



## Alerts

### Illinois Appellate Court Rejects the Crime-Fraud Exception in a Defamation Claim

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#### Brief Summary

An Illinois appellate court reversed a discovery order compelling the defendant law firm to produce privileged communications with its client in a defamation action under the crime-fraud exception. The court found that the crime-fraud exception did not apply because the conduct attributed to the law firm did not rise to the level of fraud, and no fraud was perpetrated as a result of the law firm's advice.

#### Complete Summary

This case arose when HBC, an evangelical megachurch, terminated James MacDonald, its founder and senior pastor (the "plaintiff"), citing several reasons, including improper exercise of authority and flagrant misuse of church resources for personal gain. In the aftermath, HBC retained Sally Wagenmaker and her firm, Wagenmaker & Oberly, LLC, to investigate and make recommendations regarding its corporate structure, governance, finances, and legal compliance accountability systems. The law firm, in turn, hired an accounting firm to conduct a forensic accounting of MacDonald's transactions.

In its report, the law firm found a massive failure in corporate governance during MacDonald's tenure, allowing him to impose a "heavy-fisted" leadership and to improperly exploit his position for personal financial gain with impunity. The contents of this report were relayed to the members of the congregation and posted on HBC's site to "provide clarity" as to the reasons behind MacDonald's termination.

After the report's publication, MacDonald sued Wagenmaker, her firm, the accountants, and HBC's other lawyers for defamation, false light invasion of privacy, intrusion on seclusion, civil conspiracy, and aiding and abetting. He then served a subpoena upon the Wagenmaker firm seeking its communications with HBC, HBC's other lawyers, and the accountants regarding the MacDonald investigation. The law firm refused to produce the requested information, asserting the attorney-client privilege.

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MacDonald moved to compel, arguing that the crime-fraud exception overcame the attorney-client privilege. The trial court agreed, finding that the crime-fraud exception extended to torts akin to or involving deliberate misrepresentations like defamation and that *in-camera* inspection of the disputed documents was justified because the Wagenmaker firm drafted the report, HBC's other lawyers edited it and gave HBC advice when consulted about its publication.

After reviewing the documents, the trial court ordered the production of the disputed documents because of the judge's finding that there was substantial evidence that HBC knew or strongly suspected that the report was defamatory and enlisted the aid of the defendants to prepare and publish the defamatory material.

The appellate court reversed, finding that the trial court erred in applying the crime-fraud exception to the facts of this case and in finding that MacDonald's showing sufficed to trigger an *in-camera* inspection. The court recognized that other Illinois courts, as well as cases from other jurisdictions, support extending the application of the crime-fraud exception to conduct that is not explicitly criminal or fraudulent but either rises to the level of fraud or is akin to fraud.

But here, they concluded that even accepting the trial court's expansive reading of the crime-fraud exception, it had no application in this case because MacDonald's complaint alleged only defamatory conduct, not fraud. MacDonald accused HBC and its lawyers of launching a public smear campaign against him by publicizing false information and also using the defamatory publication to obtain a litigation advantage in his separate arbitration against HBC.

**The court recognized that common law fraud requires:**

- a false statement of material fact;
- the defendant's knowledge of its falsity;
- intent to induce the plaintiff's reliance; and
- the plaintiff's detrimental reliance.

Based upon the above requirements, the conduct alleged by MacDonald did not rise to the level of fraud because there was no allegation that the conduct was intended to induce MacDonald's reliance, nor did he do so. Moreover, there was no evidence that HBC sought advice from the law firm with the intent to defame MacDonald, that HBC knew or should have known that the statements it published were defamatory, or that the consultation with the law firm and the ensuing rendition of advice by the firm were not undertaken in good faith by both HBC and the law firms.

The *MacDonald* court noted that:

"good faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held improper."  
*MacDonald*, 2024 IL App (1<sup>st</sup>) 230089, ¶133.

## Significance of Decision

A quick review of the case could yield the impression that it precludes the application of the crime-fraud exception to defamation claims, but it does not go that far. The decision has no quarrel with those courts that have extended the crime-fraud exception to reach cases that are not strictly criminal or fraudulent but involve misrepresentations or are akin to fraud and even implicitly subscribe to that view.

Here, the court simply found that the exception was inapplicable because the facts did not permit it. No conduct tantamount to fraud was alleged, nor was there any evidence that the client had consulted with the lawyers with an intent to perpetrate a fraud or that the lawyers rendered any advice for such purpose.