[J-122-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JAMES B. NORTON, III, ALAN M. WOLFE, AND JAMES MARLOWE,	:	Nos. 18 & 19 MAP 2003
	:	Appeal from the Order of the Superior Court, dated March 18, 2002,
v.	:	Consolidated Appeal Nos. 633 and 707 EDA 2001, vacating the judgments of the Court of Common Pleas of Chester
WILLIAM T. GLENN, SR., TROY PUBLISHING COMPANY, INC., TOM KENNEDY, AND WILLIAM CAUFIELD,	:	County, Consolidated Action No. 95-06483, entered on January 19, 2001 and February 12, 2001.
	:	797 A.2d 294 (Pa. Super. 2002)
Appeal of: Troy Publishing Company, Inc., Tom Kennedy, and William M. Caufield.	:	ARGUED: October 20, 2003

CONCURRING OPINION

MR. JUSTICE CASTILLE **Decided: October 20, 2004**

I join the Majority Opinion with the single exception of the discussion in footnote 6 of the fair report privilege, which I believe warrants elaboration for purposes of retrial. I write separately to address two points: (1) my own view of the neutral report privilege; and (2) what role may be played upon remand by the related, but distinct, fair report privilege under Pennsylvania law.

The single issue accepted for review in this discretionary appeal is whether the neutral report privilege is viable in Pennsylvania under either the First Amendment of the U.S. Constitution or Article I, Section 7 of the Pennsylvania Constitution. I agree with the Majority Opinion that, under current authority from the U.S. Supreme Court, the First Amendment cannot be said to encompass such a privilege. I also agree that, since any

innovation in this area would mark a distinct break from the U.S. Supreme Court's current analytical approach, such innovation should come from the High Court. I also agree with the Majority that there is no basis to construe the Pennsylvania Constitution separately, *i.e.*, as if it provided absolute protection for "neutral" reportage of defamatory but "newsworthy" information. Mr. Chief Justice Cappy's learned Majority Opinion reflects a characteristically comprehensive survey of the current state of the governing law involving the neutral report privilege; and the Chief Justice's review persuasively demonstrates why that jurisprudence requires a conclusion that the newspaper article in question is not protected by the neutral report privilege.

If this Court truly were unfettered in its evaluation of the jurisprudential soundness of the neutral report privilege, I believe that there is much to be said, as a theoretical matter, in favor of recognizing a First Amendment privilege to fairly and accurately report newsworthy events -- at least where, as here, the event not only is newsworthy but also pertains to matters involving the official conduct of elected public officials. However, the neutral report privilege has never been embraced by the U.S. Supreme Court, so there is no overarching governing definition of its scope and contours. The leading case on the subject is the Second Circuit Court of Appeals' decision in Edwards v. National Audubon Society, Inc., 556 F.2d 113 (2d Cir. 1977), which provides the following description of the privilege:

> [W]hen a responsible, prominent organization . . . makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private view regarding their validity. What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the first amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation. The public interest in being fully informed

> about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.

Id. at 120 (further citations omitted).

The case *sub judice* involves more than a sensitive issue of public interest or controversy. Here, the article concerned the acrimonious fallout from a special meeting of the Parkesburg Borough Council, and it reported defamatory comments that Glenn, an elected borough councilman, made concerning the elected council president and the borough mayor. Absent some special circumstance (such as editorial adoption or apparent approval of the contents of the reported comments), the purpose for which a newspaper reports and disseminates such information is not the same defamatory purpose existing in the mind of the elected official/speaker. The very fact that, in response to official government proceedings such as the council meeting here, an elected public official would act in such a scurrilous manner as to call a fellow councilman and the local mayor "queers" and "child molesters," accuse the council president of inappropriate sexual overtures, falsely accuse the mayor and council president of having a homosexual affair and conspiring against him, etc., is not only newsworthy, but a matter of importance to voters. The report conveys information concerning the fitness of that elected public official to continue in office. I concur in the approach of the trial court in finding that such a report should be protected by a First Amendment-based privilege.

I am concerned also with the practical difficulties the press will encounter in trying to walk the very fine line between accurately reporting public governance-related comments such as these, while avoiding liability for doing so. Absent a privilege, the newspaper may be forced to sanitize the report or resort to vagaries -- highly subjective changes which inevitably will operate to mislead the public as to the seriousness or rashness of the accusations. Moreover, by forcing newspapers to recharacterize what actually occurred, the absence of a privilege essentially requires the substitution of editorial opinion for

accurate transcription. Such a transformation of the actual event inevitably alters its context and content. In addition to being inaccurate, news reports altered for fear of litigation would be of far lesser value to the general public in learning of and passing upon the appropriateness of the public behavior of their elected officials. Such a stilted reporting regime would contravene the United States Supreme Court's seminal statement that "debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

Having said this, I nonetheless remain satisfied with the Majority's assessment of existing U.S. Supreme Court precedent and its conclusion that this precedent militates against this Court embracing the neutral report privilege. The U.S. Supreme Court has not yet, and may never, embrace the extension of First Amendment protection that would be represented by adopting the privilege. I believe that such an extension, if to be recognized at all, should originate with the High Court.

I also agree with the Majority that, in this particular instance, there is no basis for concluding that a greater protection for the newspaper, in the form of a neutral report privilege, exists under Article I, Section 7 of the Pennsylvania Constitution. In this regard, Sprague v. Walter, 543 A.2d 1078 (Pa. 1988) is essential as that case recognizes that, in the defamation arena, there are interests other than free and unfettered speech interests which are implicated in a Pennsylvania constitutional analysis -- such as the interest in one's good reputation. In Sprague, this Court addressed the Shield Law privilege, 42 Pa. C.S. § 5942, which affords the media a right to conceal the identity of confidential sources. We found that the statute did not translate into a broader presumption that information received from such sources was reliable, and thus a defamation plaintiff may challenge the reliability of the information received or the credibility of the source. 543 A.2d at 1083, 1086. Thus, Sprague recognized that the right to free speech and the interest in free-

flowing information does not necessarily outweigh the interest an individual has in protecting his or her own good reputation. Id. at 1084-85. As a result, the Sprague Court declined to find greater protection for free expression in defamation actions under the Pennsylvania Constitution.[1]

Turning to footnote 6 of the Majority Opinion, the Majority notes that, in recognizing a neutral report privilege, the trial court conflated that doctrine with the separate and distinct fair report doctrine. The question of whether the account in this case was separately protected by the fair report privilege apparently was raised by appellants in the Superior Court, but not reached by the panel majority, although it was discussed in Judge (former Justice) Montemuro's concurring opinion. The question was then raised in appellants' allocatur petition as a distinct claim for review, but this Court did not grant review on the issue.

I write to emphasize that the fact that the applicability of the fair report privilege has not been squarely addressed at the appellate level will not preclude appellants from raising that distinct privilege upon retrial. The fair report privilege is a settled aspect of

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[1] Even in the absence of a neutral report privilege, I note that appellees will have a heavy burden at retrial, where the New York Times v. Sullivan actual malice standard will govern. In this regard, it is notable that, in the New York Times case itself, the Court approved of the following charge to the jury in an analogous situation:

> [W]here an article is published and circulated among voters for the sole purpose of giving wha[t] the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principle matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in such a case, the burden is on the plaintiff to show actual malice in the publication of the article.

376 U.S. at 280-81.

Pennsylvania law; that the trial court conflated the two doctrines cannot preclude appellants from invoking the doctrine upon remand.

The fair report privilege was embraced by this Court over forty years ago -- indeed, even before the decision in New York Times -- in Sciandra v. Lynett, 187 A.2d 586 (Pa. 1963), which held that:

> [A] newspaper has the privilege to report the acts of the executive or administrative officials of government. . . . If the newspaper account is fair, accurate and complete, and not published solely for the purpose of causing harm to the person defamed, it is privileged and no responsibility attaches, even though information contained therein is false or inaccurate.

Sciandra, 187 A.2d at 588-89 (citations omitted).[2] The definition of the fair report privilege adopted by Sciandra derived from Section 611 of the Restatement (First) of Torts:

> The publication of a report of judicial proceedings, or proceedings of a legislative or administrative body or an executive officer of the United States, a State or Territory thereof, or a municipal corporation or of a body empowered by law to perform a public duty is privileged, although it contains matter which is false and defamatory, if it is
>
> (a) accurate and complete or a fair abridgment of such proceedings, and
>
> (b) not made solely for the purpose of causing harm to the person defamed.

Following Sciandra, the fair report privilege became well-established as a part of the free speech law of Pennsylvania. See e.g., Binder v. Triangle Publications, Inc., 275 A.2d 53 (Pa. 1971) (applying fair report privilege with citation to Restatement (First) Torts); Purcell v. Westinghouse Broadcasting Co., 191 A.2d 662, 667 (Pa. 1963) (analyzing radio station's

[2] I note that nothing in this Court's decision in Sprague called into question the availability of the fair report privilege in appropriate circumstances.

comments about judicial proceeding under Section 611 fair report privilege); Rosenbloom v. Metromedia, 403 U.S. 29, 37-38 (1971) ("Pennsylvania law recognizes . . . a conditional privilege for news media to report judicial, administrative, or legislative proceedings if the account is fair and accurate, and not published solely for the purpose of causing harm to the person defamed, even though the official information is false or inaccurate.").

In 1977, the Restatement (Second) of Torts broadened Section 611 to include reports of any official action or proceeding and any meeting open to the public. Notably, the Second Restatement also eliminated the requirement that the publication not be made solely for the purpose of causing harm:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Restatement (Second) of Torts § 611 (1977). The fair report privilege has continued to be recognized and successfully advanced by the media in Pennsylvania cases, albeit this Court has not expressly adopted and applied the Second Restatement formulation. Curran v. Philadelphia Newspapers, Inc., 439 A.2d 652 (Pa. 1981) (fair report privilege of Restatement (Second) Torts *would have applied* to newspaper's report of comments at press conference *if* report was fair and accurate); DeMary v. Latrobe Printing and Publishing Company, 762 A.2d 758 (Pa. Super. 2000) (*en banc*), appeal denied, 786 A.2d 988 (Pa. 2001) (issue involving fair report privilege should go to jury; citing Restatement (First) Torts); Williams v. WCAU-TV, 555 F. Supp. 198 (E.D. Pa. 1983) (predicting Pennsylvania will adopt Section 611 of Restatement (Second) Torts formulation and applying that privilege).

In his concurring opinion below, Judge Montemuro described the practical operation of the fair report privilege, as follows:

> The privilege may be forfeited by a publisher who exaggerates or embellishes its account of the occasion . . . which must be "fair, accurate and complete." Sciandra, 187 A.2d at 589. Publication of defamatory material solely for the purpose of causing harm to the person defamed results in loss of the fair report privilege. DeMary, [762 A.2d] at 762. **Whether a privileged occasion occurred is a matter for the defendant to establish and for the trial court to decide, . . . but whether abuse of the privilege has occurred is a question for the jury.** DeMary, [762 A.2d] at 763.
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> The DeMary Court held, albeit in the context of preliminary objections, that the burden of proof borne by a public figure in order to succeed in making out a defamation case against (a) media defendant[] requires two types of malice to be demonstrated. "First, in order to make a prima facie case the plaintiff must show that the newspaper acted with actual malice toward the truthfulness of the statement." Id. at 765. The actual malice referred to is that which was defined by the Supreme Court of the United States in New York Times v. Sullivan . . ., as knowledge of the falsity of the defamatory statements or reckless disregard for their truth or falsity. DeMary, [762 A.2d] at 764. "Second, to defeat the fair report privilege once it has been properly raised, the plaintiff must show that the defendant was motivated by ill will toward the plaintiff," id. at 765, that is, by common law malice. As the DeMary Court explains, "Actual malice focuses on the defendant's attitude toward the truth, whereas common law malice focuses on the defendant's attitude towards the plaintiff." Id. at 764.

797 A.2d at 298-99 (Montemuro, J., concurring) (emphasis supplied) (additional citations omitted).

Judge Montemuro went on to recognize that the trial judge's conflation of the unavailable neutral report privilege with the recognized fair report privilege would not have necessitated reversal in this case if the court's actions in ruling on evidentiary questions and instructing the jury would have conformed with the requirements of the fair report privilege; in that instance, the only error would have been one of nomenclature. Ultimately, Judge Montemuro concluded that the distinct nature of the two doctrines rendered the court's rulings erroneous under the fair report privilege and thus, he concurred in the award of a new trial.

I agree with Judge Montemuro's analysis. With the fair report privilege, assuming a privileged occasion, the question of an abuse of the privilege is for the jury, and evidence of actual and common law malice is admissible. The rulings at trial excluded such evidence; hence, the verdict cannot stand.

With respect to the legal question of whether a "privileged occasion" is at issue for purposes of the fair report doctrine, that is a matter which was not passed upon by the trial court under the proper standard and it is a matter properly left to that court in the first instance -- particularly given the limited appellate posture in which the case is before this Court. I am aware that the event at issue here does not fit within the classic expression of the privilege: *i.e.*, the report was not an account of what occurred within the special council meeting itself. Nevertheless, appellants should be permitted an opportunity to demonstrate that the event reported -- the defamatory comments of a public official immediately after official proceedings of a public meeting had ended -- falls comfortably within the doctrine. In this regard, it is notable that the Comments to the Second Restatement suggest no requirement that the reported statements be made during an official public meeting. Rather, the privilege is deemed to "extend[] to the report of . . . any action taken by any officer . . . of any State or of any of its subdivisions." Restatement (Second) of Torts § 611, Comment d.[3] This rationale comports with the concerns I have expressed earlier (albeit concerning the neutral report privilege) that reports of matters affecting core democratic values such as the public's right to be informed concerning the public acts and comments of public officials implicating their fitness to serve, are deserving of special protection. I believe that a legitimate argument can be forwarded that the fair report privilege applies to

[3] Glenn's action here -- communicating false statements to a reporter about fellow council members -- arguably was an official one, that is, "to defend himself." N.T. Mar. 27, 2000, at p. 113.

the publication of Glenn's communications made outside of this meeting. See Curran, 439 A.2d at 661-62.