., concurring) (stating that ‘[i]n the First Amendment the Founders gave the free press the protection it must have to fulfill its central role in our democracy’, that ‘[t]he press was protected so that it could bare the secrets of government and inform the people’, and that ‘[o]nly a free and unrestrained press can effectively expose deception in government’). See Sanders, *supra* note 123, 773 (stating that ‘a rollback in constitutional protection for speech – particularly criticism of government officials or issues important to our communities – poses a grave threat to our nation’s democratic foundation’).

¹²⁷ *Sullivan*, 376 U.S. 271-72; Jeff Kosseff, ‘What Protects Fox News Also Protects Our Democracy’, *New York Times*, 14 April 2023, <<https://www.nytimes.com/2023/04/14/opinion/dominion-fox-news-supreme-court-sullivan.html>>.

¹²⁸ Roy S. Gutterman, ‘Actually ... A Renewed Stand for the First Amendment Actual Malice Defense’, 68 *Syracuse L. Rev.* 579, 585 (2018). See also Lyrissa Lidsky, ‘Cheap Speech and the Gordian Knot of Defamation Reform’, 3 *J. Free Speech L.* 79, 80 (2023) (arguing that ‘[m]erely rolling back constitutional protections will not deliver the proper balance between protecting individual reputation and safeguarding the types of speech that contribute to informed decision-making, because powerful people will increasingly use defamation law to punish their critics’).

¹²⁹ Freeman, *supra* note 41.

¹³⁰ *Berisha*, 141 S.Ct. at 2428 (Gorsuch, J., dissenting from denial of certiorari) (describing the standard as ‘an effective immunity from liability’); Freeman, *supra* note 41.

¹³¹ Lewis & Ottley, *supra* note 7, 1040; Freeman, *supra* note 41.

mean that the plaintiff automatically loses. Accordingly, ‘*Dominion v Fox* might ironically have as its legacy the continued retention of this [*Sullivan*] precedent and might just auger the end of the attack against it’.¹³²

Those concerned about rampant disinformation in the United States today have argued that the high bar of the actual malice standard renders defamation law useless as a means for correcting disinformation and promoting truth.¹³³ However, there is a value in allowing liability for defamation about a public actor only when one can prove that the speaker actually knew what they were saying was false. Supporters of the Republican Party in the United States place a great deal of trust in Fox News.¹³⁴ Arguments about whether Fox was unreasonable or failed to use due care in reporting about Dominion may not be enough to convince them that Dominion did not rig the 2020 U.S. Presidential Election. Showing that Fox News reporters, producers, and hosts made purposeful, knowing lies may be more persuasive.¹³⁵

The very difficulty of satisfying the actual malice standard made it particularly meaningful when the judge in *Dominion v Fox* held that a reasonable jury could find that Fox hosts and producers acted with actual malice. Actual malice involves an inquiry into what the speaker actually believed,¹³⁶ which meant extensive discovery and disclosure of Fox employees’ own statements revealing that they knew the Dominion allegations were false but presented them anyway.¹³⁷ Evidence indicated that Fox knew that the election fraud claims were unfounded but repeated them in order to satisfy the demands of their Trump-loyal audience and to avoid losing that audience to competing conservative news outlets.¹³⁸

¹³² Freeman, *supra* note 41.

¹³³ Logan, *supra* note 120, 763 (asserting that ‘there is now what amounts to an absolute immunity from damages actions for false statements, and this evisceration of the deterrent power of defamation law has facilitated a torrent of false information entering our public square’); Lili Levi, ‘Disinformation and the Defamation Renaissance: A Misleading Promise of “Truth”’, 57 U. Rich. L. Rev. 1235, 1244 (2023) (noting that ‘[t]he attack on the *Sullivan* regime found rich new ground in a line of influential scholarship focusing on the democratic harms of political distortion and disinformation’).

¹³⁴ Taylor Orth & Carl Bialik, ‘Trust in Media 2024: Which news sources Americans trust – and which they think lean left or right’, YouGov, 30 May 2024, <<https://today.yougov.com/politics/articles/49552-trust-in-media-2024-which-news-outlets-americans-trust>>.

¹³⁵ Lewis & Ottley, *supra* note 7, 1033–35.

¹³⁶ *St. Amant*, 390 U.S., 731.

¹³⁷ Lewis & Ottley, *supra* note 7, 1033–35 (noting that ‘[i]n their depositions, many Fox executives and on-air hosts stated that they never believed the claims being made against Dominion by guests such as Sidney Powell and Rudy Giuliani’ and that the deposition of Fox Corp. Chairman Rupert Murdoch was particularly damaging as ‘[h]e repeatedly rejected the conspiracy theories made by Fox News hosts after the election’).

¹³⁸ *US Dominion, Inc.*, 293 A.3d, 1020–22, 1026–28.

The kind of evidence needed to prove actual malice may be the evidence most likely to convince those otherwise susceptible to disinformation.

Alongside the arguments about the actual malice standard providing too much protection of speech, commentators have argued that courts' failure to consistently recognize the privilege of neutral reportage results in insufficient protection of important speech.¹³⁹ Fox's Chief Legal Officer Viet Dinh stated in an interview before the Dominion lawsuit, 'The newsworthy nature of the contested presidential election deserved full and fair coverage from all journalists. Fox News did its job, and this is what the First Amendment protects'.¹⁴⁰ Another attorney for Fox asserted, 'If the president of the United States is alleging that there was fraud in the election, that's newsworthy, whether or not there's fraud in the election. It's the most newsworthy thing imaginable'.¹⁴¹

The courts that have rejected the privilege of neutral reportage, however, have reasoned that the privilege is inconsistent with the balance between reputation and speech struck by the U.S. Supreme Court. Even when a reporter's goal in repeating a defamatory statement is shedding a light on the speaker, as in *Norton v Glenn*, repeating and spreading the defamation negatively affects the plaintiff. The mayor in that case, a decade after the article was published, continued to think about the allegations and avoided being alone with children due to the taint of being accused of child molestation.¹⁴² If Glenn's accusations had only been heard by those within earshot, there would have been much less effect on the plaintiffs' reputations.

Similarly, Dominion argued that, through Fox's broadcasting allegations about Dominion that Fox knew were false, 'Fox took a small flame and turned it into a forest fire. As the dominant media company among those viewers dissatisfied with election results, Fox gave these fictions a prominence they otherwise would never have achieved. With Fox's global platform, an audience of hundreds of millions, and the inevitable and extensive republication and dissemination of the falsehoods through social media, these lies deeply damaged Dominion's once-thriving business'.¹⁴³

¹³⁹ See *supra* note 100; Shelly Rosenfeld, 'The Paper Case : The Neutral Reportage Privilege in Defamation Cases and Its Impact on the First Amendment', 19 Vill. Sports & Ent. L.J. 135, 140 (2012) (asserting that 'the neutral reportage privilege is essential to the freedom of the press that the First Amendment requires').

¹⁴⁰ David Lat, 'Is Viet Dinh The Most Powerful Lawyer in America?' Original Jurisdiction, 17 March 2021, <<https://davidlat.substack.com/p/is-viet-dinh-the-most-powerful-lawyer>>.

¹⁴¹ Rutenberg and others, *supra* note 57.

¹⁴² Laidman, *supra* note 90, 102.

¹⁴³ *US Dominion, Inc. v Fox News Network, LLC*, 2021 WL 1153152 (Del. Super.) (26 March 2021) (Dominion's Complaint).

Proponents of the privilege of neutral reportage often argue that it is a necessary corollary of the privilege of fair report. As stated by one scholar, ‘[t]he fair report privilege, while vital to promoting the public’s knowledge of governmental actions, is incomplete in that important issues about public issues and officials’ fitness for office is just as likely to come from statements made in interviews, press conferences, campaign events or myriad other settings as it is in a public meeting or official report’.¹⁴⁴ If reporters are aware, however, that they can safely repeat statements they know are false only if those statements occur in public documents or proceedings, two things are likely to happen. First, fewer falsehoods will be repeated, causing less harm to reputation. Second, the most egregious falsehoods – the ones that even the original speaker knows are false – will not get spread because the original speaker will hesitate before putting the statement in a legal document. While Sidney Powell filed lawsuits seeking to overturn the election in four states, including Georgia, she did not include some of her most outrageous allegations about Dominion in those lawsuits, such as her claim that Dominion made kickbacks to Georgia officials for using their machines in the 2020 election.¹⁴⁵ As an attorney, Powell was aware that knowingly including false statements in a legal document would imperil her license to practice law.

Even if the *Dominion* court had recognized the privilege of neutral reportage, it might not have applied because Fox’s reporting was arguably not neutral. The court noted that Fox’s ‘failure to reveal extensive contradicting evidence from the public sphere and Dominion itself indicates that its reporting was not disinterested’.¹⁴⁶ Fox hosts not only repeated Powell and Giuliani’s allegations about Dominion, they endorsed those allegations. In their Complaint, Dominion emphasized Fox’s business motive in spreading the election fraud allegations: ‘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 company called Dominion as the villain. After the 3 November 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

¹⁴⁴ Laidman, *supra* note 90, 80.

¹⁴⁵ Alan Feuer, ‘Dominion demands that Sidney Powell retract “baseless and false allegations” about voting machines’, *New York Times*, 17 December 2020, <<https://www.nytimes.com/2020/12/17/us/dominion-demands-that-sidney-powell-retract-baseless-and-false-allegations-about-voting-machines.html>>.

¹⁴⁶ *US Dominion, Inc.*, 293 A.3d, 1058.

viewers back – including President Trump himself – by intentionally and falsely blaming Dominion for President Trump’s loss by rigging the election’.¹⁴⁷

Nonetheless, the *Dominion* case highlights the danger the privilege of neutral reportage would pose to reputation. Fox defended its reporting by emphasizing the newsworthiness of the U.S. President claiming that the election had been stolen. Under that reasoning, the more outrageous an elected official’s statement was, the more newsworthy it would be, and the privilege of neutral reportage would allow the media to publicize that statement. Yet even if the motive of the media is to shine a negative light on the speaker/elected official, some people will believe the lies. The events of 6 January 2021 are a testament to that. An angry mob attempting by force to stop the United States Congress from formalizing the victory of the President-Elect, in order to keep the current President in power, is the antithesis of the Rule of Law.

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