REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 495

September Term, 1994

(On Motion For Reconsideration)

LEON C. FEARNOW

v.

THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF MARYLAND, et al.

Alpert,
Hollander,
Harrell,

JJ.

Opinion by Harrell, J.

Filed: March 30, 1995

Our initial opinion in the case sub judice was filed on 11 January 1995. Fearnow v. Chesapeake & Potomac Tel. Co. et al., ___ Md. App. ___ (No. 495, September Term 1994). Appellee, Donald K. Wood, filed a motion for reconsideration on 8 February 1995. Appellant, Leon C. Fearnow, filed a motion for reconsideration on 9 February 1995. Having pleased no one entirely, we approached the motions with a certain ambivalence.

Appellee's motion for reconsideration argued that we had overlooked his previously raised points that the circuit court erred in denying his motion for judgment at the close of all the evidence for two reasons: (1) there was insufficient evidence, as a matter of law, that any telephone conversations of appellant were intercepted by appellee; and (2) there was insufficient evidence, as a matter of law, that appellee acted wilfully.[1] As we find no merit in appellant's arguments for reconsideration, his motion is hereby denied.

Appellant's motion for reconsideration, as we perceive it, argued, among other things, that this Court's affirmance of the trial court's grant of summary judgment in favor of C&P on the issue of respondeat superior was incorrect. Moreover, appellant contended that several issues, not addressed by our prior opinion, must be addressed in order to avoid a "multiplicity of appeals and

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[1] Appellee raised this issue in its brief as an alternative ground for affirmance, and not by cross-appeal. Glenn v. Morelos, 79 Md. App. 90, 95, cert. denied, 316 Md. 427 (1989).

unnecessary expense." These "unaddressed" issues included: (1) "[d]id the trial court err in quashing certain trial subpeonas and sustaining objections to the use of interrogatory answers by Wood and C&P;" (2) "[d]id the trial court err in granting summary judgment against the plaintiff on the issue of punitive damages by requiring proof of actual malice;" (3) "[d]id the trial court err in granting summary judgment against Fearnow on his claim for damages for reputational injury and resultant emotional distress;" (4) "[d]id the trial court err in denying the plaintiff additional discovery while permitting additional discovery to be reopened by the defendants;" and (5) "[d]id the trial court err in ruling as a matter of law that no conspiracy existed." We find limited merit in appellee's arguments as to questions numbered 2 and 3, supra. We briefly explain those merits. Appellant's motion is otherwise denied.[2]

Punitive Damages[3]

In his brief, appellant argued that section 10-410(a) of the Maryland Wiretap Act "is clear and unambiguous . . . [and] provides

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[2] We assume that the circuit court will issue a new scheduling order reopening discovery prior to the new trial, and therefore we believe there is no reason to reach the questions highlighted in appellant's motion for reconsideration concerning the discovery issues.

[3] This issue was raised by appellant in his brief in the context of the circuit court's grant of appellee's summary judgment motion. Therefore, we shall review, as a matter of law, the need to prove malice to sustain an award of punitive damages. Franklin Square Hosp. v. Laubach, 318 Md. 615, 619 (1990).

that any person whose communication is intercepted in violation of the act shall have a cause of action against any person who violates the act and be entitled to recover punitive damages." (Emphasis in the original.) Citing Franklin Square Hosp. v. Laubach, 318 Md. 615 (1990), appellant contended that because "[t]here is no mention of malice in the act nor [sic] in the legislative history of the act," proof of a violation of the Act should entitle appellant to submit the issue of punitive damages to the jury.[4] In addition, appellant drew our attention to the case of Citron v. Citron, 539 F. Supp. 621, 624 (S.D.N.Y. 1982), aff'd, 722 F.2d 14 (2d Cir. 1983), cert. denied, 466 U.S. 973 (1984), in which the federal district court held that "punitive damages must be available once liability has been established." Id. at 624 n.5.

Appellee, however, contended in his brief that "[t]he legislative history of the federal law, with civil liability language virtually identical to that of the [Maryland] Act, explicitly provides that proof of malice is a prerequisite for punitive damages." Without mention of appellant's discussion of Citron, supra, appellee asserted that "[n]early every federal court which has ruled on the issue has so held." (Footnote omitted.) Therefore, concluded appellee, we "should be guided by the weight

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[4] Appellant also cites Standiford v. Standiford, 89 Md. App. 326 (1991), cert. denied, 325 Md. 526 (1992) for the proposition that, in a civil wiretap case, "punitive damages were allowed without the showing of malice." It is clear, however, that the issue of punitive damages in Standiford was not preserved for appeal. See id. at 343-44.

of federal authority."

Section 10-410(a) of the Maryland Wiretap Act provides:

> Any person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of this subtitle shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use the communications, and be entitled to recover from any person:
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> (1) Actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
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> (2) Punitive damages; and
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> (3) A reasonable attorney's fee and other litigation costs reasonably incurred.

Md. Code Ann., Cts. & Jud. Proc. § 10-410(a) (1989 Replacement Volume). Although the legislative history of the Act is silent as to whether a plaintiff must prove malice to sustain a punitive damages award, there are two Maryland Court of Appeals cases that tangentially we find instructive on this issue.

The first case is Franklin Square Hosp. v. Laubach, 318 Md. 615 (1990). In that case, Timothy Laubach and Nancy Laubach, his wife, brought an action against Franklin Square Hospital (Hospital) and others. The action involved the medical treatment of the pregnant Mrs. Laubach, the death of her brain damaged daughter, and the disclosure of "fetal heart monitoring tracings." The complaint alleged that the Hospital had violated the dictates of section 4-

302(b)(1)[5] of the Health-General Article and prayed for compensatory and punitive damages pursuant to section 4-302(d)(2).[6] The jury found for the Laubachs against the Hospital and awarded $300,000 in actual damages and $700,000 in punitive damages. The Court of Special Appeals affirmed, Laubach v. Franklin Square Hosp., 79 Md. App. 203 (1989), aff'd, 318 Md. 615 (1990), and the Court of Appeals limited its review to the following question:

> Whether malice is a prerequisite to recovery of punitive damages under Md. Health-Gen. Code Ann. ("HG") § 4-302.

In its search for the answer to this question, the Court went

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[5] Section 4-302(b)(1) provided:

> (1) Except as otherwise provided in this subsection, a facility shall comply within a reasonable time after a person in interest requests, in writing:
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> (i) To receive a copy of a medical record; or
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> (ii) To see and copy the medical record.

Md. Code Ann., Health-Gen. § 4-302(b)(1) (1982 Replacement Volume) (recodified at Md. Code Ann., Health-Gen. § 4-304(a)(1) (1994 Replacement Volume)).

[6] Section 4-302(d)(2) provided:

> If a facility refuses to disclose a medical record within a reasonable time after a person in interest requests the disclosure, the facility is, in addition to any liability for actual damages, liable for punitive damages.

Md. Code Ann., Health-Gen. § 4-302(d)(2) (1982) (codified as amended at Md. Code Ann., Health-Gen. § 4-309 (1994 Replacement Volume & 1994 Supp.)).

"hunting the ghost of legislative intent." Franklin Square Hosp., 318 Md. at 619. Stating that "[t]he obvious purpose of the statute is to compel disclosure of medical records under prescribed circumstances, and to attain uniformity by having all facilities bound by the same rules," id. at 622, the Court held:

> Section 4-302(d)(2) declares that if the facility does not disclose a medical record as required, it "is liable for punitive damages." (emphasis added). That is, the issue of punitive damages goes to the jury; whether to award those damages is within the jury's discretion. Nowhere in the language of the statute or in its available legislative history is there any indication that the Legislature intended to impress on the liability for punitive damages a requirement of proof of malice, actual or implied. . . . To achieve [the uniform disclosure of medical records under prescribed circumstances], no more than a mere refusal to disclose within a reasonable time, upon proper request, whether done maliciously or not, results in liability for punitive damages in addition to actual damages. This is a case where the language of the statute is clearly consistent with its apparent purpose, and not productive of any absurd result. In other words, when the plain language in which the law is couched is considered in the context of the legislative purpose, the legislative intent shines bright and clear.

Id. at 622-23.

In the case sub judice, the plain language of section 10-410(a) of the Maryland Wiretap Act is very similar to that of former section 4-302(d)(2) of the Health-General Article. Both sections are devoid of any explicit requirement that the plaintiff prove malice to sustain an award of punitive damages. Also, both

sections are similarly couched in the conjunctive, providing for actual damages and punitive damages. Their difference, however, lies in the paucity of legislative history relevant to the Maryland Wiretap Act. Absent such "bright and clear" legislative intent as was gleaned by Judge Orth in Franklin Square Hosp., we are unpersuaded in this case to hold that a mere violation of the Maryland Wiretap Act, without a showing of malice, will sustain an award for punitive damages.[7]

A more recent and persuasive discussion of the appropriate analytical standard for ascertaining the availability of punitive damages in tort actions is found in Ellerin v. Fairfax Sav., FSB, 337 Md. 216 (1995).[8] In that case, Fairfax Savings, FSB (Fairfax) filed an action against Charles Ellerin, Louis Seidel, and their wives as personal guarantors of a loan issued by Fairfax and defaulted on by Sherwood Square Associates (of which Ellerin and Seidel were general partners). The guarantors filed counterclaims

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[7] We find support for this conclusion in the current section of the Health-General Article dealing with penalties for refusal to disclose medical records. As codified in the 1994 Replacement Volume & 1994 Supplement, section 4-309(a), formerly section 4-302(d)(2), has abolished the punitive damages provision, and now provides that "[i]f a health care provider knowingly refuses to disclose a medical record within a reasonable time after a person in interest requests the disclosure, the health care provider is liable for actual damages." Md. Code Ann., Health-Gen. § 4-309(a) (emphasis added); see also Dr. K. v. State Bd. of Physician Quality Assurance, 98 Md. App. 103, 117 (1993), cert. denied, 334 Md. 18, cert. denied, 115 S. Ct. 75 (1994).

[8] We acknowledge that, at the time the circuit ruled on this issue, Ellerin had not been decided.

setting forth tort causes of action for fraud and deceit based on their allegation that Fairfax had obtained post-completion guarantees by fraud. The guarantors demanded $6,000,000 in compensatory damages and $10,000,000 in punitive damages for the fraud.

After a first trial on the merits, the jury returned a verdict in favor of Fairfax. The Court of Special Appeals reversed and granted a new trial, and the Court of Appeals denied a petition for a writ of certiorari. The second trial ended in a hung jury and the case was tried for a third time, with the liability phase of the trial tried separately from the damages phase.

As to liability, the jury found in favor of the guarantors on the fraud count and in favor of Fairfax on the balance due on the loans. At the damages phase, the court told the jury that, while it need not award punitive damages, it could award punitive damages in its discretion. The trial court refused Fairfax's request that the court instruct the jury with respect to the malice required for an award of punitive damages. The court concluded that such an instruction was unnecessary in light of the jury's verdict on liability. "In the court's view, if a plaintiff had established the elements of the tort action, he had necessarily established malice." Id. at 226. The jury awarded both compensatory and punitive damages in the fraud action. On appeal, the Court of Special Appeals affirmed the compensatory award and vacated the punitive award, "holding that the trial court should have

instructed the jury concerning the malice necessary to support a punitive damages award." Id. (citing Fairfax Sav., FSB v. Ellerin, 94 Md. App. 685, 695-96 (1993)).

The Court of Appeals, in its discussion of the appropriate standard for an award of punitive damages, explained that, "with regard to most types of tort actions, Maryland law has limited the availability of punitive damages to situations in which the defendant's conduct is characterized by knowing and deliberate wrongdoing." Id. at 228 (citing Adams v. Coates, 331 Md. 1, 13 (1993); Komornik v. Sparks, 331 Md. 720, 725 (1993); Owings-Illinois v. Zenobia, 325 Md. 420, 454 (1992); Philadelphia, Wilmington & Baltimore R.R. Co. v. Hoeflich, 62 Md. 300, 307 (1884)).

Thus, the Court deemed it "appropriate to examine the elements of the tort of fraud or deceit for the purpose of determining to what extent the tort inherently involves the state of mind and conduct which is ordinarily required for the availability of punitive damages." Ellerin, 337 Md. at 229. The Court acknowledged the two different mental states that are sufficient to commit the tort of fraud or deceit--intentional false representations and reckless disregard for the truth--and held that

> the elements of the tort of fraud or deceit in Maryland, where the tort is committed by a defendant who knows that his representation is false, include the type of deliberate wrongdoing and evil motive that has traditionally justified the award of punitive damages.

> On the other hand, when a particular fraud or deceit action is based on the alternative form of the knowledge element, namely a "reckless disregard" as to the truth of the representation, the traditional basis for the allowability of punitive damages is not present.

Id. at 235 (footnote omitted). Therefore, concluded the Court, "reckless disregard" or "reckless indifference" concerning the truth of the representation "falls short of the mens rea which is required to support an award of punitive damages." Id..

The reasoning of Ellerin is directly applicable to the case sub judice. As we explained in our prior opinion:

> To establish liability under the Maryland Wiretap Act, appellant must prove that Wood acted wilfully. The term "wilfully" means "more than intentional or voluntary. It denotes either an intentional violation or a reckless disregard of a known legal duty. Indeed, as the federal district court explained in Earley, the violator must know that what he or she is doing is illegal.

Fearnow, slip op. at 13 (citations omitted; footnote omitted); see also Hawes v. Carberry, ___ Md. App. ___ (No. 627, September Term 1994) (filed 6 February 1995) (citing Fearnow, supra). The mens rea which is required to violate the Maryland Wiretap Act is remarkably similar to that required to commit the tort of fraud or deceit as explained in Ellerin, supra. As in Ellerin, there are two mental states that are sufficient to violate the Act--an intentional violation or a reckless disregard of a known legal duty.

Thus we apply the Court of Appeals' reasoning in Ellerin to

the case sub judice and reach a similar conclusion. The mens rea required to violate the Maryland Wiretap Act, where the violation is committed by a defendant who knows that he is violating the Act, includes the type of deliberate wrongdoing and evil motive that has traditionally justified the award of punitive damages. On the other hand, when a particular violation of the Act is based on the alternative form of mens rea, namely a "reckless disregard" as to a known legal duty, the traditional basis for the allowability of punitive damages, i.e. malice, is not present. See Ellerin, 337 Md. at 235.

Our conclusion here is also in accord with the weight of federal authority interpreting the punitive damages provision of the federal wiretap statute.[9] We agree with appellee's contention that the legislative history of the federal act "explicitly provides that proof of malice is a prerequisite for punitive damages."[10] See, e.g., Bess v. Bess, 929 F.2d 1332, 1335 (8th Cir.

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[9] We note a difference, albeit inconsequential, between the Maryland Wiretap Act and its federal counterpart in the wording of their respective punitive damages provisions. While the Maryland Act provides for "punitive damages," Md. Code Ann., Cts. & Jud. Proc. § 10410(a), section 2520(b)(2) of the federal act provides for "punitive damages in appropriate cases." 18 U.S.C. § 2520(b)(2) (1988) (emphasis added).

[10] 1968 U.S.C.C.A.N. 2196 provides:

> Recovery [under the federal act] shall include: (a) actual damages, but not less than liquidated damages at the rate of $100 a day for each day of violation or $1,000, whichever is higher, (b) punitive damages, where malice is shown, and (c) a reasonable attorney's fee and other litigation costs

1991); Jacobson v. Rose, 592 F.2d 515, 520 (9th Cir. 1978), cert. denied, 442 U.S. 930 (1979); Biton v. Menda, 812 F. Supp. 283, 285 (D. Puerto Rico 1993). This is not, however, inconsistent with our discussion and application of Ellerin, supra. Where a defendant knowingly and intentionally violates the federal act, such conduct would be considered "malicious" so as to justify a punitive damages award pursuant to 18 U.S.C. § 2520(a). Cf. Ellerin, 337 Md. at 235. On the other hand, where a violator of the federal wiretap statute acts with a "reckless disregard" of a known legal duty, the requisite "wanton, reckless, and malicious" state of mind for allowability of punitive damages is not present.[11] Cf. id.; e.g.,

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reasonable incurred.

S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2196 (emphasis added).

[11] Appellant draws our attention to the case of Citron v. Citron, 539 F. Supp. 621 (S.D.N.Y. 1982), aff'd, 722 F.2d 14 (2d Cir. 1983), cert. denied, 466 U.S. 973 (1984), ignored by appellee in his brief, to support appellant's contention that a mere violation of the Maryland Wiretap Act, without proving malice, is sufficient to submit the issue of punitive damages to the jury. In Citron, the federal district court, interpreting the federal wiretap act, held: "We reject the rule set forth in Jacobson v. Rose that an award of punitive damages must be supported by a stronger showing than necessary for compensatory damages." Id. at 624 n.5 (citations omitted).

We note, however, that the federal act differs from the Maryland Act in that it provides civil sanctions only for actions taken in violation of its penal provisions. Kratz v. Kratz, 477 F. Supp. 463, 483 (E.D. Pa. 1979). The Citron court apparently relied on this distinction in making its ruling: "If, as this Circuit has ruled, only criminal conduct is covered by the statute, it follows that punitive damages must be available once liability has been established." Citron, 539 F. Supp. at 624 n.5 (citing Kratz, supra).

In 1986, however, the punitive damages language of the federal wiretap statute was amended to allow for "punitive damages in

Bess, 929 F.2d at 1335 (where defendant testified that he installed the tape recorder out of a belief that the phone messages left for him at the marital residence were being withheld, conduct not sufficient to warrant punitive damages).

In the instant case, we agree with the circuit court that, at the time appellee's summary judgment motion as to punitive damages was granted (27 October 1992), there was insufficient evidence to support the conclusion that appellee intentionally and deliberately, i.e. maliciously, violated the Maryland Wiretap Act. Therefore, to the extent the circuit court's grant of summary judgment on this issue retains any vitality at the new trial, we affirm the court's decision in that regard. We point out for the circuit court, however, in light of the Court of Appeals's recent decision in Ellerin, that its prior pronouncement that "a showing of willfulness is not sufficient to support an award of punitive damages under the statute" may not necessarily remain true if additional relevant facts are adduced. As we discussed supra, our bifurcated definition of wilfulness under the Act allows for, in some instances, a showing of wilfulness to be sufficient to warrant an award of punitive damages under the Maryland Wiretap Act.

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appropriate cases." It is for this reason perhaps that we have been unable to discover any subsequent case that reached the same conclusion as Citron. Therefore, as the Maryland and federal wiretap statutes are worded differently in this regard, we elect not to adopt the reasoning set forth by the Citron court and, instead, apply the bifurcated approach set forth in Ellerin, supra, to determine the appropriate standard for the availability of punitive damages under the Maryland Wiretap Act.

Reputational Damages

In its memorandum and order on appellee's motion for summary judgment concerning appellant's claim for reputational damages, the circuit court found that appellant was not entitled to reputational damages in the instant case for two reasons: 1) "there is no duty imposed on anyone by the wiretap act to safeguard against the publication by others of the circumstances surrounding an alleged wiretap;" and 2) "as a police officer, [appellant] had no protectable interest in preventing publications about the suspicions which prompted the tape recorder incident." We shall discuss each reason in turn.

The Maryland Wiretap Act explicitly prohibits three forms of conduct: 1) the wilful interception of any wire, oral, or electronic communication; 2) the wilful disclosure of the contents of any wire, oral, or electronic communication; and 3) the wilful use of the contents of any wire, oral, or electronic conversation. Md. Code Ann., Cts. & Jud. Proc. § 10-402(a). Appellant, however, does not claim that his reputation was injured by the interception, disclosure, or use of his wire communications. Instead, he claims that the discovery of the tape recorder incident at the Hagerstown Police Department led to disclosure in the press and elsewhere of the circumstances that prompted the police to wiretap his telephone extension. As explained by the circuit court, because "the wiretap law imposes no duty to safeguard against disclosing police suspicions about [appellant], and any resulting investigation,

[appellant's] claim for injury to reputation and related emotional distress" cannot be sustained under the guise of actual damages proximately caused by a violation of the Maryland Wiretap Act.

Appellant's claim for reputational damages similarly fails under the tort theory of defamation.[12] To recover for defamation, a plaintiff must ordinarily establish that the defendant made a defamatory statement to a third person; the statement was false; the defendant was legally at fault for making the statement; and, the plaintiff thereby suffered harm. Rosenberg v. Helinski, 328 Md. 664, 675 (1992), cert. denied, 113 S. Ct. 3041 (1993); Kairys v. Douglas Stereo Inc., 83 Md. App. 667, 678-79 (1990). Where the plaintiff in a defamation action is a "public figure," he or she must prove by clear and convincing evidence that the allegedly false defamatory publication was made with "actual malice." Capital-Gazette Newspapers, Inc. v. Stack, 293 Md. 528, 540 (citing New York Times Co. v Sullivan, 376 U.S. 254 (1964)), cert. denied, 459 U.S. 989 (1983). Maryland law affords a "qualified privilege," however, to "any person who makes an oral, written or printed report about matters involving violation of the law." Seymour v. A.S. Abell Co., 557 F. Supp. 951, 955 (D. Md. 1983) (applying

[12] Appellant, throughout this case, has never asserted a defamation cause of action. The discussion of reputational damages in the context of defamation was initiated by appellee in its motion for summary judgment filed 25 March 1993, and perhaps unnecessarily carried forward by the circuit court in its explanation for the grant of that motion. We shall discuss this alternative characterization of appellant's reputational damages claim, however, for the purpose of closure.

Maryland law).

We agree with the circuit court that Seymour v. A.S. Abell Co., 557 F. Supp. 951 (D. Md. 1983) is persuasive in disposing of appellant's claim for reputational damages, couched, as it was, as a defamation action. In Seymour, a police officer claimed he had been defamed by publications that disclosed that he had been investigated within the police department. In granting summary judgment to the department, the federal district court explained that Maryland law affords a broad privilege that protects publishing, or causing the publication, of substantially accurate reports about police investigatory activity. Id. at 955. The court emphasized that the privilege applies to non-media defendants as well as to media defendants, and encompasses virtually all police investigatory activity, whether it ultimately proves to be well-founded or not:

> [T]he policy behind the privilege [to publish matters involving alleged violation of law] is that the public's strong interest in receiving information about matters involving violation of the law outweighs the interest of the subjects of defamatory statements at least where the defamatory statements are not made with actual malice. See Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (Holmes, J.). Since the public's interest in receiving the information is just as strong whether the purveyor of the information is a newspaper or some other source, the Court holds that the Maryland privilege applies to all persons who pass on information about matters involving violation of the law. . . . Although no formal criminal charges were ever filed, the police investigation and administrative charges unquestionably constitute "matters

> involving violation of the law." Indeed, most, if not all, police activity concerns matters involving the violation of the law. Simply put, police business is legal business, most especially so when the police investigate and file administrative charges against wrongdoing of their own.

Id. at 955-56 (emphasis added).

The court noted that such communications are also privileged because police officers are "public figures." The court explained:

> "[E]very court that has faced the issue has decided that an officer of law enforcement, from ordinary patrolman to Chief of Police, is a public `public official' within the meaning of federal constitutional law." The Tenth Circuit explained why even a low ranking police officer is a public official:
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> > The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public official.

Id. at 957 (citations omitted) (emphasis added).

In light of the discussion in Seymour, supra, it is clear that the circuit court's grant of appellee's summary judgment in the case sub judice was proper for two reasons: 1) any information regarding the investigation of appellant that was disclosed or caused to be disclosed by appellee was privileged as "matters

involving violation of the law;" and 2) appellant was a "public official" and consequently failed to meet his burden of establishing actual malice on behalf of appellee.

APPELLEE'S MOTION FOR RECONSIDERATION DENIED. APPELLANT'S MOTION FOR RECONSIDERATION GRANTED IN PART AND DENIED IN PART. OPINION FILED ON 11 JANUARY 1995 IS SUPPLEMENTED BY THIS OPINION.