

# Illinois State Court Strikes Sex Tape Lawsuit Under California Anti-SLAPP Statute

## *Former Movie Star Could Not Prove Ebony Magazine Acted With Actual Malice*

By **Steven P. Mandell, Steven L. Baron,  
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Leon Isaac Kennedy, or “Leon the Lover” as he was called during his days as a radio DJ, sued Johnson Publishing Company (the publisher of *Ebony* and *Jet* magazines) for defamation and false light invasion of privacy over an *Ebony* article about celebrity scandals. The article discussed a sex tape Kennedy made with his former wife, Jayne Kennedy, and suggested that he was responsible for leaking the tape during their divorce.

A trial judge in the Circuit Court of Cook County, Illinois, dismissed the suit with prejudice under the California anti-SLAPP statute, Cal. Civ. P. § 425.16, finding that the article addressed an issue of public interest and there was no way for Kennedy to show that the defendants published the article with actual malice. [Kennedy v. Johnson Publishing Co.](#), No. 14 L 1038 (Cir. Ct. Cook Cnty., Ill. July 9, 2014) (memorandum opinion and order). In its written decision, the court rejected Kennedy’s argument that the publisher’s failure to review information in its archives was evidence of actual malice. Moreover, because Kennedy had not publicly challenged numerous earlier reports linking him to the leak, the court determined that publisher had no reason to doubt the truth of its own account.

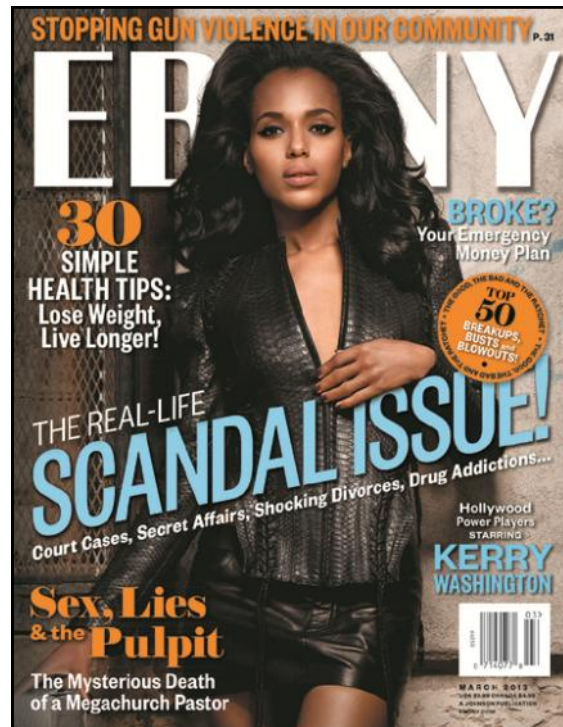
### **Background: *The Man, The Minister, The Legend...***

In his previous life, Kennedy was a Hollywood actor and radio disc jockey. In 1971, he married Jayne Kennedy, who

was well-known in her own right as a model, television host, and sportscaster. The couple was married for about ten years and was the subject of much media attention as one the “it” celebrity couples of their day. When they decided to divorce in 1981, both *Ebony* and *Jet* magazine ran cover stories about the break-up, which featured exclusive interviews with the couple. As was reported in these articles, both Kennedy and Jayne described the split as amicable.

While the couple starred together in movies made for the big screen, during their marriage they also starred together in an explicit sex tape on the small screen. At some point the video was somehow leaked and eventually ended up on the Internet. The video has become somewhat legendary, with several publications describing it as the first in what has become a long series of leaked celebrity sex tapes. Numerous reports linked Kennedy to the release of the tape, including a *Washington Post* article published in 2002. Kennedy never took legal action against that publication or others who (before *Ebony*) reported that he was suspected to have been the source of the leak.

After his divorce from Jayne, Kennedy left the movie business and found a new calling as a minister and evangelist in Burbank, California. Since the early 1990’s, Kennedy has continued this work, fortifying, as he described it, his reputation as a man of faith and a person of high morals. According to Kennedy, he has been featured on Christian television shows in the U.S. and around the world.



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### Ebony's "Scandal" Issue

In March 2013, *Ebony* magazine published an issue devoted to celebrity scandals. Included in this edition was a 12-page article highlighting dozens of celebrity scandals under various headings and subheadings. On the second-to-last page of the article, *Ebony* devoted less than two inches of column space under the page heading "SCANDALOUS! REPEAT OFFENDERS!" and the paragraph subheading: "LIGHTS, CAMERA, ACTION," to the following blurb:

Before celebs managed to forge careers out of leaked sex tapes, being caught on camera in compromising positions was oh-so taboo. The first example of this trend was the infamous 1980s **JAYNE KENNEDY** sex tape that was viciously leaked by her first husband during their divorce. Fortunately for Kennedy, the Internet wasn't widespread back in the day, so homemade copies were simply passed from perv to perv.

### Johnson Publishing's Moves to Strike and Dismiss

Kennedy filed suit against Johnson Publishing based on this publication, alleging defamation *per se*, defamation *per quod*, and false-light invasion of privacy. While Kennedy's complaint did not address whether *appearing* in the sex tape affected his reputation, his suit alleged that he was injured when Johnson Publishing falsely accused him of *releasing* the tape. Specifically, he claimed that the statement that he "viciously leaked" the tape was false not only because someone else stole the tape and leaked it, but also because his divorce was amicable and he remains friends with Jayne.

Kennedy further alleged that Johnson Publishing was well-aware of the amicable nature of their divorce and the couple's continued friendship because they reported on it back in the 1980's. To suggest that Kennedy acted vindictively, to hurt his ex-wife, Kennedy alleged, damaged his reputation as a compassionate man of faith and a spiritual leader. Kennedy also alleged that other elements of the article including the heading "Repeat Offenders" and the use of the term "perv," defamed him because they suggested that

he was a criminal and a pervert. Kennedy claimed that because of this publication, he had to cancel a number of upcoming guest ministry appearances, saw a decrease in the number of invitations he received to appear, and suffered from stress and anxiety.

In response to the suit, Johnson Publishing filed two motions—one to dismiss for failure to state a claim and one to strike the action under California's anti-SLAPP statute. The parties agreed to stay discovery and have the court consider defendant's anti-SLAPP motion first.

On July 9, 2014, the court issued a memorandum opinion and order granting the motion to strike under California's Anti-SLAPP statute (but treating it as motion to dismiss under Section 2-619(a)(9) of the Illinois Code of Civil Procedure). The court dismissed the complaint in its entirety with prejudice.

### Choice of Law: Applying California's Anti-SLAPP Statute

The court's choice of law analysis was critical to the outcome. In conflict of law cases, Illinois follows the doctrine of *depeçage* which refers to the process of cutting up a case into its individual issues, each subject to its own choice-of-law analysis. For example, under the doctrine, a court might apply one state's law to a defamation-plaintiff's claim and another

state's law to the defamation-defendant's anti-SLAPP defense.

Johnson Publishing argued that California law should govern its anti-SLAPP defense because Kennedy was a resident of California, the author of the piece researched and wrote it in California and the issue was circulated in California. It also argued that Kennedy had filed suit in Illinois solely to avoid the California anti-SLAPP statute, noting that he originally hired a California attorney who threatened to find a forum that would not apply the statute.

In response, Kennedy argued that Illinois or Delaware law should apply because, under Illinois choice-of-law rules, the domicile of the speaker is more important than the domicile of the plaintiff and, because Johnson Publishing is a Delaware company with its principal place of business in Illinois, the law of one of those jurisdictions must apply.

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The court rejected Kennedy's argument that the publisher's failure to review information in its archives was evidence of actual malice.

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The court noted that the most relevant factors under Illinois choice-of-law principles for determining which state's anti-SLAPP statute applied are: (1) the place where the speech occurred; and (2) the speaker's domicile. The court determined that the first factor was neutral because the defendant published *Ebony* in all three states—California, Illinois, and Delaware. The court also found the second factor to be neutral because although Johnson Publishing was incorporated in Delaware and had its principal place of business in Illinois, the author of the article (a "John Doe" defendant in the case) was a California resident who researched and wrote the piece in California.

Because the two primary factors were not dispositive in resolving the choice-of-law issue, the court looked to other factors typically considered in a "most-significant-contacts" analysis and concluded that the place of injury was the most determinative factor. It then followed long-standing authority holding that a defamation-plaintiff's injury will almost always be most felt where the plaintiff resides, in this case California. The court concluded that because the injury occurred predominately in California, California had the most interest in applying its laws to the dispute and therefore the California anti-SLAPP statute applied.

#### **Merits of the Suit: Kennedy Cannot Prove Actual Malice**

The court applied the California anti-SLAPP statute's two-part test, first assessing whether the claim arises from a protected category of speech and then determining whether the plaintiff has a probability of prevailing. Cal. Civ. P. § 425.16(e); *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (Cal. App. Ct. 2002). Here, Johnson Publishing argued that the

speech was protected because it concerned a matter of public interest and Kennedy was unlikely to prevail because he could not demonstrate that Johnson Publishing published the article with actual malice.

The fact that Kennedy had a personal relationship decades ago with John Johnson, the now-deceased founder of Johnson Publishing, did not mean Mr. Johnson's personal knowledge was imputed to the entire company. Johnson Publishing also attached a variety of prior published sources which had similarly reported that Kennedy was the source of the leak.

Kennedy acknowledged that failure to investigate did not alone establish actual malice but instead argued that Johnson Publishing turned a blind eye to the fact that several decades

ago Johnson Publishing had interviewed the couple about their divorce and, thus, had institutional knowledge that their split was actually amicable and they had an ongoing friendship.

The court, however, agreed with Johnson Publishing, finding that the evidence Kennedy presented was insufficient to carry his burden of proving he could demonstrate actual malice. The court noted there was no evidence that the author of the 2013 article

or anyone else at Johnson Publishing knew about the articles that appeared 30 years earlier. The court also found that Johnson Publishing would have no reason to doubt the statements in its article linking Kennedy to the leaked sex tape given that Kennedy had never publicly challenged numerous earlier reports that similarly linked him to the leaking of the tape.

*Steven P. Mandell, Steven L. Baron, Brendan J. Healey and Catherine L. Gibbons of Mandell Menkes LLC represented Johnson Publishing Company, LLC. Phillip J. Zisook and Brian D. Saucier of Deutsch, Levy & Engel, Chartered represented Leon Isaac Kennedy.*

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