Twitter Thread by Mike Dunford



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Happy Monday! Dominion Voting Systems is suing Rudy Giuliani for $1.3 billion.

As Akiva notes, the legal question is going to boil down to something known as "actual malice."

That's a tricky concept for nonlawyers (and often for lawyers) so an explainer might help.

> So Dominion sued Rudy for defamation. How are they ever going to allege actual malice? https://t.co/p8d3flDkGm
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> — Akiva Cohen (@AkivaMCohen) January 25, 2021

What I'm going to do with this thread is a bit different from normal - I'm going to start by explaining the underlying law so that you can see why lawyers are a little skeptical of the odds of success, and only look at the complaint after that.

So let's start with the most basic basics:
If you want to win a defamation case, you have to prove:
(1) that defendant made a false and defamatory statement about you;
(2) to a third party without privilege;
(3) with the required degree of fault;
(4) causing you to suffer damage.

For Dominion's defamation cases, proving 1 and 4 is easy. 2 is, in the case of the lawyers they're suing, slightly more complex but not hard. And 3 - degree of fault - is really really hard to prove.

A false statement of fact that is defamatory is a slam dunk element here - all the fraud allegations against dominion are totally banana-pants. They are also allegations which are clearly going to harm Dominion's reputation.

Damages are also going to be simple - Dominion relies on a certain degree of public trust; without that they die. And the defendants have made them toxic to about a third of America.

Publication to another is easy - Rudy (and Sidney) told the world as loudly and often as they could that Dominion is corrupt. "Without privilege" is a bit more complex because statements made in litigation are privileged. You can't sue someone for stuff said in a different case.

But it's only just a tiny bit more complex here because Rudy and Sidney are both loudmouths and made lots of out-of-court statements. The plaintiffs just need to be sure they're relying only on those and that element is fine.

That leaves degree of fault. If a private individual accuses someone of defamation, all they have to prove is negligence. But if a public figure accuses someone of defamation, negligence isn't enough. They have to prove what's known as "actual malice."

And it's very very likely that Dominion is a public figure. In fact, when @jbarro and @Popehat interviewed their lawyer before the cases were filed, he said that while he wasn't going to concede the point, he was planning on having to prove actual malice.

So let's talk about actual malice. The first thing you need to know is that in the defamation context, "actual malice" has nothing to do with ill-will or the normal meaning of the word "malice." (Sorry, I know that's confusing. It's not my fault. Blame SCOTUS.)

To prove "actual malice" in a defamation case, you need to show either that the defendant knowingly lied or that the defendant made the statements with "reckless disregard" of the truth. And "reckless disregard" is *also* a term of art here.

You can't prove "reckless disregard" by showing that there wasn't an investigation or that there was a lot of evidence that it wasn't true. You have to show that the defendant actually had serious doubts about the truth of the statement and made them anyway.

That's something that's hard to prove unless you can climb into the defendant's head. And it's really hard to do that, especially before discovery.

And when I say "really hard," here's what I mean:

I've been flipping through defamation cases from the court where this case was filed. I'm finding lots of cases that were dismissed because actual malice wasn't adequately pled. I've not yet found one where a case survived.

That's not to say there aren't any - I've only looked at 10 or 15 - but it's a very big lift.

OK - just found a case where a defamation claim survived a motion to dismiss in D. DC. Let's take a look at what that required.

In this case, Zimmerman v Al Jazeera, 246 F Supp 3d 257, 281-86 (D DC 2017), one claim survived a motion to dismiss. That survival seemed to be based on the fact that the media organization had obvious reasons to doubt their only source's veracity and still didn't investigate.

The court noted that just reasons to doubt alone wasn't enough, that failure to investigate also was often not enough, but that all of that, in combination with the source's recantation, could show reckless disregard.

And even there, the court called it a "close question."

That's a single surviving claim in an ocean of "failed to show actual malice" cases.

So I hope you can see why, even though the claims are insane and it's clear that Rudy at least should have known they were false, a lot of lawyers are still skeptical of Dominion's chances.

I've got stuff that I have to take care of right now, but I'll do another thread after lunch (linking back to this) where we'll look at the complaint and see where things stand. I will say that I'm a bit more hopeful than @AkivaMCohen seems to be, but maybe only a bit.