

Libel cases are on the rise and increasingly politicized

 abajournal.com/magazine/article/the-defame-game-libel-cases-are-on-the-rise-and-increasingly-politicized

By Mark Curriden

In June 2022, Dallas-based tax services provider Ryan sued *USA Today* and its parent company, Gannett Co., alleging the news organization published false and defamatory articles in 2021 and 2022 about its work for clients in Arizona and North Dakota.

Ryan filed its lawsuit in Montgomery County, Texas, claiming *USA Today* made a plethora of factual errors in articles, posts on Twitter (now known as X) and podcasts that “falsely accused Ryan of corruption and unethical business practices” by intentionally misrepresenting material facts about Ryan’s efforts to obtain tax relief for clients.

The 48-page lawsuit also contained a bombshell allegation: *USA Today* failed to mention in its articles that Gannett itself was a client of Ryan and had “sought, utilized and financially gained” from the tax services of Ryan. The complaint stated that Ryan’s work for Gannett saved the media company more than \$2 million in taxes but that “*USA Today* turned around and flatly stiffed Ryan on fees relating to hundreds of thousands of dollars in tax savings.”

As a result, Ryan included a breach of contract count in its case against Gannett.

“We cannot allow a major news organization to misrepresent our business, especially considering they were benefiting from Ryan’s tax services, which they failed to disclose in their reporting,” Ryan general counsel John Smith said in an interview with the Texas Lawbook when the lawsuit was filed. “Ryan seeks to set the record straight.”

“When our integrity is falsely attacked, we will do what is right and defend our reputation.” — John Smith

Smith—who clerked for Samuel Alito prior to his U.S. Supreme Court appointment and also served as a lawyer in the White House for President George W. Bush—said Ryan “ethically and vigorously advocates” for its “clients’ interests to achieve a purpose in which we strongly believe.”

“When our integrity is falsely attacked, we will do what is right and defend our reputation,” he said.

Gannett officials declined to comment for this article, but lawyers for the news organization in court documents reject Ryan’s allegations of defamation and libel and argue that its articles were accurate.

Gannett also accused Ryan of forum shopping, noting that the company had no offices in Montgomery County. Finally, the defense lawyers asked the trial judge to dismiss the lawsuit under the Texas Citizens Participation Act, the state's anti-SLAPP law.

SLAPP stands for "strategic lawsuit against public participation," and anti-SLAPP laws allow defendants in cases to seek dismissal because their speech or communication is considered an issue of public concern.

When the trial judge denied Gannett's motion, the lawyers appealed to Texas' 9th Court of Appeals in Beaumont, which triggered an automatic stay in the litigation until the interlocutory appeal is decided. The purpose of the automatic stay is to reduce litigation costs so that news organizations or regular citizens sued over their speech do not have to pay the high costs of litigating in two courts at the same time.

Upset with this provision in the law, Ryan CEO G. Brint Ryan lobbied key Texas legislators to introduce a bill that would eliminate the automatic stay. The bill did not make it to the floor of the Texas House of Representatives for a vote in the 2023 legislative session.

Developing trends in defamation suits

The case, *Ryan v. USA Today and Gannett Co.*, is not the highest-profile defamation case being litigated in the U.S., but media law experts say they are watching it closely because it is a more traditional libel case that highlights some of several developing trends. Those trends include forum shopping, having an increasingly political component, adding allegations unrelated to the defamation claim, increasingly naming individual reporters as defendants and demanding huge damage awards.

While there is no centralized data-gathering or monitoring of pending libel or defamation cases in the U.S., the experts agree that such cases are significantly on the increase, the damage awards being sought have dramatically gone up, and that they are getting much more public attention.

"It is challenging to comprehensively track media libel cases because of the shortcomings in data collection systems in the 50 states and PACER, but there is no question that we have seen an increase in the number of cases the past few years," says Katie Townsend, deputy executive director and legal director of the Reporters Committee for Freedom of the Press.

"Today's defamation cases have much more of a political flavor than they have historically, and the demand letters are seeking damages in amounts previously unheard of," Townsend says. "Even the viability of *New York Times Co. v. Sullivan* seems to be in doubt. The trends are all very concerning."

"Today's defamation cases have much more of a political flavor than they have historically."
—Katie Townsend

Lawyers who regularly represent news organizations are alarmed at the politicization of defamation law and the public statements of two members of the U.S. Supreme Court—Justices Clarence Thomas and Neil Gorsuch—expressing interest in revisiting *New York Times Co. v. Sullivan*, the landmark 1964 decision that provided sweeping First Amendment protections to journalists facing libel and defamation lawsuits.

“The whole cry that the news media is the enemy of the people has had an impact,” says Jackson Walker partner Paul Watler, who represents Gannett in the Ryan litigation. He declined to comment on the case. “Cases are being filed to teach the news media a lesson. It is the result of the political discourse of the past few years. In the past, these same lawsuits sought \$1 million to \$5 million; now, they want \$10 million to \$100 million.”

“The whole tapestry that protects free speech and a free press—from the anti-SLAPP laws to *Times v. Sullivan*—seems to be under attack,” Watler says. “The interlocutory appeal and stay provisions are a critically important component of anti-SLAPP. The challenges are everywhere.”

“The big-dollar and high-profile cases spur more cases to be filed.” —Laura Prather

Laura Prather, a media law partner at Haynes and Boone in Austin, Texas, says the “amount of damages being sought has become astronomical.”

“We are clearly seeing an increase in defamation filings,” Prather says. “Everything is so political. People are rushing to the courthouse to punish people they disagree with. Our courts allow anyone to file a lawsuit with no caps on damages for alleged reputational harm. The importance of protecting free speech is universal and not at all an only political right or only political left issue.

“The big-dollar and high-profile cases spur more cases to be filed,” she says.



Sarah Palin lost a defamation suit against the New York Times in 2017. (Photo illustration by Sara Wadford/Shutterstock.)

Major media cases in the spotlight

To be sure, media libel and defamation cases have dominated the news the past 1½ years, and there have been mixed results. For example:

- Minutes before opening statements were scheduled in the Dominion Voting Systems defamation trial in Delaware against Fox News in April, Fox agreed to pay \$787.5 million to settle the dispute. Dominion had accused Fox News and its anchors of repeatedly broadcasting knowingly false information that claimed Dominion played a role in defrauding President Donald Trump of reelection in 2020.
- In February 2022, a New York jury ruled that the *New York Times* did not defame former Alaska Gov. Sarah Palin in a 2017 editorial that wrongly linked her campaign rhetoric to a 2011 mass shooting in Arizona, which the *Times* corrected in print the following day. U.S. District Judge Jed Rakoff also rejected Palin’s petition for a new trial, stating that the editors for the Times made mistakes but that Palin’s lawyers “could not in the end introduce even a speck of such evidence” that those mistakes were motivated by actual malice.
- In August 2022, a Texas jury ordered radio talk show host Alex Jones of Infowars to pay the family of a Sandy Hook Elementary School shooting victim \$4.1 million in compensatory damages and \$45.2 million in punitive damages over Jones’ repeated contention that the 2012 tragedy was a “false flag” operation by gun control advocates. Two months later, a Connecticut jury awarded \$965 million in a defamation lawsuit brought by eight Sandy Hook victims’ families and a first responder. The trial judge in November added \$473 million in punitive damages.



A jury found former President Donald Trump liable for defaming E. Jean Carroll, who accused him of rape. (Photo illustration by Sara Wadford/Shutterstock.)

- In May, a New York City jury found Trump liable for defaming writer E. Jean Carroll when he publicly denied her allegations that he sexually assaulted her in a department store dressing room in 1996. Trump said in media interviews that Carroll was “totally lying” and that “she’s not my type.” During a video deposition, however, Trump misidentified Carroll in a photograph as his second ex-wife, Marla Maples. The jury awarded Carroll \$5 million in damages.

- Also in May, a Los Angeles judge threw out most of the defamation allegations made in a lawsuit by rocker Marilyn Manson against actress Evan Rachel Wood, who publicly accused Manson of abusing her for years.

“These are highly important cases that tell us more about the broader ills and issues of our time than they do about the state of media libel law in this country,” says Jeffrey Hermes, a deputy director of the Media Law Resource Center and longtime First Amendment legal advocate. “We are certainly going to see a rush of cases trying to fit the patterns of the *Dominion* and *Carroll* cases.

“But the *Carroll* and *Dominion* cases send a false perception that these kind of defamation cases are easy to prove and win,” Hermes says. “These are highly unique cases that are difficult to prove and win. Any cases involving Trump and Trump issues are so Trump-specific and do not transfer to ordinary media libel and defamation litigation. *Carroll* and *Dominion* are unusual cases with highly unusual facts.”

The same is true regarding the Alex Jones litigation.



Alex Jones was ordered to pay damages to families of victims of the Sandy Hooke school shooting. (Photo illustration by Sara Wadford/Shutterstock.)

“Truthfully, I don’t know what to do with the Alex Jones cases, and neither do most defamation law experts,” Hermes says. “The question is, how far can you push rhetorical behavior hyperbole before it is too far? When you are in the shock jock type of atmosphere, can you expect to be believed?”

Townsend says the *Jones* verdict, which she describes as the largest defamation judgment in U.S. history, is in a category all its own and not likely to impact media case law.

“The damage claims were so high, and the damages awarded were so high because of the emotional pull of the personal threats the plaintiffs faced,” she says.

Hermes makes it clear that not all defamation cases against news organizations are frivolous.

“The press does not have, nor does it deserve, absolute protection from defamation,” he says. “There are some defamation cases where the news organizations do not deserve to win.”

Fallout from Fox News case

But journalists and news organizations should be concerned about the massive damages claims in defamation lawsuits, even when if they have ideological differences with the defendants, media law experts say.

Former U.S. Attorney General William Barr wrote a *Wall Street Journal* op-ed in March 2023, four weeks prior to the *Dominion* settlement, saying that journalists were wrong to cheer for Fox News to lose the defamation case.

“A ruling against Fox would be a major blow to media freedoms generally, subjecting news outlets to the prospect of outsize liability whenever they report on newsworthy allegations that turn out to be false,” Barr wrote. “Emotions seem to have gotten the better of the mainstream media’s judgment. The theory advanced by Dominion is profoundly dangerous to the media industry as whole. Memories are very short and imaginations very limited if the left thinks that only Fox would be vulnerable to lawsuits in a world where defamation liability could be incurred for simply reporting allegations made by others.”

Despite the huge settlement agreement, neither Fox nor Dominion is finished with defamation litigation resulting from the 2020 election. Dominion still has defamation lawsuits against One America News Network and Newsmax. Voting-technology firm Smartmatic has a \$2.7 billion case pending against Fox.

"Emotions seem to have gotten the better of the mainstream media's judgment." —William Barr

"The Fox News case is unique because of the text messages and the internal documentation that showed the journalists didn't believe what they were broadcasting was true but continued to promote it," Prather says. "That's the true novelty of the *Dominion/Fox* case."

Smartmatic's lawsuits against Fox News also included anchors Maria Bartiromo, Jeanine Pirro and former host Lou Dobbs as named defendants. And both Dominion and Smartmatic have separate defamation cases pending against Rudy Giuliani and Sidney Powell, lawyers who represented former President Donald Trump and publicly stated that the two voting technology firms were part of a 2020 election fraud that cost their client the election.

Supreme Court justices weigh in

Comments in recent years by Justices Thomas and Gorsuch that *New York Times v. Sullivan* should be reconsidered simply added to the debate.

Thomas commented in two separate cases: *McKee v. Cosby* in 2019 and *Berisha v. Lawson* in 2021. In his concurring opinion in *McKee*, a defamation suit filed against Bill Cosby by a woman who accused him of rape, Thomas described the Supreme Court's decisions protecting the news media from defamation "policy-driven decisions masquerading as constitutional law."

In his dissent in *Berisha*, a libel suit brought by an Albanian man over his portrayal in a 2015 book, he especially attacked the "actual malice" standard required of public figures to obtain a defamation verdict.

"This court's pronouncement that the First Amendment requires public figures to establish actual malice bears no relation to the text, history or structure of the Constitution," Thomas wrote.

Gorsuch wrote his own dissent in *Berisha*, adding his voice to Thomas' concerns, though he admitted he didn't have a clear opinion on what the defamation standards should be.

"I do not even see many lower court judges advocating revisiting *Sullivan*." —Jeffrey Hermes

While most media law experts say the comments of the two justices cause them concern, they do not believe *New York Times v. Sullivan* is at risk of being overturned in the near future. "The Supreme Court has had a lot of opportunities to revisit or even grant cert to revisit *Sullivan*, but the votes simply have not been there," Hermes says. "I do not even see many lower court judges advocating revisiting *Sullivan*."

Even staunch conservatives such as Barr contend that to “to consider paring back *Sullivan*’s actual-malice standard” would not make sense. “Subjecting the press to potential defamation liability when it reports on these kinds of controversies would chill the flow of information,” Barr wrote in his *Wall Street Journal* op-ed. “It would also result in every election being relitigated for monetary damages in the deepest blue or red state a lawyer can find. Conservatives shouldn’t try to weaken the actual-malice standard.”

Targeting reporters

While *Sullivan* seems safe for now, media law experts agree that plaintiffs—especially politically minded plaintiffs—are increasingly using other tactics to attack news organizations, including naming individual journalists as defendants.

“It is not about the money when the plaintiff goes after the individual reporters because they go after the news organizations and the media companies when it is about the money,” Townsend says. “The goal in targeting the reporters in the lawsuits is to get them to stop doing the reporting. To send a message that good journalism could cost them.”

A recent example is when then-U.S. Rep. Devin Nunes (R-Calif.) sued Hearst Magazines and Esquire reporter Ryan Lizza for libel over a 2018 article headlined “Devin Nunes’ Family Farm is Hiding a Politically Explosive Secret.” The story said the Iowa dairy farm in question, NuStar Farms, hired immigrants lacking permanent legal status. Nunes’ lawsuit claimed he had no financial interest or involvement in the operation of the farm. In April, U.S. District Judge C. J. Williams of the Northern District of Iowa dismissed Nunes’ lawsuit, ruling that the article’s claim that “NuStar knowingly used undocumented labor is substantially, objectively true.”

“This court ordered the [Social Security Administration] to verify the SSNs of all disclosed NuStar Farms employees,” Williams, a Trump nominee, wrote in a 101-page opinion. “Of those employees who NuStar plaintiffs employed on or before September 30, 2018, 243 of 319 employees’ names, dates of birth and SSNs did not match SSA records.”

Nunes’ lawsuit against Hearst and Lizza is one of more than 10 defamation cases that the now-former California congressman has brought since 2019, including a lawsuit against CNN that federal courts dismissed. Nunes also filed a 2021 defamation complaint in the U.S. District Court in the Eastern District of Texas against NBCUniversal and MSNBC host Rachel Maddow. The federal judge in Texas ruled that Nunes had filed the case in the wrong forum and transferred the case to U.S. District Court in Manhattan, where a judge tossed several of the allegations but ruled in November that one count of defamation could move forward.

“The intended goal in naming individual journalists is to inflict pain,” Prather says. “I’ve seen specific instances in which the reporter or speaker was so impacted by being a named defendant that he could not sleep at night, lost 60 pounds and had so much guilt because he was costing his employer so much money.”

“The Nunes lawsuits are part of the noticeable uptick in defamation cases that involve politics,” says Holland & Knight partner Robb Harvey, who also serves as chair of the ABA Forum on Communications Law. “These are cases that are filed in a few specific jurisdictions that they believe are more favorable, including Florida, New York and Delaware.”

Not a red versus blue matter

Harvey says First Amendment advocates so far have had tremendous success getting the political cases dismissed by either trial courts or appellate courts.

Even so, media law experts say the pace of politically oriented cases being filed has not slowed because courthouse victories are not always the end goal.

“Some of these defamation lawsuits by political figures is an appeal to some of their constituents because even if they lose, they win because they help with fundraising,” Townsend says.

Hermes and Townsend argue adamantly that defamation law is not red versus blue.

“It is important to keep in mind that the First Amendment and a free press is not a liberal value or a conservative value. It protects everyone,” Hermes says. “But I also believe there’s a very significant difference between the pro-Trump, Republican-specific view of a free press and defamation and the overall view of conservative Republicans of the First Amendment.”

Prather and Watler point to Judge James Ho of the New Orleans-based 5th U.S. Court of Appeals as a perfect example. Widely and frequently criticized in the legal and political media for being publicly critical of “cancel culture,” Ho’s pro-free speech and pro-free press record equals that of Justice Hugo Black or even Justice William Brennan, who authored *New York Times v. Sullivan*, they argue.

It is important to keep in mind that the First Amendment and a free press is not a liberal value or a conservative value.” —Jeffrey Hermes

“Judge Ho is a First Amendment purist, and he has demonstrated that over and over,” Prather says.

In *Villarreal v. City of Laredo*, Ho wrote a 2-1 majority opinion stating the police in Laredo, Texas, where Priscilla “La Gordiloca” Villarreal is a freelance criminal justice blogger, should have known they were violating Villarreal’s constitutional rights when they arrested her in 2017 merely for asking law enforcement questions and publishing their answers.

“If the First Amendment means anything, it surely means that a citizen journalist has the right to ask a public official a question without fear of being imprisoned,” Ho wrote in his 2021 opinion. “Yet that is exactly what happened here: Priscilla Villarreal was put in jail for asking a

police officer a question. If that is not an obvious violation of the Constitution, it's hard to imagine what would be."

Ho wrote that it should be "obvious to any reasonable police officer that locking up a journalist for asking a question violates the First Amendment. Indeed, even Captain Lorenzo, the stubborn police chief in *Die Hard 2*, acknowledged: 'Now personally, I'd like to lock every [expletive] reporter out of the airport. But then they'd just pull that 'freedom of speech' [expletive] on us, and the ACLU would be all over us.'

"Captain Lorenzo understood this. The officers in Laredo should have too," Judge Ho opined.

The full 5th Circuit heard arguments in *Villarreal* in January but has not issued an opinion.

Which leads us back to the Ryan defamation against *USA Today* and Gannett, which is on appeal to Texas' 9th Court of Appeals.

Taking aim at SLAPP

While the case features several of the trends media law experts identify as troublesome—venue shopping and adding nondefamation-related counts in its accusations—the most important development is the plaintiffs' direct attack on Texas' anti-SLAPP law by seeking legislative changes.

In an op-ed in the *Dallas Morning News* with the headline "Don't allow abuses of free speech," G. Brint Ryan said news organizations were exploiting a "loophole" in the Texas Citizens Participation Act that "allows bad actors to file frivolous 'free speech' motions" to trigger "an automatic delay in the underlying case, hindering justice for years."

"We at Ryan have been the subject of these intentional delays that are unrelated to free speech," Ryan wrote. "Instead of a straightforward legal process, the case is hijacked."

"It is an incredible expense to fight defamation lawsuits." —Laura Prather

Ryan pushed Texas legislators in 2023 to amend the law to eliminate the automatic stay provisions in many circumstances and thus allow the trial court to continue with discovery while the appeal is being litigated.

In an interesting twist, Texans for Lawsuit Reform, which purports to support legislation that reduces litigation, supported Texas Senate Bill 896 even though it would increase litigation and litigation costs. News organizations also fought the bill and were joined by some interesting bedfellows, including the Better Business Bureau, the American Civil Liberties Union and Texas Right to Life.

“It is an incredible expense to fight defamation lawsuits, and our anti-SLAPP laws with the automatic stay provisions are designed to reduce costs by not having the parties have to pay for two different battles—one at the trial court and one at the appellate court—at the same time,” Prather says.

In Texas, plaintiffs have claimed 106 times since the Texas Citizens Participation Act was enacted in 2011 that defamation defendants’ motions to dismiss were frivolous. In 76 of those 106 cases, trial judges ruled that the anti-SLAPP motion was not frivolous. In the 30 other cases in which trial judges ruled the defendant’s motions to dismiss under the law were frivolous, the appeal courts later reversed 17 times, according to Prather.

“Anti-SLAPP laws are working exactly as they were intended, and they are protecting the free speech of Texas citizens and the news media,” Prather says.

Hermes says some states, such as Massachusetts, are strengthening their anti-SLAPP laws. But handful of states—Florida, Nevada and Texas—have experienced efforts by some political leaders to scale back anti-SLAPP protections.

“Some plaintiffs have challenged anti-SLAPP laws as violating the right to trial by jury, and others have tried adding nondefamation pleadings to try to get around anti-SLAPP provisions,” Hermes says. “But we are in our third generation of anti-SLAPP laws, and they are clearer and still effective. But free speech advocates must remain vigilant.”

The bottom line, according to media law experts, is that defamation laws and protections remain strong and effective despite a few outlying cases.

Instead, the problem may be the expectations of the public.

“The biggest misunderstanding is this: Defamation cases by their nature do not decide the truth,” Hermes says. “Just because a reporter publishes some things that turn out to be false doesn’t mean that the reporter knew it was false. But treating defamation cases as a search for the truth is a flawed idea that needs to be better understood.”



Photo illustration by Sara Wadford/ABA Journal