

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000803-MR

CAPITOL RESOURCES CORPORATION d/b/a
CAPITOL PUBLISHING

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 05-CI-01525

THE DEPARTMENT OF STATE POLICE

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,¹ SENIOR JUDGE.

THOMPSON, JUDGE: This is an action filed by Capitol Resources Corporation d/b/a/ Capitol Publishing (Capitol) pursuant to the Kentucky Open Records Act, seeking unredacted copies of traffic accident reports from Boone, Campbell, Fayette, Jefferson and Kenton counties. The issues presented are whether pursuant to KRS 189.635, the Kentucky State Police (KSP) properly refused Capitol's requests for the accident reports

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

and whether KSP can redact home addresses, dates of birth and other personal information from the accident reports. The Franklin Circuit Court held that there was substantial evidence to support KSP's conclusion that Capitol was not a news-gathering organization and, even if it was, KSP had the authority to redact the requested records. Under the facts presented, we hold that summary judgment was improper and remand the case to the trial court for the taking of additional proof on the issue of whether Capitol intended to use the accident reports for commercial purposes.

Capitol is an organization that gathers and publishes information in various print and internet publications throughout the United States. Beginning in June 2005, Capitol made requests for accident reports from Fayette County and then made subsequent requests for reports from Jefferson, Boone, Campbell, and Kenton counties. KSP complied with the requests but then became suspicious of Capitol's motives when within a ten day period dating from August 22, 2005, to August 31, 2005, KSP received from James Donato, Capitol's president; a \$308 check as payment for copies of records requested from August 12, 2005, and August 15, 2005; a FedEx Air transmittal for the return of copies at the company's expense; and six additional records requests for Kentucky accident reports.

By letter dated August 31, 2005, KSP inquired into Mr. Donato's contention that Capitol is a news-gathering organization and began an investigation into the company's use of the records. On September 8, 2005, Mr. Donato signed an affidavit stating that the sole commercial purpose for Capitol's request was the publishing or

broadcast of the news in its publications, namely “California's Working Healthy, Colorado Free Press, Florida Free Press, Florida Press Journal, Georgia Reporter, Missouri Free Press and Weekly Transcript.” KSP acknowledged receipt of the affidavit and four copies of the “Weekly Transcript” but requested that Capitol provide further documentation of its news gathering purpose. In response, Mr. Donato informed KSP that Capitol is a Nevada corporation and is a member of the Georgia and Nevada Press Association, the Newspaper Association of America, the Californian First Amendment Coalition and, in September 2004, was nominated for membership in the Louisiana Press Association.

During the course of its continued investigation, KSP discovered that an Arizona police department had received and denied similar requests from Mr. Donato as the executive director of the “Health Information Association.” The basis of the denial was that the proposed use of the information was to solicit business. Based on the evidence uncovered during its investigation, KSP concluded that Mr. Donato's requests were not made for news gathering purposes but, instead, were to further its private business interests including the sale of the reports or their contents to subscribers. By letter dated September 26, 2005, KSP notified Mr. Donato of its decision to deny Capitol's pending requests. Mr. Donato was further advised that all future requests were subject to Capitol's submission of evidence confirming its sole purpose as a news-gathering organization and KSP's continuing investigation. KSP informed Mr. Donato

that should KSP later decide that Capitol is a news-gathering organization, personal information would be redacted from the reports.

In late September 2005, KSP received a copy of a Delaware Attorney General's opinion dated February 21, 2002, addressed to Mr. Donato, "Health Information Association, Colorado Springs, Colorado," denying Mr. Donato's request for accident reports from that state. Additionally, it discovered that Health Information Association had filed an action in California against a chiropractor for payment for "mailing lists/services provided" by Health Information Association.

On September 29, October 3, and October 6, 2005, Capitol made further requests for traffic accident reports, and all were denied for the reasons previously stated by KSP. On November 7, 2005, Capitol filed this action pursuant to KRS 61.870, the Kentucky Open Records Act, seeking a declaration that Capitol is entitled to unredacted copies of traffic accident reports from KSP; an injunction ordering KSP to produce the records; a declaration that KSP willfully withheld the records; an award of costs and attorney's fees; and \$25 for each day Capitol was denied the right to inspect or copy the requested records.

Without conducting discovery, Capitol filed a motion for summary judgment. After KSP responded and filed a cross motion for summary judgment, the Franklin Circuit Court upheld KSP's denial of Capitol's requests finding that the decision was based on substantial evidence and, therefore, was not arbitrary. Specifically, the

court was not persuaded by Capitol's contention that the accident reports would be used solely for the purpose of disseminating the news and explained its reasoning as follows:

The evidence showed that Capitol Publishing is closely linked to organizations that regularly acquire similar information for use in commercial ventures. Furthermore, the requested information, every accident report filed in four different counties over a two-day period, is simply not newsworthy. This information would draw very little interest in the individual counties in which the accidents occurred, let alone in Colorado, California, or any of Capitol's other markets. This court is not aware of any circumstances that would make the minute details of hundreds of minor traffic accidents worthy of national attention.

The circuit court further found that even if Capitol was a legitimate news-gathering organization, pursuant to the terms of the Kentucky Open Records Act, KSP could redact all personal information from the reports.

Before addressing the issues raised by Capitol, it is useful to discuss the history of the two relevant statutes, KRS 61.870 *et. seq.* and KRS 189.635.

THE KENTUCKY OPEN RECORDS ACT

The Kentucky Open Records Act was enacted in 1976. Prior to that date, the right to inspect public records was determined by judicial fiat. In *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811 (Ky. 1974), the court recognized the right of the people generally to acquire information concerning the operation of their government but limited it to those instances where the purpose was to advance or further a “wholesome public interest or a legitimate private interest.” *Id.* at 815. Any inspection was required to be conducted at a reasonable time, place and

manner; the public record could not be exempt from inspection by law; and the disclosure could not be “detrimental to the public interest or violative of confidentiality under a countervailing public policy entitled to greater weight than the policy favoring free access to public records.” To further the purpose of the public interest in the operation of the government, the court imposed the burden on the custodian to justify the refusal with specificity. *Id.*

After the court's decision, the legislature enacted the Kentucky Open Records Act. Through its provisions, the General Assembly expressed a policy in this Commonwealth that public records are to be “free and open” for examination; the enumerated exceptions to its coverage, therefore, are to be strictly construed. KRS 61.871. However, the General Assembly also recognized that public records necessarily include personal information private to the individual and not relevant to the public interest in the conduct of its government. *See Zink v. Commonwealth*, 902 S.W.2d 825 (Ky.App. 1994). Thus, access to public records is not unlimited and it is subject to the “statutory rights of personal privacy and the need for governmental confidentiality.” *Beckham v. Board of Education of Jefferson County*, 873 S.W.2d 575, 578 (Ky. 1994). Among the exemptions enumerated in the Open Records Act are those records of a personal nature where the public disclosure would constitute a “clearly unwarranted invasion of personal privacy.” KRS 61.878(1)(a).

Since not all public records are subject to the disclosure requirement, the General Assembly provided remedies when disclosure is denied. The circuit court of the

county where the agency has its principal place of business or where the record is maintained has jurisdiction to enforce the provisions of the Act. To expedite the proceeding, the case is to be “assigned for a hearing and trial at the earliest practicable date.” KRS 61.882(4). Moreover, the General Assembly sought to promote disclosure by permitting an original action against the agency without the necessity of exhausting any available administrative remedies. *Beckham*, at 577. Further incorporating the common law view expressed in *City of St. Matthews*, the Act provides that the burden is on the agency denying the request to prove that an exemption applies. KRS 61.882(3)

KRS 189.635

Prior to KRS 189.635, there was no statutory requirement that accident reports be filed and, therefore, there was no disclosure of the reports pursuant to the Open Records Act. *See City of St. Matthews*. In 1977, the General Assembly enacted KRS 189.635 which requires that every law enforcement agency whose officers investigate a vehicle accident for which a report must be made, file a report of the accident with the Department of State Police within ten days after the investigation of the accident. Also, Kentucky motorists involved in certain types of accidents which are not investigated by law enforcement officers are required to file accident reports with the Department. KRS 189.635(3) and (4).

Certain personal information disclosed in an accident report includes the driver's name, birth date, address and driver's license number, which all have personal privacy implications. However, the original version of the statute, in effect until 1994,

did not contain any prohibition on the dissemination of the personal information detailed in the report; it was accessible to news-gathering organizations as well as other business entrepreneurs including chiropractors and attorneys who could potentially use the information to solicit clients.

Although a citizen who operates a vehicle on a public way, breaks a law, or commits a tort, to a limited extent forfeits his privacy, that interest is not forfeited to the degree that personal information should be freely available to business entrepreneurs for uses other than those which further the public interest. *Zink*, 902 S.W.2d at 828. The extent of the intrusion upon the privacy of accident victims and the need for an amendment to KRS 189.635, became apparent not long after its enactment.

Under Kentucky's no-fault statute, personal injury protection benefits in the minimum amount of \$10,000 are paid with relative ease. This fact, combined with the mandate that all accidents be reported, left the identity and personal information of those involved in accidents susceptible to the prey of those who used the information to solicit business. In fact, not only in Kentucky but across the country, businesses developed where “middle-men” sought the reports for the purpose of selling the information to attorneys, chiropractors and other medical providers.

So widespread was the problem that in Florida, a statewide grand jury was convened to investigate the problem and in its report, emphasized its scope. The grand jury stated that a major factor contributing to the high level of illegal solicitations was the easy access to accidents reports. The report noted that lawyers and medical professionals

could use the reports to contact large numbers of potential clients. Such conduct, it observed, can be emotionally, physically, and ultimately, financially destructive. Moreover, some seeking access to the reports attempted to disguise their activity as news-gathering, claiming to be publishers of “transportation news” or “accident journals”. *See, State v. Bradford*, 787 So.2d 811, (Fla. 2001) citing the Supreme Court of the State of Florida, Case No. 95,746, Second Interim Report of the Fifteenth Statewide Grand Jury: Report on Insurance Fraud in Florida in the Area of Personal Injury Protection (2000).

As a result of the abuses associated with the access to accident reports, states such as California, Florida and Tennessee have enacted statutes which make the use of such reports for purposes of solicitation subject to criminal penalties or, the solicitor, subject to perjury charges.² Recognizing the potential for the abuse of the privacy interests of Kentucky citizens arising from the unfettered access to accident reports, in 1994, the General Assembly amended KRS 189.635. The pertinent parts of the statute now place limitations on access to the accident reports and state:

(5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident. Except as provided in subsection (7) of this section, all other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except when produced pursuant to subsection (6) of this section. These

² *See* Cal. Gov. Code § 6254(f)(3); F.S.A. § 316.066; T.C.A. §55-10-108.

reports shall be made available only to the parties to the accident, the parent or guardians of a minor who is a party to the accident, and the insurers of any party who is the subject of the report, or the attorney of the parties.

- (6) The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

Shortly after the amendment, a group of chiropractors and attorneys filed an action in the Federal District Court requesting an injunction against various government officials alleging that the amended statute violated the First Amendment and the Equal Protection clauses of the United States Constitution. After years of litigation regarding matters relating to the injunctions sought, ultimately the statute withstood all constitutional challenges. *Amelkin v. McClure*, 330 F.3d 822 (6th Cir. 2003).³ Central to the court's analysis was the legitimate state interest in protecting the privacy interest of accident victims. The extent of that interest and the magnitude of the problem of unwanted solicitation of accident victims was aptly described by its earlier decision in

³ Throughout its brief, Capitol makes reference to a “lack of guidelines or procedures” for the denial of requested accident reports and sporadic references to federal and state constitutional provisions. There is, however, no direct constitutional attack on the statute nor was the Attorney General notified of a constitutional challenge to the statute. Ky.R.Civ. P. (CR) 24.03. The constitutionality of the statute is not, therefore, properly before this court and is not addressed. Although in this case Capitol does not test the statute under federal constitutional standards, we are persuaded that the view of the purpose of KRS 189.635 as expressed in *Amelkin* is correct.

Amelkin v. McClure, 168 F.3d 893 (6th Cir. 1999), vacated, *McClure v. Amelkin*, 528 U.S. 1059, 120 S.Ct. 630, 145 L.Ed. 507 (1999), when it commented on the solicitation of accident victims:

Such accident reports contain the name, address, and driver's license number of those involved in the accident, and a diagram and brief description of the accident itself. After procuring these reports, certain attorneys and chiropractors would use the information contained therein to contact victims and offer their services, often attaching the accompanying accident report to the solicitation letter.

The efforts to solicit potential clients through the procurement and use of accident reports became so incessant that those involved in traffic accidents immediately began receiving large stacks of direct mail solicitations from various attorneys and chiropractors.

One editorial described the attorneys who used such accident reports as “greedy, money grubbing lawyers” who seemed “to prey on the misfortunes of others.” *Ky. Bench & Bar*, Summer 1993, at 7. In addition to the solicitations tarnishing the image of the legal community in the eyes of the public, some who received a mailbox full of such letters grew concerned over their personal privacy and safety. *Id.* at 895-896.

One of the purposes of the amendment to KRS 189.635 is to protect the privacy of accident victims while affording news-gathering organizations the constitutional freedoms they are due. As always, this court must give effect to the intent of the legislature as contained in the statutory language, considering the evil the law intended to remedy. *Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 340 (Ky. 2005).

STANDARD OF REVIEW

The Kentucky Open Records Act permits an aggrieved party to file an original action in the circuit court.⁴ Thus, our standard of review is that matters of law are reviewed on a *de novo* basis and, when there are questions of fact, or mixed questions of law and fact, we apply the clearly erroneous standard. If there is “substantial evidence” to support the decision, we must affirm the court's factual findings. *Medley v. Board of Education of Shelby County*, 168 S.W.3d 398, 402 (Ky.App. 2004). Thus, we must determine whether there is a question of law or a material issue of fact which precluded summary judgment in favor of KSP. *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991).

KSP'S AUTHORITY TO DENY CAPITOL'S REQUESTS

Capitol's initial assertion is that KSP did not have authority to deny its request. As stated above, the statute actually imposes a rule of confidentiality subject only to the exemptions provided. Yet, Capitol construes the statute to require the release of the information to organizations even though it will be used for non-permitted purposes. Then, after the harm has been done Capitol argues, KSP can pursue the civil remedies available for any unauthorized use of the information. KRS 61.874(5).

The obvious fallacy in this construction is that it directly contradicts the intent of the General Assembly in enacting both statutes. Although the offender would be penalized, the citizen's personal information would have already have been unlawfully

⁴ A request for review of a denial of an open records request may also be made to the Attorney General. A review of the Attorney General's opinion is *de novo*. KRS 61.882(3).

exposed, which is precisely the evil sought to be remedied by the amendments to KRS 189.635. Moreover, KSP, as the custodian of the records, is the gate-keeper of the records. It is its duty to keep the accident reports from those who will use them for the purpose of directly or indirectly soliciting accident victims.

The statute explicitly states that it is mandated to give the reports only to those who are news-gathering organizations and only when the sole purpose of the request is for the publishing or broadcasting of the news. It appears then, that the legislature intended for KSP to make a preliminary determination as to the purpose of the requests and, if denied, the aggrieved party can seek the available remedies under the Kentucky Open Records Act.

**WHETHER CAPITOL IS A NEWS-GATHERING
ORGANIZATION AND THE NEWSWORTHINESS
OF THE REQUESTED REPORTS**

Before discussing the facts relevant to our inquiry, we first point out the significance of the constitutionally protected freedom of the press and the court's hesitation to interpret any statute in such a manner so as to infringe on that freedom. Many years ago, the Supreme Court in *Grosjean v. American Press Co.*, 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936), eloquently stated the invaluable role that freedom of the press plays for the benefit of the press and society:

The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrument of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the

publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

Thus, when defining news gathering or examining the content of information for newsworthiness, this court is mindful of its own constitutional restraints and prohibitions against abridging that freedom.

“News gathering” is undefined in the statute but its definition needs little explanation. In general terms, it is the act of obtaining information with the intent to publish or disseminate it to the public. Although the gathering and dissemination of news was once confined to newspapers, periodicals, and television broadcasts, the internet has made it possible for news gatherers to reach a large mass of people with a virtually endless amount of information, including the headline news as well as the most trivial. Simply because a news organization disseminates news via the internet or by a less conventional communication method, it is no less newsworthy and is entitled to the same First Amendment protection.

Capitol publishes various internet, print news publications, and periodicals and is a member of numerous press associations. Although clearly a news-gathering organization, the court held that the information it seeks, the accident reports, are not newsworthy. Nothing in KRS 189.635 permits a court or a custodian of a record to judge whether the content of the record sought is newsworthy. In fact, any such inquiry would be virtually impossible. For instance, contrary to the trial court's assumption that residents of states other than Kentucky would have little interest in the accident reports, it

is more than plausible that those in other states are former residents of this state who like to keep informed of the local Kentucky news.

Moreover, an attempt by the state to determine which accident reports are newsworthy and which news-gathering organizations are entitled to the reports would, we believe, be subject to constitutional debate. Although stated in the context of a challenge to a statute regulating the content of billboards, the court's statement in *Flying J Travel Plaza v. Com., Transp. Cabinet Dept. of Highways*, 928 S.W.2d 344, 350 (Ky. 1996) is applicable by analogy:

The restrictions in this case allow some noncommercial messages to be displayed while prohibiting other such messages. The state does not have the choice in the area of noncommercial speech to evaluate the strength of, or distinguish between various communicative interests. (citations omitted).

If, as KSP suggests, the statute permits it to determine the newsworthiness of an accident report requested by a particular news-gathering organization, the statute would be subject to constitutional attack. It is not for the state to prioritize the value of news to be conveyed when the communicator of that news is entitled to first amendment freedoms. However, we find no constitutional implications because KRS189.635 does not permit KSP to judge the newsworthiness of the accident reports sought and, on that basis alone, grant or deny the request.

WHETHER CAPITOL INTENDED TO USE THE REPORTS FOR A COMMERCIAL PURPOSE

Although Capitol is a news-gathering organization, under KRS 189.635, it is not entitled to the requested accident reports unless it intended to use them *solely* for the purpose of publishing or broadcasting the news and not for a commercial purpose.

We can find no Kentucky case which defines commercial purpose but find guidance in KRS 61.870(4) which states:

(4) (a) "Commercial purpose" means the direct or indirect use of any part of a public record or records, in any form, for sale, resale, solicitation, rent, or lease of a service, or any use by which the user expects a profit either through commission, salary, or fee.

(b) "Commercial purpose" shall not include:

1. Publication or related use of a public record by a newspaper or periodical;
2. Use of a public record by a radio or television station in its news or other informational programs; or
3. Use of a public record in the preparation for prosecution or defense of litigation, or claims settlement by the parties to such action, or the attorneys representing the parties;...

Notably, the statute makes no reference to internet news; this omission, however, is simply a consequence of the non-existence of the internet when the statute was enacted and the failure to amend it to encompass all methods of communicating the news.

Because the internet is so well-recognized as a method of communicating information, we believe it is included in the exemptions under KRS 61.870(4)(b)(1)(2).

The statute recognizes that the mere publication or broadcast of the news and its monetary return, does not render it a commercial purpose. Likewise, KSP cannot deny access to accident reports by a news-gathering organization because of its intent to

sell the newspaper, periodical, web site, or whatever method of communication is used to convey the information. KRS 189.635(6) states that the commercial purpose must be “other than the news-gathering organization's publication or broadcasting of the information in the reports” and it is not a “commercial purpose merely because of its publication or broadcast.” Thus, Capitol could not be denied the requested reports merely because it intended to “publish” them on a web site for which presumably its access is open only to paid subscribers.

Other state and federal courts have more precisely defined the term commercial purpose and have focused attention on the actual use of the information. For instance, in *Star Publishing Company v. Parks*, 178 Ariz. 604, 875 P.2d 837, (Ariz.App. Div. 2, 1993), the court held that a statutory fee applicable to those who sought public records to be used for a commercial purpose, would not be imposed on a newspaper seeking autopsy reports from the chief medical examiner because the reports were not sought for a commercial purpose. The statute, the court emphasized, was directed at deterring the “direct economic exploitation of the records” and not at the “use of the information gathered from public records in one's trade or business.” *Id.* at 605, 875 P.2d at 838. Likewise, in *Primary Consultants L.L.C. v. Maricopa County Recorder*, 210 Ariz. 393, 111 P.3d 435 (Ariz.App. Div. 1, 2005), the court explained that the reproduction of a public report for sale would be a “commercial purpose.”

Interpreting “commercial purpose” in the Freedom of Information Act, the federal court in *National Security Archive v. U.S. Department of Defense*, 880 F.2d 1381,

1388 (D.C. Cir. 1989), focused on whether the request was in furtherance of the publication of the news or some unrelated activity. Finally, California, in its version of an Open Records Act, defines the term commercial purpose as “any purpose which has financial gain as a major objective.” Cal. Civ. Code § 1798.3. Using a similar definition, Cal. Gov. Code § 6254(f)(3), which prohibits arrest records from being used for commercial purposes, states that address information may not be used “directly or indirectly, or furnished to another, to sell a product or service to any individual or group of individuals. . . .”

It is obvious from the language of our statute and the cases from other jurisdictions, that an inquiry into the use of the information must include a factual determination as to the intended use of the public record and the function it is intended to serve. The issue in this case is, we believe, simply whether the circuit court properly ruled that there was no issue of material fact and, as a matter of law, KSP was entitled to summary judgment. *Steelvest*, 807 S.W.2d 476.

The circuit court properly placed the burden of proof on KSP to support its denial of Capitol's requests. KRS 61.882(4). The proper standard of review in appeals from summary judgments has frequently been recited and is concisely set forth in *Lewis v. B&R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001) as follows:

The standard of review on appeal when a trial court grants a motion for summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” The trial court must view the evidence in the light most favorable to the nonmoving party,

and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” (citations omitted).

The court had before it KSP's evidence that Mr. Donato's requests for the accident reports were frequent and broadly encompassed the larger Kentucky counties. When KSP received a sizable check for accident reports, its suspicions were aroused. Further investigation by KSP produced evidence that on behalf of other corporations connected to Mr. Donato he had made similar “blanket” requests for accident reports in at least three states other than Kentucky. Moreover, he had attempted to recover money allegedly owed from a “client” as a result of a sale of the very same type of information he sought from KSP.

In support of its motion for summary judgment, Capitol relied on Mr. Donato's affidavit stating that it did not intend to use the requested information for an improper commercial purpose and that KSP's evidence was not relevant since it pertained to Health Information Association and not Capitol.

Confronted with the information obtained by KSP involving Mr. Donato and Health Information Association, Capitol contends that all of the prior attempts by Mr. Donato's corporations to obtain similar information in various states and the litigation to recover money for the sale of the reports are not relevant to the dealings of Capitol. The two are separate entities, it argues, and the actions of one are separate from the other.

The courts have long been willing to look beyond the mere name of a corporation or association to determine whether it is a “dummy or alter ego or conduit of individuals or of another corporation” and may “disregard the legal fiction to circumvent fraud or to remove a mere shield against responsibility.” *See C.L. & L. Motor Express Co. v. Achenbach*, 259 Ky. 228, 82 S.W.2d 335, 339 (1935). Here, Mr. Donato made the same requests on behalf of both Capitol and Health Information Association, the information was to be mailed to same Colorado address and the organizations are closely linked in their commercial ventures. The court properly looked beyond the mere names of the two organizations. However, this evidence alone is not sufficient to overcome KSP's burden of proof because Donato's affidavit creates a material issue of fact.

Much of KSP's information was based on the prior acts of Mr. Donato and Capitol's blanket requests for the Kentucky accident reports. Apart from inferences that can be drawn from these facts, there is no evidence in the record which establishes that Capitol intended to use the Kentucky accident reports for commercial purposes as prohibited by KRS 189.635. While KSP certainly had a reasonable suspicion to deny the requested reports, to meet its burden of proof in a court action filed pursuant to the Kentucky Open Records Act, it must demonstrate that its suspicions are factually accurate. This is particularly true in light of Mr. Donato's affidavit stating that the reports would not be used for commercial purposes. If proven to be false, as Mr. Donato's counsel admitted to at oral arguments, Capitol would not only be denied the reports but Mr. Donato would be subject to perjury charges.

Since there is a genuine issue of material fact regarding Capitol's intended use of the reports, the summary judgment is hereby vacated. On remand, each party shall have a reasonable opportunity to utilize discovery including, but not limited to, interrogatories, request for production of documents and depositions to establish whether Capitol requested the accident reports for commercial purposes. If, as KSP asserts, Capitol is nothing more than a sham news organization requesting the reports for the purpose of selling the contents in order to solicit accident victims, by it or its subscribers, then Capitol was properly denied the reports and Mr. Donato can face the penalties of filing a false affidavit.

Although the trial court denied the reports, it nevertheless considered whether KSP could redact certain personal information from the accident reports such as the home addresses and social security numbers of the parties involved in a traffic accident. Based on the personal privacy exemption contained in KRS 61.878(1)(a), the court indicated that the information could be withheld.

Because the trial court's summary judgment held that Capitol was not entitled to the reports, the redaction of the information was not fully briefed before the court. On remand, if the court finds that Capitol is entitled to the reports it shall give the parties time to brief the issue and then the court shall make specific findings and conclusions in regard to that issue. If redaction is ordered, the court shall specifically state the information ordered to be withheld.

CONCLUSION

The summary judgment is vacated and the case remanded to the trial court for the taking of additional evidence and a factual finding as to whether Capitol intended to use the accident reports for commercial purposes. If not, and the court determines Capitol is entitled to the requested reports, the parties shall then be able to submit its arguments concerning what, if any, of the information contained in the reports can be redacted. The court shall then make appropriate findings and conclusions.

KNOPF, SENIOR JUDGE, CONCURS IN RESULT BY SEPARATE OPINION.

KNOPF, SENIOR JUDGE, CONCURRING IN RESULT ONLY: I concur in the result of this opinion as set forth in the paragraph headed "CONCLUSION."

WINE, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

WINE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART:

I concur in part with the result that this matter should be remanded to the trial court for additional findings as to the purpose for obtaining these traffic reports. However, I do not believe KRS 189.635 allows for any redaction by the Kentucky State Police (KSP). It is the prerogative of the legislature to provide for such redactions just as it has under KRS 61.878(1)(a). Therefore, I dissent as to any dicta which suggests the information could be redacted by the trial court or KSP.

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