

Court Dismisses Virginia Lieutenant Governor's Defamation Suit Against CBS

By Emmy Parsons and Matthew E. Kelley

In mid-February, a judge in the Eastern District of Virginia granted CBS's motion to dismiss a defamation lawsuit filed by Virginia Lt. Gov. Justin Fairfax over the broadcast of interviews with two women who accused him of sexually assaulting them. [Fairfax v. CBS](#), 1:19-cv-01176 (E.D. Va. Feb. 11, 2020).

The court held that, because CBS presented both the allegations and Fairfax's denials of them, a reasonable person would not understand the broadcasts as an adoption by CBS of the truth of the allegations, part of a growing number of decisions holding that a balanced report of a controversy is not reasonably understood in a defamatory sense – without any reliance on the so-called neutral report privilege. And the court also held that Fairfax had failed to adequately plead actual malice.

Background

On February 1, 2019, media reports began circulating about a photo from Virginia Governor Ralph Northam's medical school yearbook page that showed a white man in blackface and another person dressed as a Ku Klux Klansman. Northam immediately began receiving calls for him to resign from office. Although Northam ultimately denied that he was one of the two men in the photograph, he admitted to having worn blackface in the past.

Two days later on February 3, the same online publication that first reported on the Northam yearbook photo reported that Virginia Lieutenant Governor Justin Fairfax had been accused of sexually assaulting a woman at the 2004 Democratic National Convention in Boston. Fairfax issued a public statement denying the claim and threatening legal action against those who repeated it. On February 8, a second woman came forward and accused Fairfax of raping her in 2000 when both were students at Duke University. Fairfax also denied these allegations, and asserted that both women had consented to sexual activity. Fairfax called the women's allegations part of a "vicious and coordinated smear campaign" being orchestrated against him.

Media outlets around the country, including CBS, immediately began reporting on these allegations. Nearly two months later, between March 31 and April 2, *CBS This Morning* aired several segments of interviews between co-host Gayle King and the two women who accused Fairfax of sexual assault, Vanessa Tyson and Meredith Watson.

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Fairfax declined to be interviewed by CBS, but he provided statements denying the allegations and summarizing the results of two polygraph tests he took that he claimed showed that he was telling the truth about the encounters with the women. CBS included these denials, including the results of his polygraph test, in the segments.

The Lawsuit

On September 12, 2019, Fairfax sued CBS in the U.S. District Court for the Eastern District of Virginia, alleging that CBS, acting with actual malice, defamed him and intentionally inflicted emotional distress on him by publishing interviews with the two women.

Fairfax's complaint maintained that both encounters were "entirely consensual," and that the women released their allegations just as Governor Northam was set to resign and Fairfax was in line to become the second African-American governor of Virginia. He described the women's allegations as a "political hit job" and a "deliberate and calculated effort to permanently harm [his] political and professional career."

Fairfax alleged that CBS chose to air the interviews in order to rehabilitate its image in light of several #MeToo allegations involving high-ranking employees at the network. Fairfax also alleged several categories of conduct that he claimed established that CBS acted with actual malice, including:

- CBS allegedly failed to investigate four sources for whom Fairfax's team provided the name and contact information to CBS who could have allegedly corroborated his assertion that Watson's allegations were false;
- CBS allegedly failed to interview unnamed "relevant witnesses" about the encounter between Fairfax and Tyson;
- King allegedly failed to ask specific questions of Watson provided to CBS by Fairfax's team that allegedly would have revealed that there was an eyewitness to the encounter between Watson and Fairfax;
- King's co-hosts made on-air comments after the interviews aired that allegedly suggested they believed the two women's allegations and "vouch[ed] for the credibility" of their stories;
- CBS allegedly conducted a "pre-interview" of Watson to be sure that her comments fit a "preconceived narrative";
- CBS edited the interviews to ensure the stories fit its preconceived narrative;

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- CBS failed to report on new information revealed by Fairfax in July 2019, four months after the stories ran, regarding the presence of an allegedly exculpatory eyewitness to Fairfax’s encounter with Watson; and
- CBS aired the interviews at a time “calculated to maximize the ratings for CBS.”

On November 1, 2019, CBS filed a motion to dismiss Fairfax’s claims, and a motion for attorney’s fees pursuant to Virginia’s anti-SLAPP statute. In its motion to dismiss, CBS argued (1) that the broadcasts did not reasonably convey a defamatory meaning, and (2) that Fairfax did not, and could not, adequately plead actual malice.

Regarding defamatory meaning, CBS argued that the reasonable viewer would not understand the broadcast to be an assertion *by CBS* that Fairfax was guilty of the alleged sexual assaults. Rather, the challenged broadcasts objectively presented the women’s allegations and Fairfax’s version of those same events. And CBS argued that none of Fairfax’s allegations, either standing alone or in combination, were sufficient to plausibly establish CBS aired the interviews knowing they were false or being aware they were probably false.

CBS argued that the reasonable viewer would not understand the broadcast to be an assertion by CBS that Fairfax was guilty of the alleged sexual assaults.

The Court’s Opinion

In granting CBS’s motion to dismiss, Judge Anthony Trenga first ruled that the CBS *broadcasts* did not convey a defamatory meaning. Although acknowledging that the women’s statements, if false, would be defamatory *per se*, reasonable viewers would not interpret the broadcasts as assertions by CBS that Fairfax had in fact sexually assaulted the women, Judge Trenga ruled. Because CBS included Fairfax’s denials in each broadcast and King “probed inconsistencies and shortcomings in both women’s statements,” when viewed as a whole and in context the broadcasts did not convey a defamatory meaning. Although the co-hosts’ comments when viewed in isolation could imply they believed the women’s accounts, none of the journalists explicitly said they believed the women were telling the truth or asserted that Fairfax committed sexual assaults.

Judge Trenga ruled in the alternative that Fairfax did not plausibly plead actual malice because he did not plead sufficient facts to support any of his multiple theories regarding why CBS purportedly knew or strongly suspected his accusers were lying. CBS had no heightened duty to investigate the women’s claims both because they had been widely reported for months and Fairfax acknowledged having sexual encounters with them, albeit while insisting they were consensual. CBS reached out to the individuals Fairfax had suggested could contradict the women’s statements and could not be faulted for the fact that those sources did not agree to speak with journalists. CBS did not violate journalistic standards; rather, its journalists were in frequent contact with Fairfax’s spokeswoman and aired his denials of wrongdoing. CBS’s post-

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broadcast conduct was irrelevant to whether it had actual malice at the time of the broadcasts, the judge ruled.

Judge Trenga dismissed Fairfax's intentional infliction of emotional distress claim because Fairfax acknowledged that the claim failed to the extent his defamation claim failed.

The court denied CBS's motion, pursuant to Virginia's anti-SLAPP statute, for an award of its attorney's fees, holding that the statute requires a finding of frivolousness or bad faith on the part of the plaintiff and that, given what the women in fact stated about him, his claims did not meet these standards despite lacking merit.

CBS was represented by Lee Levine, Jay Ward Brown and Matthew Kelley of Ballard Spahr LLP. Fairfax was represented by Sara Kropf and Daniel Portnov of Kropf Moseley LLP; Jane Reynolds of the Law Offices of J.M. Reynolds, PLLC; and Kiah Spinks of Spinks Law PLLC.



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