

**WISCONSIN SUPREME COURT**  
**FRIDAY, MARCH 6, 2009**  
**1:30 p.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Jefferson County Circuit Court decision, Judge Randy R. Koschnick, presiding.*

2007AP1289-CR

State v. Baron

This is the second time this case, which involves e-mail messages and the state's identity theft statute, Wis. Stat. § 943.201, has reached the Supreme Court. The defendant filed a petition to bypass, which was denied Nov. 5, 2007; a petition for review was granted July 25, 2008 after the Court of Appeals decision.

Some background: Defendant Christopher D. Baron worked as an emergency medical technician for the City of Jefferson. His boss, Mark Fisher, was the director of Jefferson's Emergency Medical Service program. The criminal complaint alleged that the defendant hacked into Fisher's work computer and sent e-mails he found in Fisher's e-mail account to about 10 people. The forwarded emails purported to have come from Fisher. The forwarded emails were originally sent from Fisher to a female EMT and suggested that Fisher was having an extramarital affair. The emails also indicated that Fisher was using an apartment owned by the EMS department to conduct the affair. The defendant sent the emails to various local and county EMS workers, as well as to Fisher's wife. The day after the defendant sent the emails, Fisher committed suicide.

Baron admitted to investigators that he had sent the e-mails, and that he had done so to get Fisher in trouble. He said he knew Fisher's password because he had helped Fisher with Fisher's computer. He told investigators he had used his personal computer at home to access Fisher's work computer and that he "blinded" the e-mails so it would not be possible to determine who had actually sent them. The defendant said he originally intended to send the e-mails only to Fisher's wife but then decided to send them to other people as well so that they could see that Fisher was not "golden."

Baron was charged with criminal defamation, two counts of obstructing an officer, identity theft, and two counts of computer crimes. The state voluntarily dismissed the criminal defamation charge. Baron moved to dismiss the identity-theft charge on the ground that the identity theft statute was unconstitutional as applied to his conduct.

Following a hearing, the circuit court granted the motion to dismiss. It held that one of the elements of the identity theft statute was that the defendant had the purpose of using the information to defame another or actually using the information for that purpose – an element substantially the same as the criminal defamation statute. The circuit court reasoned that applying that element to the defendant's conduct would impair his right to communicate defamatory information about a public official. The circuit court concluded that the state had failed to carry its burden of proving beyond a reasonable doubt that the statute was constitutional. The state appealed, and the Court of Appeals reversed.

The Court of Appeals noted that the parties agreed that Fisher was a "public official" as that term is used in defamation law, and the parties also agreed that the defendant had a First Amendment right to disseminate defamatory information about Fisher's performance as a public official if either the information was true or, if it was false, the defendant did not act with "actual malice."

However, the Court of Appeals concluded, in part, that "the identity theft statute neither prohibited Baron from disseminating information about Fisher nor prevented the public from receiving that information. Instead, the statute prohibited Baron from purporting to be Fisher when he sent the emails..."

Baron argues his First Amendment right to defame a public official with true information is being balanced against Fisher's less established right to privacy, a right that is further lessened by Fisher's decision to act as a public official. The defendant notes the U.S. Supreme Court has conceded that privacy concerns give way when balanced against the interest in publishing matters of public importance.