

## A JUDGE AT THE PLAINTIFF'S TABLE TIPS THE SCALES

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Chief Justice Robert R. Thomas of the [Illinois](#) Supreme Court has lately been disqualifying himself from hearing libel cases. That is probably because he is a libel plaintiff himself, one who not long ago won a \$7 million verdict against a little newspaper in the Chicago suburbs, The Kane County Chronicle, circulation 14,000.

Chief [Justice Thomas](#) will not be hearing the paper's appeal either, of course, and neither will his court, because four of his colleagues testified on his behalf at trial. All but two of the current justices are disqualified from hearing the case, and the Illinois Constitution says you need four votes for a decision to count.

With no way to appeal to the state's highest court, The Chronicle opened a novel counterattack a couple weeks ago, suing Chief Justice Thomas in federal court in Chicago.<sup>1</sup> Having to litigate a libel case against the state's top judicial officer in the court system he supervises, the suit says, is simply not a fair fight.

The suit is colorful and creative, and it points to an authentic problem. Libel lawsuits by judges, which have spiked in recent years, put an unusual strain on the justice system.

In 1998, according to the Media Law Resource Center, four judicial officers sued media companies, representing fewer than 1 percent of such lawsuits that year. In 2005, the most recent year for which data are available, the number had shot up to 25, or 6 percent.

The center cautions that its survey, based on an analysis of several hundred suits annually gathered from media companies and their insurers, is not comprehensive. But the trend seems real enough.

This month, for instance, The Boston Herald paid \$3.4 million to a Massachusetts Superior Court judge, Ernest B. Murphy, who won a libel suit over articles contending that he had said insensitive things about a teenage rape victim.

Chief Justice Thomas, a former kicker for the Chicago Bears, sued over two columns by Bill Page on The Chronicle's opinion page. The columns accused the chief justice of allowing politics to play a role in a case about disciplining a prosecutor. "The jury could — and did — find that Mr. Page constructed the columns out of whole cloth," the trial judge, Donald J. O'Brien Jr. of Cook County Circuit Court, wrote in upholding the verdict in March.

But it is hard to see how the accusation, in a state that elects its judges in partisan elections fueled by big campaign contributions from people and groups who appear before them, did any particular harm. Libel law means to compensate people for damaged reputations, and Chief Justice Thomas's reputation cannot have suffered much from some speculation in the puny Chronicle.

Judge O'Brien walked a fine line in considering this point. He noted that the chief justice, his boss, had given "heartfelt and sincere testimony." But the award, Judge O'Brien wrote, was supported by a "paucity of evidence" and "was the result of passion and prejudice."

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<sup>1</sup> [Federal lawsuit](#) filed by The Kane County Chronicle against Chief Justice Robert R. Thomas in Federal District Court in Chicago. (June 12, 2007)

Judge O'Brien also scoffed at the chief justice's assertion that the columns had made it more difficult for him to get a job on the federal bench or at a big law firm.

So Judge O'Brien knocked the award down, to \$4 million, from the \$7 million awarded by the jury.

The Chronicle's suit asks t90

he court to bar Chief Justice Thomas from collecting the money he won or from pursuing the case while he and his colleagues remain in office.

The suit did not impress Chief Justice Thomas's lawyer, Joseph A. Power Jr., who compared it to the sort of filings that arrived at the court written in pencil by people representing themselves, badly.

"This is the type of case that a mentally challenged pro se plaintiff would file," Mr. Power said.

He said the paper was taking advantage of the legal system. "Instead of retracting, they continue to defame," he said. "But they put it in a court pleading so we can't sue over it."

A lawyer for the paper, Bruce W. Sanford, said it had no choice but to look for a neutral forum. Chief Justice Thomas, Mr. Sanford said, "cannot expect the newspaper to be satisfied with its right to appeal within the court system he controls."

An appeal to a middle-level state court is pending. But that will be the last stop in the state court system, given the conflict on the Supreme Court.

No matter, Mr. Power said. "Less than 5 percent of cases are accepted by the Illinois Supreme Court."

But the paper has some pretty good arguments, and libel cases are often overturned on appeal.

For instance, Judge O'Brien refused to allow the jury to see that the columns ran beneath the word "Opinion" in bold 60-point type. (He reasoned, curiously, that the word "opinion" was hearsay. Most courts would call it important context.)

The federal judge assigned to the new case, Blanche M. Manning, issued her first order on June 15. "The complaint alleges, in essence, a conspiracy to deprive the plaintiffs of their constitutional rights because of relationships among certain state court judges," she wrote.

Judge Manning, a former Illinois appeals court judge who had served with some of the judges involved in the libel case, then immediately disqualified herself.