SUPERIOR COURT OF NEW JERSEY: APPELLATE DIVISION

LOUIS HORNBERGER, ROBERT TONKERY and JAMES MENNUTI,
Plaintiffs-Appellants,

v.

AMERICAN BROADCASTING COMPANIES, INC., ABC HOLDING COMPANY, JOAN MARTELLI, PHYLLIS McGRADY, JOHN W. ZUCKER, JOHN QUINONES, RICHARD WALD, JASON D. WILLIAMSON, RAYMOND B. CAMPBELL, DIANE E. ARMSTRONG, WILLIAM ARMSTRONG, DIANE SAWYER, ROBERT LANGE, ANNA SIMS PHILLIPS, CRAIG HAFT, JEFFREY KLEINMAN, JACK NORFLOSS, RICHARD WHITE, and MITCHELL WAGONBERG, and ERIC WAGONBERG,
Defendants-Respondents.

MAJORITY OPINION:

On June 28, 1996 at 9:30 p.m., plaintiffs, police officers in Jamesburg, stopped a Mercedes Benz in which defendants Raymond Campbell, William Armstrong and Jason Williamson, three young African-American men were riding. Because Williamson, the driver, had changed lanes without signaling, plaintiffs demanded identification of the three. When Campbell, the back-seat passenger, said that he did not have any identification, the officers ordered the three men out of the car, frisked them, searched the car's interior, found no contraband, and released them.

Defendant Diane Armstrong, Jason Armstrong's mother, owned the Mercedes. Defendants Joan Martelli and Anna Sims Phillips, producers of PrimeTime Live, a television program broadcast by defendant American Broadcasting Companies (ABC), had arranged for the three to cruise in an expensive car to find out if the police would stop them. The incident was surreptitiously recorded with cameras concealed in the Mercedes and also in a van which followed the Mercedes. Defendants Richard Wald, an ABC vice president, and John Zucker, ABC's attorney, approved the use of the hidden cameras. The remaining defendants were all involved in the PrimeTime Live production of this broadcast, which aired in November 1996.

Plaintiffs alleged that (1) the broadcast was defamatory and portrayed them in a false light; (2) a portion of the recording of a conversation between two of the plaintiffs while they were conducting the search violated the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 to -34; and (3) defendants fraudulently procured the tape of the episode.

Plaintiffs appeal from the dismissal by summary judgment, contending that the judge erred in ruling that (1) on the defamation claim, plaintiffs had neither consent nor probable cause to search the car, and the ABC defendants did not produce and publish

the broadcast with actual malice; (2) on the electronic surveillance claim, plaintiffs had no expectation of privacy while they were searching the car; and (3) plaintiffs did not prove an actionable fraud claim. We agree with the judge's disposition and affirm.

The "DWB" Broadcast - November 27, 1996

We first summarize the factual record before the Law Division judge when he ruled on the motions for summary judgment. After a three-minute introduction, which included other topics on the PrimeTime Live program that night, the "DWB" segment ran for about twelve minutes. The broadcast began with Sawyer's account of recent rioting in Florida when police killed an African-American teenager during a routine traffic stop. Sawyer said that police target African-Americans when they are driving "simply because they're black."

Quinones said that these were "extreme cases" and showed videotapes depicting more common examples: officers in Volusia County, Florida, stopping black motorists for minor traffic offenses; several times they asked for permission to search the cars, without any apparent cause.

Quinones then announced that "PrimeTime decided to try a little experiment" in "the all-American small town of Jamesburg, New Jersey." He explained the hidden cameras, noted the time about 9:30 p.m., and said that the three were "driving carefully through town on our second night in Jamesburg. This time, within minutes, they're pulled over." The broadcast showed the three cruising in the Mercedes, and, after the car had stopped, Officer Hornberger approaching Williamson, the driver, and explaining that he had changed lanes without signaling. The broadcast did not identify the plaintiffs-officers by name. The narrative refers to them as "New Jersey Patrolmen."

The broadcast showed Hornberger asking the passengers for identification. The film showed that when Campbell, the rear-seat passenger, said that he did not have any, Hornberger asked him to "get out of the vehicle, please." While the film showed the officers searching the car, Quinones' narration stated that "they were stopped for a minor traffic violation" and "separated, questioned, even frisked . . . . And their car is searched, although police never asked permission."

Professor Ogletree intervened in the narration, stating that a traffic violation was "not a basis" to conduct the "complete search, going into packages," which was occurring. Quinones explained that Ogletree was maintaining that the officers were "conducting an illegal search."

The film showed Hornberger attempting to open a cosmetic case in the back seat of the car, remarking that it was locked, and Officer Tonkery saying, "probably dope." Ogletree commented: "Why would he say that? Hunch? Evidence? Because they're black men, probably, in a late-model car at night and that's all he needs. The rest he can fill in the blanks. It's sad."

Jamesburg Police Chief Knowles then said: "It's called profiling." In response to Quinones's questions, Chief Knowles explained that profiling was "a law enforcement term"; it "goes on every day, every night in every town, everywhere in the United States." Knowles said he did not "agree" with profiling and saw no reason to suspect "three young black men in a Mercedes." Nevertheless, he approved the search, which was "incidental to the individual officer's protection" and thus "constitutionally okay." When asked whether the officers should have requested permission to search, Knowles conceded, "it's a good point. I think it could be borderline."

Quinones questioned the reason for the initial stop, stating: "On another night we watched this same intersection for three hours . . . . We counted 260 cars at that intersection and of those, 223 also failed to turn on their blinkers, including four police squad cars . . . . And they weren't . . . pulled over." Knowles said: "I don't have an answer . . . . [T]here's a possibility that this fit the criteria of profiling." Knowles admitted that Tonkery's assumption that the testers were carrying "dope" was "definitely inappropriate."

Quinones suggested that stopping a few innocent people might be "a small price to pay . . . to get drugs off the streets." Finally, Quinones related that the testers were released after twenty minutes, without a traffic violation summons. When Quinones inquired about an apology, Knowles said: "Police officers don't apologize for doing their job."

Martelli certified that she conducted substantial research on racial profiling before she produced "DWB." She read many articles and judicial opinions including State v. Soto, 324 N.J. Super. 66 (Law Div. 1996), in which the court relied on statistics of a disproportionate number of traffic stops of African-Americans on a southern section of the New Jersey Turnpike. Martelli and the others responsible for the production "felt that this was an important social issue" which met ABC's criteria for using concealed cameras. The three men had been cruising around for about twenty hours on four other evenings in various towns in central New Jersey before they were stopped in Jamesburg.

The Reason for the Stop

According to Hornberger, the stop occurred on June 28, 1996 at the intersection of County Route 522 and Forsgate Drive. Tonkery explained that the Mercedes went straight while traveling in a left-turn-only lane and, "drove over a double-yellow line and a painted median," and "proceeded in front of me," causing Tonkery to brake hard in order to avoid an accident. According to Tonkery, the driver failed to use a signal for the lane change, failed to keep right, and disregarded a marked lane.

Tonkery admitted that investigation for possible wrongdoing was "one element of the stop," and he was "looking for a reason to stop the car." He explained that he had seen the same car with the same occupants two days before and knew that another

officer thought that the car was "suspicious." The other officer, Sergeant Paul Karkoska, told Hornberger that the Mercedes had been seen driving around an area known for drug sales, and to "keep an eye on it." Karkoska confirmed that, while on an investigation in an unmarked, stationary vehicle, he had seen the Mercedes in a residential area known for drugs and that he observed it pass him several times.

The Stop, Removal from the Car, and Frisks

Hornberger said that to insure his safety or "acquire a safe passage to speak to the operator of the vehicle," as he put it, he asked the rear-seat passenger, Campbell, to place his hands in plain sight. Campbell did not comply; he asked, "Is that necessary?" in an allegedly arrogant manner. Hornberger repeated his request and Campbell again refused to show his hands. After a third request, Campbell grunted in disgust and showed Hornberger his hands.

The film showed Hornberger approach the driver, Williamson, who asked if there was a problem. Hornberger responded, as he recalled in his deposition, that Williamson "failed to signal a lane change." Hornberger then asked Williamson for his license, registration and insurance card. Williamson produced them, and Hornberger pointed out that the insurance card had expired thirteen days earlier. Williamson looked for a valid insurance card. He could not find one.

After this exchange, Tonkery asked Hornberger to get identification from the occupants of the Mercedes. Armstrong produced his identification, but, after a second request, Campbell, in the back seat, touched his pocket and responded: "I left mine at home."

Hornberger then ordered Armstrong out of the car. Hornberger explained that he did so because Campbell did not produce identification and he wanted to ask Armstrong for Campbell's name. Armstrong recalled being "patted down." Hornberger explained that a frisk or a "quick pat down" was standard police procedure when a person is asked to leave a car, because of the officer's safety concern.

After a short time, Officer Mennuti, also a plaintiff, ordered Campbell out of the car. Campbell recalled responding "this ain't necessary." Campbell admitted that he was "showing off for the camera." Mennuti recalled that when Campbell left the car he said: "I don't like cops." Campbell denied making this statement but Williamson did hear Campbell say that all cops were racists. Mennuti explained that Campbell's "demeanor" justified asking him to get out of the car. Campbell denied that he was obnoxious or surly, or that he was trying to antagonize the officers.

Hornberger then returned to Williamson, who remained in the driver's seat, and asked him the name of the rear seat passenger. Williamson answered "Raymond," and Hornberger said that Armstrong said that it was "John." Armstrong later claimed that he

made a mistake about Campbell's first name, as the two had only recently met. Soon after this, Hornberger ordered Williamson out of the car and frisked him.

The Search of the Car

The videotapes show Hornberger first, and Tonkery joining him later, thoroughly searching the car. The search was extensive, into every crevice and area of the passenger compartment. One of the officers asked "What's in the bag, forties," referring to beer and indicating a paper bag in the back seat. Campbell, said, "find out." The officers later looked into the bag, which contained a water bottle. The officer responded, "water. All you had to do is answer me."

Chief Knowles explained that the county had recently modified the intersection where the stop took place and the police were issuing warnings but not summonses. No tickets issued for careless driving, unsignaled lane change, or the absence of an insurance card.

The Views of Ogletree and Knowles

Martelli arranged for Quinones to interview, on camera, Harvard Law School Professor Ogletree on September 4, 1996 and Chief Knowles on September 20, 1996, after showing them an edited version of the films of the stop and search which she had prepared. Martelli believed that the excerpts she prepared "showed the most significant events." Martelli stated that she edited the tape, in part, because of its length and her program's time demands. Much of the original tape contained periods when nothing occurred or "dead space," as Quinones put it. Ogletree and Knowles both realized that the tape had been edited.

Nor did Ogletree "consider the circumstances to be such . . . that the officers were endangered." Ogletree concluded that the officers had no right to search the vehicle even when confronted with: (1) a tip from another officer that the same car was "driving around" and "suspicious"; (2) no valid insurance card; (3) Campbell's lie that he had no identification and confusion about his name; and (4) Campbell's acting "in a totally surly manner to the police officers." Ogletree commented that "all of us look surly when we're stopped by the police." When confronted with Campbell's statements that "all cops are racists" and "I don't like cops," Ogletree conceded that, at that point, "the officers could reasonably have concern for their safety."

This is the procedural context in which the case comes to us. Plaintiffs, the police officers, filed a Law Division complaint in March 1998 and an amended complaint in August 1999. They alleged that PrimeTime Live was a "tabloid television show" which "pandered to voyeuristic desires and other base emotions," demeaned and degraded others, invaded their privacy, and was a notorious user of "hidden cameras, ambush interviews, trespass, spying, false impersonation, and stalking." Plaintiffs accused

defendants of interfering with police business while "manufacturing" a story and a controversy about racial profiling.

Count One of the amended complaint alleged that the November 1996 broadcast of PrimeTime Live "DWB" falsely stated the car was searched illegally and without consent. It contained incorrect statements by Professor Ogletree that the search was illegal and racially motivated because the version of the film shown to Ogletree had material facts deleted. Martelli had shown Ogletree and Chief Knowles only an edited version of the film of the incident, recorded their opinions, and used excerpts of these recordings in the broadcast. The program allegedly contained an inaccurate statement of Knowles, "it's called profiling," taken "out of context to attribute it to the actions of plaintiffs."

Plaintiffs complained that the broadcast compared them to "errant police officers beating up others and generally running amuck [amok]." They said that the broadcast falsely "accuses and implies that [plaintiffs] are racists and profilers."

All defendants moved for summary judgment. Plaintiffs opposed both motions and cross-moved for summary judgment on their electronic surveillance claim. Judge Garruto heard oral argument on August 4 and issued a written opinion on August 25, 2000. He granted summary judgment to all defendants on all of plaintiffs' claims. As noted, plaintiffs claim that the judge: (1) improperly dismissed the defamation and false light claims, (2) erred in dismissing the electronic surveillance claim, and (3) erred in dismissing the fraud claim.

Plaintiffs contend that the judge erred in dismissing their defamation and false light claims because there were genuine issues of material fact. Plaintiffs assert that, contrary to the judge's findings, the statement in the broadcast that there was no consent to search the car was untrue. Plaintiffs contend that this statement in the broadcast, together with (1) Ogletree's opinion that the search was invalid, which was based on incorrect facts, (2) the omission of exculpatory factors, and (3) the implication that the stop and search represented racial profiling and plaintiffs were racists, constituted defamation and cast them in a false light. Plaintiffs assert that they produced substantial evidence of defendants' actual malice . . . that defendants' knew that their representations were false or they recklessly disregarded their falsehood.

The judge determined that the initial stop was warranted but the subsequent search of the testers and the Mercedes was "sorely lacking of justification" and without probable cause. The judge found no evidence to support plaintiffs' allegations they reasonably feared for their safety.

Summary judgment is appropriate only if there is no genuine issue as to any material fact. An issue of fact is genuine, only if, there is no dispute as to the correctness or accuracy of the evidence submitted, or that all parties agree as to the underlying facts.

If there is any dispute or alternative explanations, then the issue is a question for jury determination. [R. 4:46-2(c).]

In Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995), the Court explained:

> The judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. . . . The import of our holding is that when the evidence is so one- sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment.

Defamation is a statement that is "false, communicated to a third person, and tends to lower the subject's reputation in the estimation of the community." Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 164 (1999). Because police officers are public officials, Costello v. Ocean Cty. Observer, 136 N.J. 594, 613 (1994), plaintiffs must prove that the objectionable, false statements, which related to their official conduct, were published with actual malice. New York Times Co. v. Sullivan, 376 U.S. 254, 279, 84 S. Ct. 710, 11 L. Ed.2d 686, 706 (1964). This standard protects the freedom of expression on public questions guaranteed by the First Amendment. Actual malice is knowledge that the statement was false *or* reckless disregard for its truth. Lynch, 161 N.J. at 165. Plaintiffs' burden of proof for each of the elements of defamation is by clear and convincing evidence. Rocci v. Ecole Secondaire, 165 N.J. 149, 159 (2000); Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 165 (1999).

Plaintiffs also claim that the broadcast invaded their privacy by placing them in a false light. A false-light tort consists of publication of a falsity which significantly misrepresents the plaintiff's "character, history, activities or beliefs." Romaine v. Kallinger, 109 N.J. 282, 295 (1988). The publication must be "highly offensive to a reasonable person" and must be made with knowledge or reckless disregard of its falsity. As plaintiffs concede and the judge found, the actual malice standard applies to the false light claim to avoid violation of the First Amendment's protection of freedom of expression. Hustler Magazine v. Falwell, 485 U.S. 46, 56, 108 S. Ct. 876, 883, 99 L. Ed.2d 41, 53 (1988).

If the initial stop is unjustified, then the subsequent search is invalid and any contraband obtained from it is inadmissible as "fruit of the poisonous tree." State v. Maryland, 167 N.J. 471, 489 (2001). For example, in State v. Carty, 332 N.J. Super. 200, 208 (App. Div.), *affirmed*, 170 N.J. 633 (2002), we held that a pat- down of a passenger was invalid when its only justification was an improper consent to search the car.

We conclude the trial judge was correct. Plaintiffs failed to create a fact issue regarding the truth of the statement that the search was without consent. Whether the search was constitutionally reasonable is essentially a legal question. As we discuss below, we agree with the judge that the search of the car was improper and the opinion that it was illegal was correct. Because the statements in the broadcast that the search

was without consent and illegal were true, we do not find it necessary to consider the issue of defendants' actual malice.

A. Consent to Search the Car

We conclude the evidence that there was no consent to search was "so one-sided" that defendants "must prevail as a matter of law"; a "fair-minded jury" could not reasonably find that there was consent to search the car on the basis of the evidence.

Hornberger admitted that he did not ask the driver for consent to search the car and the driver did not give him consent. Tonkery claimed that he asked Williamson whether there was any contraband in the vehicle; when Williamson responded "no," Tonkery asked, "you wouldn't mind if I looked, then, would you? And I believe he said no."

The right to refuse is an essential element of a voluntary consent to search. State v. Suazo, 133 N.J. 315, 319-20 (1993). Many persons, perhaps most, would view the request of a police officer to make a search as having the force of law. Unless it is shown by the State that the person involved knew that he had the right to refuse to accede to such a request, his assenting to the search is not meaningful. State v. Johnson, 68 N.J. 349, 354 (1975).

The police need not necessarily advise the person of the right to refuse, as long as the State can prove the person was aware of this right. No written consent to search was requested or even considered by the police.

A reasonable jury could not find that the officers obtained permission to search the car. Because the statement in the broadcast that there was no permission to search the car was factually true, it is unnecessary to consider whether defendants published it with actual malice.

Plaintiffs are correct that they were fooled because the three were driving around in the Mercedes for the purpose of inducing police officers to stop them. Nevertheless, plaintiffs had no cause to suspect that the three were dangerous when plaintiffs removed them from the car and frisked them.

We conclude that the trial judge correctly dismissed plaintiffs' defamation and false light claims. The broadcast's statements that the search of the car was improper and without consent were true. Moreover, they constituted expressions of legal opinion, and the opinion that the search was invalid was plausible.

Plaintiffs next claim that the judge erred in rejecting their claim that defendants violated the Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 to -34 (the Act). Plaintiffs' claims go only to the portion of the tape which recorded Hornberger and Tonkery searching the car in the absence of the testers. During this

search Tonkery said that there was "probably dope" in the locked cosmetic case. Plaintiffs' claims are premised on lack of consent to this conversational recording, a portion of which was disclosed in the broadcast.

Tonkery and Hornberger submitted declarations that, while they were searching the Mercedes, they directed all of their statements solely to each other and believed that no one else could hear them. Tonkery and Hornberger obviously did not consent to the taping.

"Oral communication" is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." N.J.S.A. 2A:156A-2(b).

The Act provides that any person who: a. Purposely intercepts . . . any . . . oral communication . . . or b. Purposely discloses . . . to any other person the contents of any . . . oral communication . . . knowing or having reason to know that the information was obtained through the interception of a[n] . . . oral communication . . . shall be guilty of a crime in the third degree. [N.J.S.A. 2A:156A-3.] The Act creates a civil cause of action for damages by any aggrieved person against the person who intercepted or disclosed their oral communication. N.J.S.A. 2A:156A-24. Further, based upon State v. Diaz, 308 N.J. Super. 504, 513-16 (App. Div. 1998), we conclude that the Act does not apply to the video portion of the film. Our inquiry is thus limited to the audio part of the recording.

The first issue that must be considered is whether the officers had a reasonable expectation of privacy at the time the recording was made. A person has a reasonable expectation of privacy, which is protected under our constitutional prohibition against unreasonable searches and seizures, N.J. Const. Art. 1, § 7, so long as the expectation of privacy is reasonable. State v. Hempele, 120 N.J. 182, 200 (1990).

In this case, plaintiffs declared that they directed their remarks to each other and believed that no one could hear them; this satisfies the requirement that they manifested a subjective expectation of privacy.

Courts which have considered the issue have generally determined that conversations which take place in enclosed, indoor rooms are protected. People v. Lesslie, 939 P. 2d at 447-48 (defendant had a reasonable expectation of privacy in a bar restroom despite "the potential for a bystander to overhear"); United States v. Duncan, 598 F. 2d at 849-53 (IRS agents auditing a bank had a reasonable expectation of privacy in their assigned office in the bank, despite the consent of the bank's owner to recording the IRS's agents conversations, the hostility between the parties, and the fact that others could overhear the auditors from outside the office).

On the other hand, when the location of the conversation was a cemetery during a grave site service, the father and grandmother of the deceased children, whose mother was convicted of murdering them, failed to establish that they had a subjective

expectation of privacy. Kee v. City of Rowlett, 247 F. 3d at 215-18. The court commented that the open and publicly accessible place where the conversations occurred "may be a significant factor countenancing against finding a reasonable expectation of privacy." Id. at 217 n.21.

Here, the location of the conversation between Hornberger and Tonkery was more akin to an open, accessible place than an enclosed, indoor room. The search of the car occurred on the shoulder of a busy public highway. Automobiles and other means of transportation are afforded a lower expectation of privacy than homes, offices and other structures. Chambers v. Maroney, 399 U.S. 42, 48, 90 S. Ct. 1975, 1979, 27 L. Ed.2d 419, 426-27 (1970); State v. Lund, 119 N.J. at 38. The four doors of the Mercedes were wide open while Hornberger and Tonkery were conducting their search, rendering the vehicle even more exposed. These officers were public servants performing their police function in public view. As recognized by the Supreme Court in Berkemer v. McCarty, 468 U.S. 420, 438, 82 L.Ed.2d 317, 334, 104 S. Ct. 1338 (1984), "perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist."

In Katz, 389 U.S. at 351, 88 S. Ct. at 511, 19 L. Ed. 2d at 582, the Court said:

> The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

The court in Kee elaborated on this standard, listing six "nonexclusive factors to evaluate the subjective expectation of privacy in oral communications in publicly accessible places." 247 F. 3d at 215. These six factors are:

(1) the volume of the communication or conversation; (2) the proximity or potential of other individuals to overhear the conversation; (3) the potential for communications to be reported; (4) the affirmative actions taken by the speakers to shield their privacy; (5) the need for technological enhancements to hear the communications; and (6) the place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating. [Id. at 213-14.]

Here, Tonkery's recorded comment, that it was "probably dope" in the locked case, was audible, and no technological enhancements were required. Tonkery and Hornberger took no action to shield their privacy.

As the trial judge noted, plaintiffs' expectation of privacy is restricted because of their status as police officers. Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 189 (1993) ("As a police officer, plaintiff had a diminished expectation of privacy"); Hart v. City of Jersey City, 308 N.J. Super. 487, 493 (App. Div. 1998) ("police officers, because

they occupy positions of public trust and exercise special powers, have a diminished expectation of privacy.").

Courts have held that police officers do not have a reasonable expectation of privacy when they are interacting with suspects. Angel v. Williams, 12 F. 3d at 790 (officers were recorded while subduing an inmate in a jail), and State v. Flora, 845 P. 2d at 1357 (officers were recorded while effectuating an arrest). Here also, plaintiffs, as police officers on duty, searching a vehicle on a public street, cannot expect the same level of privacy as a private citizen in a private place.

We conclude the judge properly rejected plaintiffs' claim that defendants violated the Wiretapping and Electronic Surveillance Control Act when they recorded the conversation between Tonkery and Hornberger during their search inside the vehicle. Although the officers did not consent to the recording, they did not have a reasonable expectation of privacy while in the targeted vehicle under the circumstances.

Plaintiffs next contend that the judge erred in dismissing their claim for fraud. When the damages are non-reputational and do not compensate for injury to plaintiff's state of mind, First Amendment proscriptions do not preclude recovery on a pre-publication tort, also involving a media-defendant's publication. Cohen v. Cowles Media Co., 501 U.S. 663, 671, 111 S. Ct. 2513, 2519, 115 L. Ed.2d 586, 598 (1991). There, the Court allowed economic damages resulting from plaintiff's loss of his job when defendants published his name, in breach of a promise of confidentiality, because his particular damages were distinct from defamation damages.

The problem with plaintiffs' contentions is the measure and type of damages sought. Here, plaintiffs allege in their complaint that defendants' fraud:

> injured . . . the reputations of the plaintiffs, damaged their chances for promotion, made it difficult for them to obtain employment elsewhere, subjected them to ridicule and humiliation nationwide, and among their friends, family, loved ones, their neighbors and others in law enforcement. . . . As a result of the foregoing, plaintiffs suffered loss of sleep, anxiety attacks, fear of further invasions and defamations, powerlessness, chagrin, anger, frustration, embarrassment, humiliation, mental distress, general depression, and fear of being invaded by ABC.

These damages are almost entirely for injury to reputation and emotional distress. Plaintiffs allege damage to their chances for promotion and difficulty in obtaining other employment, but do not specify any promotion or other employment opportunity for which they were rejected. Mere speculation, regardless of its possibility, is insufficient and must be shown by actual evidence of such loss.

We hold that the PrimeTime Live video program DWB was not defamatory. The program portrayed with reasonable accuracy a routine traffic stop of young

African-American males, resolved ultimately by a warning and without traffic violation charges for several admitted violations, which was in reality a pretext to launch a criminal investigation without articulable suspicion, probable cause, or legal consent.

Affirmed.

DISSENTING OPINION:

I respectfully disagree with my brother jurists on this matter and am therefore compelled to submit this dissenting opinion. I note that the facts as recited by the majority are not questioned by this opinion, however, their reasoning to reach the conclusions that they have come to seem to lack logic and consistency. Further, while this Court is, and should be, highly offended by the existence and use of racial profiling in the conduct of police business, this is not the issue that should have been focused on as the majority missed the bus on this one!

The majority focuses on claims that the plaintiffs allege that (1) the broadcast was defamatory and portrayed them in a false light; (2) a portion of the recording of a conversation between two of the plaintiffs while they were conducting the search violated the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 to -34; and (3) defendants fraudulently procured the tape of the episode. However, the analysis of these claims is being done without reflection on the real life situation then and there occurring. In addition, the majority also appears to consider the defamation claim as the same claim as the portrayal in a false light claim. These are two separate and distinct claims that must be considered separately.

The first problem to deal with is whether this matter is appropriately dealt with on a motion for summary judgment. As the majority correctly points out summary judgment is only appropriate if there is no question of fact and that there can be no question that as a matter of law, the case must be decided only in one way. Basically, if there is any difference in the factual reliance between the parties, then summary judgment is not appropriate and those differences must be ruled upon by a trier of fact, a/k/a the jury. See R. 4:46-2(c) and Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). Unfortunately, the majority dismisses the differences in the factual positions of the differing sides to this litigation and declare this matter ripe for summary judgment.

The initial claim of defamation raises an interesting question. Have the police officers, by virtue of the broadcast of this episode of PrimeTime, been defamed. I imagine that would depend upon what the show suggested or said about the officers and whether it was true. The majority starts its analysis on whether the search of the car was improper, coming to the conclusion that it was and therefore the officers were not defamed. However, my learned brothers have failed to complete the analysis on this

issue, opting to rely on the offensive nature of racial profiling as a rational basis for not completing the analysis, which would lead to a different conclusion.

The Fourth Amendment to the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution protect citizens against unreasonable searches and seizures and provide for warrants, issued upon probable cause, describing the place to be searched and the thing to be seized. The Court established an exception to this probable-cause requirement in Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed.2d 889, 909 (1968), allowing a police officer to "stop and frisk" a person whom the officer reasonably believes is armed and dangerous, when the officer does not have probable cause to make an arrest.

The Court expanded this exception to allow a protective search of the passenger compartment of an automobile, to locate weapons, if the officer reasonably believes "that the suspect is dangerous and the suspect may gain immediate control of weapons." Michigan v. Long, 463 U.S. 1032, 1049, 103 S. Ct. 3469, 3481, 77 L. Ed.2d 1201, 1220 (1983) (footnote omitted). The Court explained that the officer's reasonable belief must be based on "specific and articulable facts . . . taken together with the rational inferences from those facts." Ibid. (quoting Terry, 393 U.S. at 21, 88 S. Ct. at 880, 20 L. Ed. 2d at 906). The New Jersey Supreme Court has held that "the Michigan v. Long rule is sound and compelling precedent and should be followed to protect New Jersey's police community." State v. Lund, 119 N.J. 35, 48 (1990).

Here, I agree with plaintiffs that their belief they were in danger and that this belief was reasonable. I do not think it is the position of the court to second guess an officer's desire to protect himself on a dark night during a legal vehicle stop. The specific facts supporting such a belief were Campbell's antagonistic remarks, made when leaving the car; to wit: "all cops are racists" and "I don't like cops."

In addition, our Court in Lund mentioned "lying to the police" and "the absence of identification" as factors that, together with "'furtive' movements or gestures by a motorist," might "ripen into a reasonable suspicion that the person may be armed and dangerous." 119 N.J. at 48. Here, the officers' concern for their safety might have been buttressed by Campbell's rejection of their demand to produce his identification, which the officers later discovered when they frisked him, and Armstrong's incorrect statement about Campbell's first name.

Contrary to the majority, I am not convinced that the issue is whether the search was without consent. (Although I note that the majority was very careful not to state that the objectionable statement was that the search was illegal or improper.) In fact, even if I agree that the search should not have taken place, the real question is whether that is the defamation complained about? I suggest that it is only part of the possible defamation claim. The other defamation claim in this case is the very obvious insinuation that the officers are racists, bigots or for other reasons carrying out their duties in an inappropriate racially biased manner.

Alternatively, there is a question of fact as to whether there was a consent to the search in the first place. Reading the majority opinion, it is clear that,

Hornberger admitted that he did not ask the driver for consent to search the car and the driver did not give him consent. Tonkery claimed that he asked Williamson whether there was any contraband in the vehicle; when Williamson responded "no," Tonkery asked, "you wouldn't mind if I looked, then, would you? And I believe he said no."

Based upon the finding as set forth above, I immediately see a difference in the facts as set forth before the court which are in need of a jury's determination as a question of fact. Did Williamson, the driver of the car, consent to the search, when he stated that he wouldn't mind if the car was searched?

Clearly, any consent must be given voluntarily and knowing that the person has the right to refuse, State v. Suazo, 133 N.J. 315, 319-20 (1993), but this issue was never adequately addressed by the trial court and seems to have been glossed over by my brethren on this court. The problem is that this issue seems to come up almost exclusively in the criminal setting where the State has the obligation of proving this element. However, as this is a civil case, it is unclear as to who would bear this burden, either in terms of raising the issue in the first instance and having the burden of proof in the latter. Regardless of the burden, this issue was not considered at all by the majority. The record before us is devoid of any information as to the knowledge, or lack thereof, of Mr. Williamson regarding his right to refuse the request to search the car. Certainly, being aware that Mr. Williamson was being used as part of a set-up situation to entice police to stop him in his vehicle, it would not be surprising to learn that he was advised of his rights by counsel involved in this "sting-like" operation. Unfortunately, the record before us does not answer these necessary questions and I am unwilling to make these assumptions. Accordingly, the question of whether this search was performed without consent must await further development and/or a jury determination as to Mr. Williamson's actual awareness, or the reasonable expectation of his awareness, at the time of the request to search.

The story, entitled "DWB" or driving while black, and detailing the problems and issues faced by minorities in our community who are pulled over and stopped far more often than their Caucasian neighbors. Accordingly, it is not a stretch to take the position that any officers highlighted in this story will be seen as racially motivated, bigoted and biased. (I don't think it is a stretch to think that anyone, with rare exception, being called a racist, a bigot, or biased is being defamed.) Although the trial judge did not consider this element of the defamation claim, I find that we must proceed with the necessary analysis to determine if it rises to the level of defamation. The problem is that we are left with insufficient factual development to answer this question in the context of a summary judgment motion and as such I would reverse the decision of the trial judge and reinstate the complaint in this matter.

One must remember that all facts must be before the court and there must not be a factual dispute, requiring a jury determination, in order for this court to affirm a summary judgment dismissing the complaint. See Brill, *supra*.

In considering the defamation claim on whether insinuating the plaintiffs are racists, one must go through the same evaluation that the majority went through in determining of claiming the search was illegal was defamatory. Clearly, we have previously held that police officers are public officials, Costello v. Ocean Cty. Observer, 136 N.J. 594, 613 (1994), and as such do not have the same rights as members of the general public insofar as claims of this nature are concerned. In New York Times Co. v. Sullivan, 376 U.S. 254, 279, 84 S. Ct. 710, 11 L. Ed.2d 686, 706 (1964), it was made very clear that public officials must prove more than a claim is false. A public official must prove that any statement relating to their official capacity was false *and* that that it was published with actual malice. Of course, actual malice is not limited to actual knowledge of the false nature of the statement, but is also satisfied when there is a reckless disregard for its truth. New York Times Co., *supra*; Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 169 (1999). Further, this element or burden we place on public figures, in an effort to protect our first amendment rights, must be proven, not by the ordinary civil standard of "more likely than not" but by the much more onerous standard of "clear and convincing evidence". (Neither of which should be confused with the criminal burden of "beyond a reasonable doubt".) Lynch, *supra*, at 165; Rocci v. Ecole Secondaire, 165 N.J. 149, 159 (2000).

Applying this criteria to the instant case, I am concerned that we don't have any information before us as to whether these officers are racist or whether some bias or prejudice was the motivating factor behind their stopping the defendants' car. However, we do have before us un-contradicted testimony of valid reasons why this particular car was pulled over. Officer Tonkery enumerated specific non-racially related grounds for pulling over the defendants" car. He observed the defendant change lanes without signaling. He observed the defendant cross a double yellow line and a painted median. He also observed the defendant cut off the officer's car, causing the officer to take evasive action to avoid the collision. Any of these actions are legitimate reasons to pull over a driver. The fact that all three occurred, including almost causing an accident, would seem to require that the defendant be pulled over. Clearly, based upon the events, it is highly suspect to me to suggest that the initial pull over was based upon racial profiling. In addition, this makes no mention of the fact that this same car, a very expensive luxury car, was seen traveling around in an known drug area on other nights, possibly raising the suspicion that there was more going on than the reckless driving that would sufficient to justify the car being pulled over in the first place.

The next issue is the removal of the occupants from the car, the frisk and the search of the car. Was this racially motivated, thus allowing the defendants to insinuate that the plaintiffs are racists or at least racially profiling the defendants?

In conducting their official duties, police must often stop vehicles and interact with members of the public who are completely unknown to them. Should they be allowed to take reasonable steps to protect themselves? The facts of this case suggest that the police were speaking to three young men, who by their age, alone, were probably not possessed of sufficient resources to have been the owner of the car. There would be no problem that they may have been driving a car owned by one of their parents, but isn't this something we would expect the police to determine? By all accounts, the officers properly asked for the license, registration and insurance card for the car. The insurance card was found to have been expired. Could the car have been impounded at that moment – of course, but the officers did not do that. Instead they merely asked for each of the three men to provide identification.

When Mr. Campbell either refused or could not provide identification, the officers asked the other occupants of the car for his name. Suspiciously, they were told his name was John and Raymond. This is the same individual who refused to put his hands in plain view while Officer Hornberger was trying to speak to the driver. Campbell admitted he was playing it up for the cameras that were in the car, but to the police officer, it is not a fun time, but a time to be concerned about his safety. Yet he had to ask Mr. Campbell three times to put his hands in plain view and receive some arrogant responses before Campbell finally put his hands within view. Granted, while there was nothing to suggest that Campbell was in possession of a weapon, the last thing anyone wants is for an officer to respond with force when there is no actual threat or for a passenger in a car to assault an officer because the officer did not see where his hands were at. A request to put one's hands in plain site is neither inappropriate nor onerous, but an arrogant refusal may raise suspicions.

Thereafter, following the arrogant refusals by Mr. Campbell and the different names when Mr. Campbell refused to produce any identification, very well could rise to the level of a reasonable suspicion. At this point, we are faced with a jury question as to whether it was reasonable to remove all of the occupants from the vehicle. Add to this the expired insurance and erratic driving, and I wonder why the police were so lenient and did not impound the car.

The next issue is whether the defendants then portrayed the officers in a false light. Similar questions exist on this issue as with the defamation claim. Are we talking about stopping a car inappropriately, performing a search without consent, performing an illegal search, or being a racist? While there is no proof or evidence submitted in any form that the plaintiffs are racist, that is clearly the insinuation in the publicized story. Are they being portrayed as police who performed a search without consent – when there is a question as to whether the consent was given by Mr. Williamson? The court never affirmatively concluded that the search was illegal, just without consent. If the search was legal, then these officers are surely being portrayed in a false light. However, all of these questions were not resolved in the motion or by the motion judge. Accordingly, I would deny defendants' summary judgment on this ground.

The next issue to consider is whether the defendants violated the Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 to -34. The act which applies to audio taping (if not videotaping) provides that,

> The Act provides that any person who: a. Purposely intercepts . . . any . . . oral communication . . . or b. Purposely discloses . . . to any other person the contents of any . . . oral communication . . . knowing or having reason to know that the information was obtained through the interception of a[n] . . . oral communication . . . shall be guilty of a crime in the third degree. [N.J.S.A. 2A:156A-3.]

Courts have opined that the "expectation of privacy" language in the statute was intended to parallel the language and standard of Katz v. U.S., 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed.2d 576 (1967), making the "reasonable expectation of privacy" highly relevant to claimed interceptions of oral conversations. In Katz, the Court held that the Government's recording of the petitioner's end of conversations in a telephone booth "violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353, 88 S. Ct. at 512, 19 L. Ed. 2d at 583. As defendants point out, most federal courts have used this standard in applying Title III of the Federal Omnibus Crime Control Act and Safe Streets Act. U.S. v. Peoples, 250 F.3d 630, 637 (8th Cir. 2001) (recordings of conversations between a prisoner and his visitor at a correctional facility were admissible under the federal wiretap law because the individuals had no reasonable expectation of privacy in that conversation); Kee v. City of Rowlett, 247 F.3d 206, 211 (5th Cir. 2001) (placement of an electronic surveillance microphone at an outdoor grave site during a funeral was not a violation of the federal Act because of no reasonable expectation of privacy); U.S. v. McKinnon, 985 F.2d 525, 527 (11th Cir. 1993) (a recording of defendant's conversation in the back seat of a police car did not violate the federal Act); U.S. v. Duncan, 598 F.2d 839, 849-53 (4th Cir 1979) (recording IRS auditors in an office that was assigned to them in the bank they were auditing violated the federal Act), and U.S. v. McIntyre, 582 F.2d 1221, 1223 (9th Cir. 1978) (recording the assistant chief of police in his office violated the federal Act). See also, People v. Lesslie, 939 P.2d 443, 446 (Colo. Ct. App. 1997) (defendant had a legitimate expectation of privacy in a bar restroom) and Boddie v. ABC, 731 F. 2d at 338-39 (whether plaintiff's expectation that she was not being recorded and whether that expectation was reasonable were fact issues).

Here, the location of the conversation between Hornberger and Tonkery was not more akin to an open, accessible place than an enclosed, indoor room. The two officers were in a car, speaking in a manner that only they could hear one another. The fact that this occurred on the shoulder of a busy public highway is of limited probative value. There is nothing to suggest that anyone was present, other than the three men from the car, who were all out of ear range. Automobiles passing by at roadway speeds would have no impact on the privacy of the officers. The fact that automobiles are generally

afforded lower expectations of privacy is of no moment as we are not concerned with what may have been visible for this claim, but what could have been heard.

Using the six "nonexclusive factors to evaluate the subjective expectation of privacy in oral communications in publicly accessible places." that the court elaborated in Kee, it is clear that the officers had a reasonable expectation of privacy. The six factors listed by the majority include: (1) the volume of the communication or conversation; (2) the proximity or potential of other individuals to overhear the conversation; (3) the potential for communications to be reported; (4) the affirmative actions taken by the speakers to shield their privacy; (5) the need for technological enhancements to hear the communications; and (6) the place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating.

Applying each item to the instant case, (1) the officers were speaking only to each other; (2) there is nothing to suggest that anyone else could hear them; (3) as no one could hear them, there normally would not have been any report of the conversation; (4) as there was no one else in the immediate vicinity, no actions were needed to maintain the privacy of the conversation; (5) the only way the defendants ever became aware of the statement was through the use of electronic enhancements a/k/a hidden microphones; (6) notwithstanding the conversation took place in a car, the officers were aware that there was no one able to hear, absent the hidden microphones.

Based on the above, I find the only possible resolution is to find as a matter of law that the defendants violated Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 to -34.

The only issue wherein I agree with the majority is on the issue of the claim for fraud. The majority correctly concluded that the damages sought were of the type properly recoverable in an action for defamation. While an action for defamation has increased hurdles to surmount, taking this end around route to seek the same damages without the hurdles presented by a defamation case cannot stand.

Accordingly, I would reverse the decision of the lower court to the extent that I would deny defendants' summary judgment motion insofar as it seeks to dismiss the causes of action for defamation, portrayal in a false light and violation of the Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 to -34. I would, however, affirm the lower court's decision insofar as it dismisses the cause of action based on fraud.

For the reasons set forth above, I dissent in part and concur in part with the majority decision.