

Court Holds One-on-One Conversations With Government Officials Are Not Immune Under Fair Report Privilege

By Kristel Tupja

The Supreme Court of Tennessee has held that the state's fair report privilege only applies to official actions of the government or public proceedings, explicitly excluding one-on-one interviews or conversations with government officials. [Burke v. Sparta Newspapers, Inc.](#), No. M2016-01065-SC-R11-CV, 2019 Tenn. LEXIS 519 (Dec. 5, 2019).

The White County trial court granted Sparta Newspapers, Inc.'s Motion for Summary Judgment, reasoning that the Defendant's one-on-one interview with a White County Sheriff's Department detective, which was the basis for a news article detailing the Plaintiff's indictment and arrest, was covered by the fair report privilege, specifically because the "official" prong of the privilege was met.

Vacating the lower court's ruling, the Court of Appeals held that the fair report privilege was inappropriately applied, as the privilege was not so broad as to encompass "statements made by any governmental employee in any circumstance." *Burke v. Sparta Newspapers, Inc.*, No. M2016-01065-COA-R3-CV, 2018 Tenn. App. LEXIS 420, at *10-11 (Ct. App. July 23, 2018). On December 5, 2019, the Supreme Court of Tennessee further parsed out what constitutes an official action or proceeding and a meeting open to the public, establishing that a one-on-one conversation between a reporter and a detective was not a meeting open to the public that dealt with a matter of public concern. In reaching its conclusion, the Tennessee Supreme Court focused on the necessity of including the public, holding that "the fair report privilege encompasses only *public* proceedings or official actions of government that have been made *public*."

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The Article in Question

Plaintiff Jeffrey Todd Burke served as a middle man between a local youth football league and a cookie dough fundraising company. In 2013, Burke was accused of stealing money from a White County football team's cookie dough fundraiser, and subsequently plead guilty to theft. During this time, Defendant Sparta Newspapers, Inc. published a news article detailing an interview between a reporter and Detective Chris Isom of the White County Sheriff's Department about Burke's indictment and arrest. Detective Isom was one of the three individuals tasked with investigating Burke, and also served as the Public Information Officer for the White County Sheriff's Department, a job function that required speaking to the press on behalf of the Department.

The article discussed Burke's alleged misappropriation of more than \$16,000 raised by the football league, which he failed to deliver to the cookie dough company, consequently leaving the football league with no cookie dough. Burke's attorney reached out to Sparta Newspapers and indicated that the football league did, in fact, receive everything they ordered—albeit, in an untimely fashion. Sparta Newspapers edited the amount in controversy to \$11,000, but otherwise stood by their story, informing Burke's attorney that the information in the article came directly from Detective Isom, who verified his statements were accurate, aside from the amount in controversy. Burke subsequently filed a defamation suit, alleging that because the article erroneously stated the amount of money in controversy and that neither the funds nor cookie dough were ever delivered, Burke lost his job, sustained damage to his personal and vocational reputation, and suffered serious emotional strain and duress. In its Motion for Summary Judgment, Sparta Newspapers cited Tennessee's fair report privilege and argued it was immune from liability because the article was a fair and accurate report of the statements Detective Isom made to the reporter in his capacity both as a lead detective and as the Public Information Officer.

Tennessee's Fair Report Privilege Standard

The Supreme Court of Tennessee recently adopted the approach found in Section 611 the Second Restatement of Torts for determining when the fair report privilege applies, which states that an alleged defamatory statement is privileged if the statement is an accurate and complete or a fair abridgement of an official action or proceeding, or of a meeting open to the public that deals with a matter of public concern. *See* Restatement 2d of Torts, § 611.

Joined by a number of *amici*, Sparta Newspapers argued that the Court of Appeals' decision was inconsistent with Tennessee law because it introduced "several pernicious principles" that improperly narrowed and restricted application of the fair report privilege. Citing to the Court of Appeals holding in [Lewis v. NewsChannel 5 Network, L.P.](#), Sparta Newspapers conceded that while the fair report privilege might not extend to news reports from anonymous sources, the privilege nonetheless applies to news reports of statements made to a reporter during an on-the-record interview with a government official. *Lewis*, 238 S.W.3d 270 at 287. Given this holding, Sparta Newspapers argued the fact that the detective chose to make his statement orally and directly to one reporter as opposed to a press release disseminated to multiple people should not have given rise to a fair report privilege distinction.

Sparta Newspapers further argued that numerous courts applying Tennessee law previously concluded statements from law enforcement officials in non-public interviews are protected under the fair report privilege so long as the statements are made on the record and in an official capacity. Therefore, the additional qualifier that the official action or statement be public and/or made available to the public should not have impeded the Courts of Appeals from finding that reporting on a private but on-the-record interview with a government officials was protected.

Tennessee Supreme Court Decision

The Supreme Court of Tennessee was not swayed. Citing the precedent it recently established in *Funk v. Scripps Media, Inc.*, the Supreme Court agreed with the Court of Appeals, noting that the fair report privilege is warranted only when the context in which the contested statement was made involves the public in some way. 570 S.W.3d 205 (Tenn. 2019). Although the holding in *Funk* addressed whether actual malice defeated the fair report privilege, the Supreme Court also took the opportunity to define the fair report privilege in its holding, and adopted the elements laid out in the Second Restatement of Torts, discussed supra. In the present case, the Supreme Court declined to expand the fair report privilege to situations where there is a nonpublic, one-on-one conversation because it would amount to “a departure on which the privilege is based,” and would result in complicating a court’s task of determining when a statement should be protected by the privilege.

The Supreme Court of Tennessee pointed out, however, that its holding did not impose liability on Sparta Newspapers or foreclose Sparta Newspapers from raising other available defenses on remand.

Future Implications

Justifying its holding in this case, the Tennessee Supreme Court highlighted that such a holding would not hinder newspapers and other outlets from being the “eyes and ears of the members of the public who would have been able to witness the proceeding or obtain the information had they been present to see or hear for themselves.”

However, an alternate reality could very well result.

The *Burke* decision may have a chilling effect on journalists relying on quotes from government officials, undoubtedly leaving the public with less opportunities to receive meaningful information about current events in their local communities. At the heart of any journalistic piece is the opportunity to disseminate information to the public that it may have not otherwise been aware of.

A journalist’s job description entails uncovering pertinent information and circulating it to the public, and journalists, by virtue of their profession and their credentials, are able to access more information than an ordinary citizen. Thus, limiting the fair report privilege to information the public would “have been able to witness ... had they been present” strips from journalists a certain level of protection in their ability to freely investigate and report.

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