

BACKGROUND TO THE LITIGATION

Tuesday, June 12, 2007

SHAW SUBURBAN MEDIA GROUP, INC. AND BILL PAGE

v.

CHIEF JUSTICE ROBERT THOMAS, ET AL.

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Who are the plaintiffs in the federal case?

Shaw Suburban Media Group, Inc. is an Illinois publishing company based in Crystal Lake. It publishes The Kane County Chronicle and over 20 other newspapers in Illinois. Bill Page was an opinion columnist for the Chronicle from 2001-2006. He wrote about a broad range of local political issues.

Who are the defendants in the federal case?

The defendants are the Justices of the Illinois Supreme Court, including Chief Justice Robert Thomas, the three Justices on the Illinois Appellate Court who were hand-picked to hear the appeals in the defamation case (Illinois Appellate Court judges carry the title “Justice” as well), and the Circuit Court judge who presided over the trial (who was also hand-picked to sit on this case).

What was the defamation case about?

Page wrote three columns about the politics of a high-profile disciplinary case at the Illinois Supreme Court involving the Kane County state’s attorney, Meg Gorecki. Thomas has been an elected judicial official from that part of the state since 1988, and multiple sources told Page that there was pervasive speculation around Kane County that Thomas was biased against Gorecki. Page believed that Thomas should have recused himself from the case. Page had also been informed that Thomas had decided not to push for stiffer sanctions against Gorecki because Gorecki backers would be supporting the judicial campaign of a Thomas ally, Robert Spence. Like many judges in a state where judicial offices are filled by competitive election, Thomas is known to work state judicial politics aggressively.

What happened at trial?

The journalism was never properly presented to the jury for a number of reasons:

- The newspaper’s many sources were, unsurprisingly, afraid to testify against the most powerful judge in the state.

- Thomas's colleagues created a "judicial deliberation" privilege specially for this case that prevented the newspaper from obtaining information needed for its defense and from fully cross-examining the Supreme Court Justices who testified for the Chief Justice.
- The trial judge treated the opinion columns as if they were news articles, even forcing the newspaper to redact the word "Opinion" from the page on which the columns were published before providing them to the jury.
- The jury was also not permitted to decide whether the columns were defamatory – the trial judge took this traditional juror issue away from the jury and decided it on his own.

After trial, the Circuit Court judge upheld \$4 million of the Chief Justice's \$7 million in compensatory damages even though he found a "paucity" of evidence supporting the Chief Justice's claim that his reputation was harmed by the columns and believed that the jury verdict was "the result of passion and prejudice."

What exactly is the newspaper asking the federal court to find?

The relief the Chronicle is seeking includes a finding by the federal court that its constitutional rights are being violated because it cannot receive a fair appeal. After all, the Chief Justice and the colleagues who testified for him control the very court system in which the appeal would be heard. Second, the newspaper is asking the federal court to find that its constitutional rights are being violated because the Illinois judiciary is treating it differently from all other litigants in the state. Illinois has two levels of appellate review, the Appellate Court and the Supreme Court. But the Chronicle has no Illinois Supreme Court to appeal to because Chief Justice Thomas's lawsuit has disqualified the Supreme Court. Finally, the newspaper is asking the federal court to find that the Chief Justice's award is illegitimate because he won it in legal proceedings that were unconstitutional. The unconstitutional conduct of the defendants is detailed throughout the federal complaint and summarized in paragraph 162.

So what's the solution?

The constitutional irregularities are so substantial – Chief Justice Thomas's control of the court system, the Supreme Court's arbitrary reshuffling of the judges hearing the case, the invention of a "judicial deliberation" privilege – that the state court judgment should be made unenforceable. If Chief Justice Thomas still wants to sue when he's a private citizen, let's start over with a new trial. At the very least, the appeal should be stayed, with no interest accruing on the judgment, until Chief Justice Thomas and the Supreme Court Justices who testified for him are off the bench and no longer in a position to 1) negatively affect the jobs of the Illinois Appellate Court judges asked to decide the appeal in the first instance and 2) deny the newspaper a quorum at the Illinois Supreme Court if a second level of appeal is needed. Thomas's term on the Supreme Court runs out in 2010. If he runs for retention and serves another term, then the judgment continues to be stayed until he leaves office.

Is the newspaper asking the federal court to serve as its appellate court?

No, the federal court cannot serve as the appellate court in this case. We are not asking the federal court to review the evidence in the defamation case. We are asking the federal court to find that the procedures underlying the defamation case and the appeal are unconstitutional and that the case therefore cannot proceed at this time.

Is there any way the state can appoint special judges to hear the appeal?

No, unlike other states, Illinois has no statutory or constitutional provision to appoint temporary judges to hear an appeal when a mass disqualification of judges is necessary. So there is no way for the Chronicle and Page to get a fair appeal in Illinois.

Why is the newspaper filing the federal case now? Why not earlier?

The newspaper tried raising the constitutional concerns with the state trial judge. He said it needed to save them for “another day.” That day has come. It is apparent to the newspaper and any average citizen that it is impossible for the newspaper and the columnist to receive a fair hearing in the state courts.

Why does the newspaper need a court of last resort in the state if it has an appellate court that will hear its appeal?

Every other litigant is entitled to two levels of appellate review in Illinois. Newspapers and opinion columnists who criticize state judges deserve nothing less. Furthermore, the one level of review the Chronicle has in the Appellate Court is not constitutionally fair. The appeals court judges the Supreme Court assigned to decide whether Thomas keeps a multi-million dollar windfall serve under the Chief Justice and the Supreme Court Justices who testified for him. These very appellate judges gave Chief Justice Thomas’s Supreme Court exactly what it wanted when they created the “judicial deliberation” privilege in 2005. Furthermore, they would be asked to evaluate critically the testimony of the Chief Justice and his judicial colleagues under special rules the U.S. Supreme Court has mandated for appeals in public-official libel cases. The independence from the Chief Justice and his witnesses that the Constitution – and public confidence in the impartiality of the judiciary – require is simply not possible in the Illinois Appellate Court.

What else is new in the federal case?

Because the trial judge was unwilling to address the due process concerns during the state trial, the newspaper and the columnist are now telling this story for the first time. The federal complaint provides a detailed factual chronology showing how the pervasive procedural irregularities, and the judicially-created “judicial deliberation” privilege, have deprived the Chronicle and Page of their constitutional rights. In a broader sense, the complaint is precedent-setting because this suit is the first in the nation to challenge the fairness of a personal lawsuit brought by a judge controlling a state court system.

What will happen to the newspaper's state appeal while the federal claims are being heard?

We think the state case should be put on hold so that the federal case can proceed. If we lose in federal court, we'll be back in state court and everyone's rights will be preserved. But we think that the state courts have a duty to let a neutral forum decide if they have the institutional independence to hear the appeal.

What did the newspaper expect Justice Thomas to do – simply not sue?

Justice Thomas was faced with a choice. Suing over the opinion columns would inevitably mean depriving the newspaper and the columnist of their constitutional rights to a fair trial and to a fair and full appeal. As a judge, he has a duty under the Code of Judicial Conduct to put the interests of the court system and the citizens of Illinois above his own personal interests. He chose instead to look out for himself. There may be circumstances in which judges, particularly lower court judges, will be able to sue for libel without disrupting the entire judicial system and depriving an adversary of its constitutional rights. But a suit by an appellate court judge, let alone by the chief judge of an entire state court system, should be prosecuted only under the most dire of circumstances. Chief Justice Thomas has not even come close to satisfying that threshold in targeting a small, community newspaper with less than 15,000 subscribers. He should not have sued.

Who will represent the judges?

The judges are entitled to representation by the Attorney General of Illinois. The Attorney General represented Chief Justice Thomas's Supreme Court colleagues earlier in this case when they refused to respond to discovery and insisted that the Illinois court system establish "judicial deliberation" protections to barricade the judiciary behind a wall of privilege – even though it was the judiciary's top officer who had put these deliberations at issue by instigating the state proceedings against the newspaper and the opinion columnist.