THE ILLINOIS SUPREME COURT GUIDE TO CONVERTING YOUR JUDICIAL OFFICE INTO A "GET RICH QUICK" SCHEME

By Evan Gutman CPA, JD (2013)

Okay, so you want to make a lot of money. Here's what you do. It's simple. You get yourself elected to be a Justice on the Illinois Supreme Court. Then when someone criticizes you, institute a lawsuit against them for defamation. But, after you win the lawsuit, make sure you reaffirm your commitment to the First Amendment.

Illinois State Supreme Court Justice Robert Thomas, with the assistance of other Justices on the Illinois State Supreme Court who testified on his behalf, succeeded in implementing this ingenious "insider" investment plan to the tune of a cool $3 million. Alright, concededly no one in the general public or media will probably ever really trust Justice Thomas again and he ruined his judicial career by compromising his commitment to the general public for a few bucks. But, the bottom line is that he got $3 million for it. And based on my research, he did it legally. The man should have been a Wall Street tycoon. Here's what happened.

In 2003, Bill Page a columnist for the Kane County Chronicle wrote three articles extremely critical of Justice Thomas. According to a New York Times article written by Adam Liptak and published on June 25, 2007, the columns ran beneath the word OPINION, which was in BOLD 60 Point Type. In the columns Page alleged that Thomas had traded his vote in an attorney disciplinary case pending before the Court for a political favor. Thomas instituted suit against Page and the Chronicle for defamation.

The case was tried before Cook County Judge Donald O'Brien. Justice Thomas obtained a jury verdict in his favor for $7 million. This was subsequently reduced by the trial court Judge to $4 million. According to the New York Times article, Judge O'Brien refused to allow the jury to see that the columns ran beneath the word "OPINION" in bold 60-point type. Instead, he preferred to conceal this critically important fact from them.

Page and the Chronicle then instituted suit in the Federal District Court of Illinois against Justice Thomas, along with 10 other Judges in the Illinois State system. They included the trial court Judge and other Justices of the State Supreme Court. According to the Sun-Times it was their position they couldn't fight the trial court verdict because Justice Thomas headed the entire State court system, which would hear any appeal.

An article in Chicago Magazine written by David Murray, stated as follows (emphasis added):

> "Although the Chronicle is published in Thomas's Second Judicial District, the column did not set off many ripples. And why would it? After all, the paper claims a circulation of less than 15,000. . . .
> . . .
> Perhaps the biggest question concerns Justice Thomas's motives for going to court. . . .
> . . .
> Is there any precedent for a state supreme court justice suing a newspaper for libel? Chicago [Magazine] could unearth only one, and that case was in Pennsylvania. Although 21 years old, it has yet to be resolved despite the fact that the justice, James T. McDermott died 12 years ago. . . .
>
> **. . . In filing the suit, Thomas has probably ensured that the charges in the small newspaper's columns get vastly bigger and longer play than the columns ever did."** [202]

One of the most interesting aspects of the case was that other Justices of the Illinois State Supreme Court appeared as witnesses on behalf of Justice Thomas. This is quite remarkable considering that prior to the trial on February 10, 2006, the following was published by author Michael Miner according to the Chicago Reader story archive (emphasis added):

> ". . . The defense [Chronicle and Bill Page] also asked the trial Judge to dismiss the suit entirely.
>
> "A ludicrous proposition," declared Cook County Judge Donald O'Brien last week as he denied the motion to dismiss. Perhaps it was. But so is the position Page's lawyers find themselves in. The witnesses they want answers from are Thomas's fellow supreme court justices, who will probably cooperate as soon as hell freezes.
> . . .
> The suit says Page falsely portrayed Thomas as a "vindictive, petty and biased human being."
>
> The problems this case has stirred up were there from the beginning. No Kane County Judge would touch it, so it was shifted to Cook County and wound up with O'Brien. Seeking documents and depositions, Page's lawyers subpoenaed the other supreme court justices. OK by us, says Power: "If the appellate court allowed it we'd have another six good witnesses." But it wasn't OK with these "non-party justices," who moved to quash the subpoenas. O'Brien granted their motion, Page appealed and the appellate court gave the justices all the protection they could dream of." [203]

Ultimately, the parties settled for $3 million according to an article published by the Chicago Tribune on October 12, 2007. As part of the settlement, the Chronicle and Justice Thomas issued a joint public statement. The statement indicated that the newspaper regretted publishing statements about Thomas that a jury found to be false. The Chronicle apologized to Justice Thomas. For his part, Justice Thomas affirmed his support for the role of a free press in informing the public about all branches of government, including the Judiciary.

I actually love that. It's just too perfect. The Judge institutes suit against the newspaper for making statements about him and then reaffirms his support for a free press. According to a Suntimes article written by Dan Rozek and Eric Herman on October 12, 2007, the settlement did not sway columnist Bill Page from his original stance. Page stated, "I don't apologize. I stand by what I wrote. . . ." [204] Page called the settlement a money decision. The Chicago Tribune quoted Page on October 12, 2007 as indicating in a phone interview that he would not have agreed to a settlement and stands by his work. Page said, "I will never back down from what I wrote. . . . It was based on what I had from confidential sources." [205]

In an article published June 25, 2007 by Adam Liptak of the New York Times, Justice Thomas' attorney Joseph A. Power Jr. compared the Federal lawsuit that was filed by the Chronicle against the eleven Illinois Judges as being the sort of filing that arrives at the court written in pencil by people representing themselves, badly. Specifically, Power stated (emphasis added):

> "This is the type of case that a **mentally challenged** pro se plaintiff would file." [206]

Power's selection of the phrase "mentally challenged" is totally correct, but he applied the phrase to the wrong category of litigants. The phrase should more appropriately be applied to a State Supreme Court Justice who would institute a defamation suit against people for criticizing him. Nevertheless, I must concede my review of applicable case law indicates Supreme Court Justices are not necessarily precluded from doing so. It's just a stupid thing to do.

The problem is that when a Justice sues those who criticize him, they engage in conduct that will be perceived by a large percentage of the general public as inimical to the spirit of the First Amendment. When high-ranking judicial officials sue people who criticize them for the purpose of obtaining monetary judgments (whether such criticism is based upon truthful fact or false

allegations), they appear to the public as compromising their commitment to judicial office for personal profit.

However, I also concede that notwithstanding the inevitable negative public perception, the U.S. Supreme Court may have "arguably" held such lawsuits are not prohibited. As discussed below, it's a difficult call. If such lawsuits are not prohibited, then it means people who disseminate negative opinions about Supreme Court Justices based on false allegations, may not be protected from liability by the First Amendment. This would be the case even if their statements are couched in terms of opinion. Notably, the same premise would apply to criticism of the President of the United States, U.S. Senators or any other politician.

As I read existing U.S. Supreme Court case law, it "arguably" appears to suggest President George Bush or Bill Clinton, using Justice Robert Thomas" theory, could institute defamation lawsuits against all of the newspaper reporters or private citizens who express negative opinions about them. That would be about 20 million lawsuits right off the bat, give or take several million either way. But the bottom line is that whether you like or dislike Bush or Clinton, or any other President, none of them have been stupid enough to institute such lawsuits. It's just a dumb thing to do. A "mentally challenged" thing to do, so to speak. Presumably, if a State Supreme Court Justice possessed the understanding of legal matters, characteristic of competent Pro Se litigants those "mentally challenged" Supreme Court Justices wouldn't institute such lawsuits.

The seminal U.S. Supreme Court case addressing the issue is Milkovich v Lorain Journal Co., 497 U.S. 1 (1990). The express holding of Milkovich is that the First Amendment does not require a separate "opinion" privilege limiting application of State defamation laws. However, in the opinion the Court also indicates that under Greenbelt Cooperative Publishing Assn, Inc. v Bresler, 398 U.S. 6 (1970) statements that cannot reasonably be interpreted as stating actual facts about an individual are protected. The example the Court gives in Milkovich is that to state "In my opinion the Mayor is a liar" is an unprotected statement because it implies knowledge of facts leading to the conclusion that the Mayor told a lie. In contrast, to make the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. Distinguishing the line between what is actionable and what is not actionable is quite difficult.

The foregoing examples given by the Court in Milkovich intended for clarification, actually make the opinion pretty confusing. I personally have a difficult time differentiating between the real essence of the two above examples presented. One statement is presented by the Court as actionable, and one as not. Yet, the statements aren't really all that different. It does appear though

that the mere assertion a statement is nothing more than an "opinion" does not protect a citizen from a defamation lawsuit. This seems to be the case even regarding lawsuits filed for financial gain by powerful public officials, including the President of the United States or a State Supreme Court Justice like Robert Thomas. That is quite a problem. At a minimum, the Milkovich opinion positively needs to be modified or overruled to the extent it provides protection from legitimate criticism to high-ranking public officials.

After the jury verdict in favor of Justice Thomas' apparently legal, albeit politically ill-advised lawsuit, and before the parties settled for $3 million, the Illinois State Legislature in August, 2007 passed Public Act 095-0506. It states as follows (emphasis added):

> "Section 5. Public policy. Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence. The information, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to effective law enforcement. . . .
>
> Civil actions for money damages have been filed against citizens and organizations of this State as a result of their valid exercise of their constitutional rights to petition, speak freely, associate freely, and otherwise participate in and communicate with government. There has been a disturbing increase in lawsuits termed "Strategic Lawsuits Against Public Participation" in government or "SLAPPS" as they are popularly called.
>
> The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. **This abuse of judicial process can and has been used as a means of intimidiating, harassing, or punishing citizens**. . . ." [207]

The highlighted passage above is quite important. The Illinois law indicates that if an Illinois State Supreme Court Justice were to currently institute a suit like Thomas did, they would be engaging in an "abuse of judicial process." That's quite a strong and totally correct charge. The question however, in the Thomas case became whether the statute applied to his lawsuit because the jury verdict was rendered prior to enactment of the statute. This became a serious point of contention between the parties because of additional language in the statute, which provided as follows:

> "Section 15. Applicability. This Act **applies to any motion to dispose of a claim** in a judicial proceeding on the grounds that the claim is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." [208]

Presumably, in reliance on the phrase "applies to any motion," the Chronicle filed a motion to have the trial court judgment overturned. The Chicago Tribune reported on September 27, 2007 that the Chronicle's attorney Bruce Sanford stated in reliance on the statute as support for the motion:

> "The anti-SLAPP law "obviously applies to pending litigation and future litigation,"" [209]

However, according to the Chicago Tribune, Justice Thomas' attorney, Joseph Power then said:

> "It's a complete and utterly frivolous motion," . . . It's shameful the things these lawyers are doing." [210]

Shortly thereafter, the Chicago Sun-Times reported on October 12, 2007 that the case settled for $3 million. Whether the SLAPP law would have applied to a motion filed after its enactment, which attacked the legitimacy of a jury verdict rendered prior to its enactment, I really don't know the answer to. There is definitely a strong presumption against ex-post facto laws, so my inclination is the statute probably could not have been applied to a motion addressing the jury verdict. By the same token, Power's overreaching statement that "It's a complete and utterly frivolous motion" is incorrect, in light of the express language of the statute indicating otherwise. The settlement of the case for less than the trial court award shortly subsequent to the filing of the motion seems to confirm such.

As for Justice Robert Thomas, he's really not "mentally challenged." He's just Plain Ol' Stupid. He gave up an immense degree of public respect, thereby jeopardizing his entire judicial career for a paltry $3 million.

Enjoy your retirement money Bob. You paid a high price for it.