IN THE SUPREME COURT FOR THE STATE OF TENNESSEE
AT NASHVILLE

JEFFERY TODD BURKE	)	
	)	
Appellee	)	**White County Circuit Court No. CC-2605**
	)	
vs.	)	**Court of Appeals Case No. M2016-01065-COA-R3-CV**
	)	
	)	**Supreme Court**
SPARTA NEWSPAPERS, INC.	)	**Case No. M2016-01065-SC-R11-CV**
	)	
Appellant	)	

APPLICATION OF TENNESSEE PRESS ASSOCIATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

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ISSUE PRESENTED FOR REVIEW

The Tennessee Press Association ("TPA") presents this proposed Brief of Amicus Curiae regarding the correct interpretation of the facts presented in this record and the appropriate legal standard to be applied to the fair report privilege.

EXAMINATION OF FACTS

TPA is concerned that the record in this cause contains erroneous interpretations of facts which in turn could contribute to a decision clearly detrimental to the public's right to know and the ability of journalists and other news gatherers to fulfill their societal function of being the eyes, ears and partners of the public in the examination and evaluation of the affairs of their government.

For the purposes of this examination, TPA has focused solely upon allegations made by Appellee in support of his position in this litigation. An examination of the Memorandum of Appellee Burke and supporting Affidavits filed in opposition to a Motion for Summary Judgment of Appellant Sparta Newspapers provides a basis for this factual analysis. In other words, in making this analysis, TPA is not looking to the pleadings of Appellant, but instead is concentrating on the pleadings and exhibits of Appellee. From those, the following appears with respect to the persons involved in critical aspects of the development of the fact scenario in this matter:

- Jeffrey Todd Burke (Burke) - a businessman/entrepreneur who, prior to this incident, had been involved in assisting fundraising efforts by youth sports teams.

- Shane Rittenberry (Rittenberry) - a representative of the Warrior Youth Football program in White County.

- Chris Isom (Isom) - a deputy sheriff and employee of the White County Sheriff's Department.

- Pamela Claytor (Claytor) - a reporter for Sparta Newspapers.

It is respectfully submitted that the following is an accurate recitation of undisputed facts and a proper interpretation of those facts based upon the examination of Burke's pleadings.

Prior to the fall of 2013, Burke had been involved in assisting fundraising activities for a sports program in Gordonsville, Smith County, Tennessee, as well as Warrior Youth Football in White County, Tennessee. These fundraising efforts included the sale of uncooked cookie dough by the fundraising entity to members of the community and the acquisition of this cookie dough from its manufacturer through the efforts of Burke.

An agreement was reached between Warrior Youth Football and Burke whereby Burke was to supply certain "soft goods" (t-shirts, etc.) as well as cookie dough to the team to support its fundraising efforts.

Money was raised by Warrior Youth Football and turned over to Burke in return for which Burke was to provide soft goods and cookie dough. The cookie dough had been presold by Warrior Youth Football. The soft goods and cookie dough were due to be delivered by Burke prior to August or September of 2013. When in the August through September time period Burke had not performed fully, Rittenberry, after discussions with individuals from Gordonsville concerning similar issues of non-delivery of product, consulted an attorney. Pursuant to advice of the attorney, Rittenberry filed a report with the White County Sheriff's Department.

During the relevant time period, Claytor, pursuant to an inquiry by another citizen, perhaps another employee of Sparta Newspapers, contacted Isom. Prior to this contact, Claytor and Isom were acquainted. Isom, in addition to being a detective for the White County Sheriff's Department, was also the Department's Public Information Officer (PIO). Claytor initiated her contact with Isom in his capacity as PIO. How do we know this? -- because at that time, by Isom's own statement, to his knowledge no investigation of Burke had been initiated by the White County Sheriff's Department. Therefore, he could not have been contacted in his capacity as an investigator. Claytor and Isom were acquainted and had exchanged information on previous occasions. There is no indication in the record that either felt the other to be unreliable.

Therefore, when Claytor initiated her inquiry to Isom, it had to have been within his capacity as PIO for the White County Sheriff's Department. He could not have, at that point, been the "lead detective". In fact, Burke's record reflects that the report made by Rittenberry to the White County Sheriff's Department initially went to an officer other than Isom.

According to the information given to Claytor by Isom, he was to make an inquiry and get back to her with whatever information he discovered. During the time period following the initial inquiry by Claytor, Isom was, apparently, assigned to be lead detective with regard to the allegations against Burke. Those allegations proved to be at that point substantiated in that money for product had been turned over to Burke by Warrior Youth Football for the purchase of the cookie dough, but the cookie dough had not been

delivered to Warrior Youth Football. In fact, according to the record, the cookie dough was not delivered to Warrior Youth Football until some time mid to late October of 2013 after the investigation by Isom was in progress. Subsequent to Isom's investigation, the White County grand jury returned an indictment in January of 2014 against Burke charging him with felony theft. According to Burke's own record, he had also been indicated in nearby Smith County for felony theft arising out of his handling of fundraising activities.

After the indictment was issued, Isom contacted Claytor and provided her with information from which she subsequently prepared an article for publication in Sparta Newspapers. Since Isom had been approached by Claytor in his capacity as PIO of the White County Sheriff's Department, his response to her with the information he had promised likely was also in his capacity as PIO of the White County Sheriff's Department. He was coincidentally the lead detective in the investigation. In the newspaper story, Claytor chose to emphasize the role of Isom as lead detective rather than his position as PIO.

The information which Claytor received was provided by the PIO of the White County Sheriff's Department. She had every right to rely upon that information because first it came from the PIO and second the PIO was a source known to her to be reliable.

Burke, upon his plea of guilty, was convicted of felony theft in both White and Smith Counties as well as two other counties in Tennessee.

It is respectfully, therefore, submitted that to imply or state that the statements made by Isom were not in the nature of a press release is error. Claytor correctly relied upon Isom as PIO and the two understood the roles which they occupied. That is a correct interpretation of the facts pertaining to this matter as derived solely from the pleadings of Burke.

STATEMENT OF LAW AND ARGUMENT

Article I of the Constitution of the State of Tennessee is entitled "Declaration of Rights". The first section of Article I contains basic assurances applicable to the citizens of this state. Those are:

1. All power is inherent in the people;

2. Free government is founded upon the authority that is inherent in the people;

3. Free government founded on authority inherent in the people is to be established for their peace, safety and happiness; and

4. Most importantly, the people have at all times a non-transferrable (unalienable) and indefeasible (non-voidable) right to alter or to reform or to abolish the government which they have created in such manner as they think proper.

These guarantees, assurances and protections were first written into Article XI, Section l of the Constitution of 1796. At this point in our history, do we consider these assurances to be simply ancient language expressing obsolete and arcane positions which are nothing but vestiges of 18th century expression or are they relevant as the strength, bone and sinew of our system of representative government? TPA submits that the provisions of Article I, Section 1 of the Tennessee Constitution are even more valid and relevant today

than when the present Constitution was ratified in 1870. In 1966, this Court said:

> It is fundamental law of this state that the supreme authority rests in the people . . .

Williams v. Carr, 218 Tenn. 564, 404 S.W.2d 522 (Tenn. 1966). From this interpretation of Article I, Section 1, we learn that the government is the creature of the people and not the other way around. The people are the origin of all authority, a portion of which they give to their government and not the other way around. The government is there to serve the people, not to have the people serve the government. These are constitutional precepts. They have not changed in 223 years.

> The Tennessee Constitution, in Article I, Sections 1 and 2, recognizes that our government serves at the will of the people of Tennessee, and expressly advocates active resistance against the government when the government no longer functions to serve the people's needs. There is no better statement of this state constitution's concept of liberty than this audacious empowerment of Tennesseans to forcibly dissolve the very government established but one article later in the Constitution.

Planned Parenthood of Middle Tennessee v. Sundquist, 38 S.W.2d 1, 2000 Tenn. LEXIS 575 (Tenn. 2000).

If the people are the ultimate authority and have the power to alter or abolish their government whenever they see fit and create a new government, how can they effectively exercise this authority in the darkness without information? To this end, TPA has always believed that a free press stands as a bulwark for our society and its form of representative government. Its

function is to disseminate information to the people. For 150 years, TPA has followed its founding principle of being a unified voice for the newspaper industry in Tennessee. It has always advocated for the press by proactively shaping public policy and opinion to promote freedom of speech and expression. In this regard, TPA is safeguarding rights guaranteed to every citizen by Article I, Section 19 of the present Constitution and Article II, Section 19 of the Constitution of 1796 which provide that "the presses shall be free to every person to examine . . . any branch or ***officer*** of government and no law shall ever be made to restrain the right thereof . . . (emphasis supplied). Presently, the TPA has 129 newspaper members. However, 82% of those newspapers are non-daily. Its newspapers are located in 95 counties in this state yet only a handful of those counties could be classified as metropolitan. Rural would be a good description of the majority of the 95 counties served by newspapers who are members of TPA. **Every week TPA members publish over 4 million newspapers.** You cannot underestimate the role which newspapers and TPA play in the process of self-governance guaranteed to the citizens of this state by its Constitution and the Constitution of the United States.

The founders of this nation were keenly aware of the evils of monarchial government as it related to rights of free speech and expression. Prior restraint on publication was the order of the day in those governments. Therefore, the framers of the United States Constitution went to great lengths to assure that there would be no prior restraint on the press. That prior

restraint took two basic forms, one of which was licensing and the second was censorship. Law of Mass Communications, Dwight L. Teeter, Jr. and Bill Loving, 12th Ed. (2008). How do these traditional constitutional concerns about prior restraint become relevant to the issues raised in this litigation? The answer was given by the United States Supreme Court in 1964 in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), wherein the court denounced the evil and chilling effect of self-censorship. This self-censorship, in the opinion of the supreme court, arose as the result of concerns by the media over the threat of litigation, primarily defamation, and the attendant cost of defense. New York Times Co. v. Sullivan and its progeny reason that, if a newspaper was concerned about potential litigation, it would censor itself by unjustifiably restricting the information which it permitted the public to receive through its resources. It is this very concept of self-censorship that looms large on this litigation's horizon.

Not only does the Tennessee Constitution as well as the United States Constitution provide assurances of a free press, but the underlying significance of the acquisition of information by the people in the process of self-governance is further underscored by our legislature when, in Tenn. Code Ann. § 10-7-505(d), it mandated that the public was to have the fullest possible access to public records. TPA is not asserting that the Public Records Act controls in this litigation. TPA merely cites the Public Records Act as evidence of the commitment by the State of Tennessee to the free flow of information to its citizens.

The apparent position of Appellee and his academic amici is that there should be no recognition of a fair report privilege absent some form of formal press conference or formal press release and an elaborate identification of the source of the information. It is respectfully submitted that this requirement, if adopted, would be the very antithesis of free expression and threaten the free flow of information which an informed public must consider in performing its duty of evaluating its government and the performance of its government to see whether or not that government is meeting the needs of the people or needs to be modified or abolished.

The Sheriff of White County is an elected official. In order to obtain the office of sheriff and, if elected, in order to retain the office of sheriff at the next regular election, as a candidate, he must seek approval of the people in a contested election. Every candidate in a contested election takes the opportunity to try to convince the people why they are the better choice for the office. If that candidate is running as an incumbent, a relevant consideration of the qualifications for re-election of that candidate is the way they have performed during their first term of office. In order to accurately assess the performance of any officeholder, information is crucial. Where law enforcement is concerned, however, acquisition of information is sharply restricted. A shield of confidentiality has been erected over law enforcement investigative files as a result of Tennessean v. Metro Gov't of Nashville and Davidson Cnty., 485 S.W.3d 857 (Tenn. 2016). Because the protection created by this decision is "cradle to the grave", covering records from the inception of the investigation to

the conclusion of the last appeal, traditional methods of evaluating the performance of a sheriff, for example, have been modified. No longer can someone not a party to the criminal proceeding expect to routinely receive information about a case unless the custodian of those records (law enforcement) elects to share some or all of that information with the public. Selectively shared information may be viewed by some as suspect. Therefore, when a source of information becomes available, it is particularly valuable and desirable.

Not every county in Tennessee is a metropolitan county. As previously stated, many of the members of TPA serve rural counties -- counties where the police department of a small community or even the sheriff's department may be composed of a very few members, many of whom perform multiple duties. Does that mean that there should be no fair report privilege in those counties because they do not meet some artificial criterion? The answer is no.

For example, the subject county in this litigation, White County, covers almost 380 square miles of territory in Middle Tennessee. The most recent estimate of its population is in excess of 27,000 people and over 9,000 households sprinkled throughout this 380 square miles. In order to serve this county and its population, the White County Sheriff's Department has fewer than 40 deputies. These are the deputies who are in the field performing law enforcement functions. That means that that number of deputies has to cover the county and its population 24 hours a day, 365 days a year so, therefore, all

of those deputies are not available at any one time during any one shift to meet the needs of the people. If you assume that there was an even distribution of personnel among two 12 hour shifts each day, that would be 20 or less deputies available to answer calls, enforce the law and otherwise meet the needs of a population disbursed over 380 square miles (about 1,350 persons per deputy). This fact argues in favor of deputies wearing multiple hats. That is why detective Isom, who was PIO for the White County Sheriff's Department, also functioned as a lead investigator in the Burke matter. The Sheriff's Department simply could not afford the luxury of a separate PIO having no other duties given the personnel available and the tasks at hand. There is nothing unusual, under those circumstances and similar circumstances in many of the other 95 counties of Tennessee served by TPA members, for official information to be disseminated by someone other than a dedicated public information officer or an official spokesperson. Without the ability of working journalists and other news gatherers to rely upon information provided to them by law enforcement officers without a choking restrictive requirement, a formal title or some form of formality of presentation such as a press conference or a press release, the fair report privilege would wither and die and the people of Tennessee and its government would be the loser.

Respectfully submitted, this 1st day of October, 2019.

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Application of Tennessee Press Association for Leave to File an Amicus Curiae Brief has been mailed by placing same in the United States Mail, postage prepaid, to the following counsel of record:

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