

Fox Tells Panel Smartmatic Coverage Was Newsworthy

By **Stewart Bishop**

Law360, New York (December 7, 2022, 9:34 PM EST) -- Fox News pressed a New York state appeals court Wednesday to dismiss a defamation suit brought by Smartmatic over the broadcaster's airing of bogus claims that the voting technology company's software was used to rig the 2020 presidential election, calling its coverage of the allegations protected speech.

U.K.-based Smartmatic sued Fox News, three of its on-air personalities, and attorneys Rudy Giuliani and Sidney Powell in 2021 over allegations against the voting company aired on Fox News in support of former President Donald Trump's false claim that the 2020 election was stolen, including that Smartmatic was founded by the late Venezuelan president Hugo Chavez for the purpose of stealing elections.

New York Supreme Court Judge David Cohen in March **refused to dismiss** the action against Fox News, host Maria Bartiromo, former host Lou Dobbs and Giuliani, but nixed claims against Powell and Fox News star Jeanine Pirro.

During oral arguments over cross-appeals of Judge Cohen's ruling before a five-judge panel of the mid-level New York Supreme Court Appellate Division, an attorney for Fox News and the remaining hosts, Paul Clement of Clement & Murphy PLLC, said the defamation suit "strikes at the heart of the First Amendment" and broader free press protections under New York law.

"When the sitting President of the United States and his lawyers make allegations of fraud and indicate that the president's legal team will challenge the election results in multiple states, those allegations are unquestionably newsworthy," Clement said. "And they remain newsworthy, whether or not they seem plausible or likely to succeed."

Justice Peter Moulton promptly inquired if statements could be both newsworthy and defamatory at the same time, pointing to a November 2020 Fox News segment with Giuliani and Bartiromo, in which she remarked, "If you've got Democrats in charge from here on out, they're in charge of the machines, you'll never see a Republican in the White House again."

"So isn't that endorsing the alleged defamatory statements?" Justice Moulton asked.

Clement said it didn't rise to that level and said every host that interviewed Giuliani or Powell eventually asked them if they were going to be able to prove their stolen election claims.

Justice Troy Webber asked if it was Fox News' position that there was no independent obligation on Fox News or its hosts to do any sort of research or vetting to determine whether these statements were in fact defamatory or untrue.

Clement said no, arguing that Fox News wasn't reporting the allegations for the truth of the matter asserted but rather was doing "op-ed kind of" reporting.

"This is like the opposite of investigatory journalism," he said.

An attorney for Smartmatic, J. Erik Connolly of Benesch Friedlander Coplan & Aronoff LLP, told the panel that Fox News positioned Dobbs, Bartiromo and Pirro as sources of factual information that the audience should rely on above all others because everyone else was not telling the truth.

"These reports by these three anchors are not objective pieces. These were endorsement pieces of something that they knew was not true," Connolly said.

Presiding Justice Rolando Acosta brought up one of Pirro's monologues, asking if she was liable for saying that Trump's lawyers said that voting company Dominion — which has **also sued Fox News** for defamation — was based in Venezuela, backed by Cuban money and, with the assistance of Smartmatic, had created a backdoor in voting machines, which allowed ballots to be flipped from Trump to President Joe Biden.

Justice Webber chimed in, saying the opposing argument is that she's unaware the statements are defamatory or perhaps doesn't even have to know because she's just reporting the news. Justice Acosta took it a step further, saying she could be relying on the fact that Trump's lawyers claimed they would offer evidence in the form of affidavits, which would prove their case.

Connolly noted the absence of any affidavits in the record and said you can still be liable for the repetition or re-publication of a defamatory statement. Moreover, he said, Smartmatic has extensively pled that when Pirro said those words, she knew they weren't true and thus acted with actual malice.

Pushing back on the notion that the threat of liability can have a "chilling effect" on free speech and the news media, Connolly said the actual malice standard is a high enough bar to protect the interests of the press.

"The only time they get in trouble is if what they are reporting is false and if they acted with actual malice when they did it," he said.

The panel reserved decision.

Smartmatic is also seeking to revive its claims against Pirro as well as certain causes of action that were dismissed by the lower court against Giuliani, who has also appealed the order denying the dismissal of the remaining claims against him.

In addition to Justices Acosta, Moulton and Webber, Justices Martin Shulman and John Higgitt sat on the First Department panel.

Smartmatic is represented by J. Erik Connolly, Nicole Wrigley and David Pope of Benesch Friedlander Coplan & Aronoff LLP.

Fox News, Dobbs, Bartiromo and Pirro are represented by Paul Clement and Erin Murphy of Clement & Murphy PLLC, K. Winn Allen of Kirkland & Ellis LLP and Steven Mintz of Mintz & Gold LLP.

Giuliani is represented by Adam Katz and Louis Russo of Russo Law LLC and Joseph Sibley of Camara & Sibley LLP.

The case is Smartmatic USA Corp. et al. v. Fox Corp. et al., case number 2022 - 01291, in the New York Supreme Court Appellate Division, First Department.

--Additional reporting by Hailey Konnath. Editing by Gemma Horowitz.