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Constitutional Law - First Amendment - Public Figures and Public Officials May Not Recover for Intentional Infliction of Emotional Distress for Publication of Ad Parody Absent a Showing That Publication Contained a False Statement of Fact Made with Actual Malice Recent Development.

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CONSTITUTIONAL LAW—FIRST AMENDMENT—PUBLIC FIGURES AND PUBLIC OFFICIALS MAY NOT RECOVER FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS FOR PUBLICATION OF AD PARODY ABSENT A SHOWING THAT PUBLICATION CONTAINED A FALSE STATEMENT OF FACT MADE WITH ACTUAL MALICE. *Hustler Magazine Inc. v. Falwell*, ___ U.S. ___, 108 S. Ct. 876, ___ L. Ed. 2d ___ (1988).

The November 1983 issue of *Hustler Magazine* included an "ad parody" satirizing Campari Liquor advertisements wherein celebrities would be interviewed regarding their "first times." Although the reference in the actual Campari advertisements referred to the celebrity's first time with Campari liquor, the advertisements played on the double entendre of sexual "first times." The *Hustler* parody, modeled after actual Campari ads, featured Jerry Falwell, a nationally recognized commentator on public issues and founder of the "moral majority." In the ad, Falwell allegedly stated his first time was in an outhouse in a drunken, incestuous rendezvous with his mother. The parody portrayed Falwell and his mother as immoral drunkards and intimated that Falwell is a hypocrite who only preaches when intoxicated. The parody was categorized in the magazine's table of contents as "Fiction; Ad and Personality Parody"; the bottom of the page on which the ad appeared contained a disclaimer "ad parody—not to be taken seriously."

Falwell filed suit in federal district court against the owner of *Hustler Magazine*, Larry Flynt, *Hustler Magazine* and Flynt Distributing Company alleging libel, intentional infliction of emotional distress, and invasion of privacy. The district court dismissed the invasion of privacy allegation. The jury subsequently decided against Falwell on the libel issue, finding that no reasonable man would believe the parody depicted actual facts about Falwell. On the intentional infliction of emotional distress claim, however, the jury ruled for Falwell, awarding him $100,000 in compensatory damages and $50,000 in punitive damages against both Flynt and *Hustler Magazine*. The defendants appealed, arguing firstly that because Falwell was a public figure, the *New York Times Co. v. Sullivan* actual malice standard had to be satisfied before Falwell could be permitted to recover on the emotional distress claim. Secondly, the defendants contended that because the jury found the parody was not believable, the statements could only be interpreted as opinions and were thusly completely protected by the first amendment. The Court of Appeals for the Fourth Circuit held that Falwell successfully stated a cause of action for emotional distress. The court held a literal application of the actual malice standard of *New York Times*, which would require Falwell to establish that *Hustler* knowingly or recklessly made a false statement of fact, was inappropriate in the context of an emotional distress claim.

The focus in an emotional distress claim is solely whether the defendant knowingly or recklessly made an *outrageous* statement. Further, the court held the fact versus opinion distinction to be irrelevant in the context of an emotional distress claim. The Fourth Circuit held that the plaintiff satisfied Virginia's common law cause of action for intentional infliction of emotional distress and affirmed the judgment. The United States Supreme Court reversed, holding that public officials and public figures are precluded from recovering damages for intentional infliction of emotional distress without establishing also that the complained of statement possesses a false statement of fact made with actual malice.

Beginning with the landmark case of *New York Times Co. v. Sullivan*, the United States Supreme Court recognized that laws governing defamation implicate constitutional interests protected under the first amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 282-83 (1964); *Time, Inc. v. Firestone*, 424 U.S. 448, 471 (1976)(Brennan, J., dissenting). In *New York Times*, the Supreme Court held that a public official cannot recover damages for a defamatory publication attendant to his official conduct without first proving that the falsehood was made with actual malice. *See New York Times Co.*, 376 U.S. at 279-80. Actual malice requires that the false statement be made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280; *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 n.30 (1984)(actual malice requires that speaker knew statement was false or had serious doubts as to its veracity). The Court in *New York Times* departed from the common law view of strict liability under the tort of defamation, *see generally* Note, Falwell v. Flynt: *An Emerging Threat to Freedom of Speech*, 1987 Utah L. Rev. 703, 705 (at common law, defamation plaintiff need only establish false or defamatory unprivileged publication), and emphasized that erroneous but good faith statements are inevitable in free debate on public issues and must be protected if "freedoms of expression are to have the breathing space that they need to survive." *New York Times Co.*, 376 U.S. at 271-72 (citing *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)).

The Supreme Court subsequently extended the actual malice standard of *New York Times* to libel suits brought by public figures. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967)(*New York Times* standard applicable to publishers of defamatory statements regarding public figures); *see also Gertz v. Robert Welch Inc.*, 418 U.S. 323, 342 (1974); *Greenbelt Coop. Publishing Ass'n Inc. v. Bresler*, 398 U.S. 6, 9-10 (1970)(public figures must prove falsehood made knowingly or with reckless disregard). In *Gertz*, the Court defined public figures as those individuals who have voluntarily or involuntarily assumed positions of prominence in community affairs, *see Gertz*, 418 U.S. at 345 (persons possessing positions of persuasive power and influence may, for all purposes, be held public figures), and those individuals who have

voluntarily thrust themselves into a particular public controversy. *See id.* (such persons become a public figure for narrower range of issues). The Court has consistently declined to classify individual who have not voluntarily thrust themselves into public affairs as public figures. *See, e.g., id.* (local prominent attorney not public figure because did not voluntarily thrust himself into public controversy); *Hutchinson v. Proxmire*, 443 U.S. 111, 134-35 (1979)(scientist submitting for federal grant not public figure); *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55 (1976)(prominent socialite did not become public figure because involved in divorce that was "cause celebre" in community). The Court has held that private figure plaintiffs need not meet the actual malice standard of *New York Times*. *See Gertz*, 418 U.S. at 345-46 (states free to impose standard of liability for publishers of libelous statements concerning private figures). The Court has reasoned that because private persons have less self-help measures to redress the effects of defamation, such as media access, and have not voluntarily thrust themselves into public affairs, they have more need for and are more deserving of protection. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986)(citing *Gertz*, 418 U.S. at 344-45). If the libel plaintiff is a private figure and the alleged defamatory publication concerns private matters he may recover presumed and punitive damages absent a showing of actual malice. *See Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985). The Court has recently held that if the publication concerns a matter of public concern, however, the first amendment requires that the private figure plaintiff establish the statement was false. *See Hepps*, 475 U.S. at 776.

The public figure libel plaintiff also has the burden of proving that the alleged defamatory publication was false. *See, e.g., Hepps*, 475 U.S. at 775; *Herbert v. Lando*, 441 U.S. 153, 176 (1979); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Pure opinions, no matter how injurious to reputation, are absolutely protected. *See Gertz*, 418 U.S. at 339-40 (first amendment applies to false ideas). Further, absent transgression of the *New York Times* standard, the Supreme Court has consistently held that even the most repulsive speech is protected by the first amendment, *see, e.g., Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 63 (1966); *cf. Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1985)(noting that speech involving obscenity, fighting words, incitement to riot, and child pornography outside scope of first amendment protection), including offensive speech concerning *personal* attributes of public officials, *Garrison v. Louisiana*, 379 U.S. 64, 76-77 (1964), or public figures, *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-73 (1971). Even if the publication is found to contain a false statement of fact, the first amendment additionally requires that it be shown that the defendant made the falsehood intentionally or with reckless disregard of its truth. *See, e.g., Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6, 10 (1970). The Supreme Court has long recognized that it is insufficient that the alleged defamer acted out of hatred or ill motives. *See id.* at 11

(citing *Garrison*, 379 U.S. at 73). Thus, the focus of the culpability requirement of *New York Times* is whether the defendant intended to or recklessly *published* the falsehood, not the defendant's intent or motive *in* publishing the falsehood. *See id.* at 9-10 n.2. Without meeting both the fault and falsity requirements of *New York Times* and *Hepps*, the public figure/official libel plaintiff is barred from recovery—regardless of the motives of the alleged defaming defendant.

The tort of intentional infliction of emotional distress generally imposes liability on "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another." Restatement (Second) of Torts § 46 (1977); *see also, e.g., Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974)(defining culpable conduct as offending "generally accepted standards of decency or morals"). The recognition by courts of the tort reflected a belief that individuals have an interest in emotional tranquility not redressed under traditional intentional torts. *See generally* Note, Falwell v. Flynt: *An Emerging Threat to Freedom of Speech*, 1987 Utah L. Rev. 703, 712. Courts, however, recognizing that emotional distress can easily be feigned, have limited recovery to those cases where the defendant's conduct is found outrageous, shocking, or "beyond all bounds of decency." *Id.* (citing Restatement (Second) of Torts § 46 comment d (1977)); *see also* Prosser, Law of Torts § 12, at 62 (4th ed. 1971)(recovery still limited to most extreme instances of violent attacks with high likelihood of shock or fright). What type of conduct constitutes "outrageous" conduct has not been clearly defined. *See generally* Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42, 51 (1982)(prohibited conduct under emotional distress tort not plainly defined). In fact, the significant feature of the tort of intentional infliction of emotional distress is that, compared to other intentional torts, it proscribes no clearly defined conduct. *See id.* (comparing intentional torts such as assault or battery which narrowly define proscribed conduct).

The last twenty years has witnessed a trend of pleading the independent torts of libel, invasion of privacy, and intentional infliction of emotional distress in suits evolving out of one alleged defamatory publication. *See generally* Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 Washburn L.J. 25-27 (1983). In *Hustler Magazine Inc. v. Falwell*, the Supreme Court addressed for the first time whether the same constitutional protections accorded a defamation defendant in a libel cause of action brought by a public figure are also enjoyed by the defendant in a cause of action brought for intentional infliction of emotional distress.

In *Hustler Magazine Inc. v. Falwell*, the United States Supreme Court held that a public figure plaintiff must meet the actual malice standard of *New York Times* to recover under the tort of intentional infliction of emotional

distress arising from the publication of a satirical ad parody. *See Hustler Magazine Inc. v. Falwell*, __ U.S. __, __, 108 S. Ct. 876, 882, __ L. Ed. 2d __, __ (1988). The Court stated that because no reasonable person would believe that the *Hustler* ad portrayed actual facts about Falwell, the parody contained no false statement of fact required to satisfy constitutional scrutiny under the *New York Times* standard. *See id.* at __, 108 S. Ct. at 882-83, __ L. Ed. 2d at __. The first amendment encourages public debate critical of public figures and protects even "vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.* at __, 108 S. Ct. at 880, __ L. Ed. 2d at __ (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Thus, without proof that the alleged defamatory statement also contained a falsehood, the public figure is precluded by the first amendment from recovering damages. *Id.* The Supreme Court refused to permit deviation from the *New York Times* standard upon the premise that an emotional distress claim attempts to redress emotional harm inflicted, not injury to reputation redressed under a libel cause of action. *See id.* at __, 108 S. Ct. at 881, __ L. Ed. 2d at __. The Fourth Circuit Court of Appeals held that as long as the public figure plaintiff established that the defendant made an "outrageous" statement knowingly or recklessly, the emotional distress claim is satisfied. *See Falwell v. Flynt*, 797 F.2d 1270, 1275 (4th Cir. 1986)(plaintiff need not prove publication made with knowledge or reckless disregard of its falsity as would add new element to emotional distress tort), *rev'd*, __ U.S. __, 108 S. Ct. 876, __ L. Ed. 2d __ (1988). The Supreme Court rejected this reasoning, holding that to abrogate the requirement that the alleged defamatory statement be proved false and permit recovery solely based upon the outrageousness of the publication and the motives of the speaker was constitutionally impermissible. *See Hustler Magazine*, __ U.S. at __, 108 S. Ct. at 880-81, __ L. Ed. 2d at __. Such an interpretation would not only unconstitutionally permit damage awards against speakers for true statements or pure opinions, but could also subject a speaker to damages merely upon a finding he acted with bad or ill motives. *See id.* at __, 108 S. Ct. at 881, __ L. Ed. 2d at __. The Supreme Court stated that "even when a speaker or writer is motivated by hatred or ill-will his expression [is] protected by the [f]irst [a]mendment." *Id.* at __, 108 S. Ct. at 880-81, __ L. Ed. 2d at __ (citing *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)). The Court in *Hustler Magazine* noted political cartoonists and satirists have historically played a prominent and important role in political debate, often transgressing the confines of good taste, and often acting with calculated intent to cause emotional harm to subjects of their portrayals. *See id.* __, 108 S. Ct. at 881, __ L. Ed. 2d at __. To permit liability against such individuals under a pejorative "outrageous" standard could permit juries to award damages based upon their own personal tastes or dislikes. *Id.* at __, 108 S. Ct. at 882, __ L. Ed. 2d at __. Imposing such a standard would contravene the Supreme Court's continuous refusal to permit damage awards solely on the basis that the "speech in question may have

an adverse emotional impact on the audience." *Id.* (citing *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982)).

In the unanimously decided case of *Hustler Magazine v. Falwell*, the Supreme Court reaffirmed the vitality of the first amendment by ensuring constitutional free speech protections even to offensive speech as long as such speech does not violate the *New York Times* standard. By refusing to permit recovery of damages under the tort of intentional infliction of emotional distress that clearly would have been precluded under a libel cause of action, the Court continues to accord defamation defendants of suits brought by public figures the first amendment protections recognized under *New York Times*. Most individuals may, and with good cause, view the *Hustler* ad as an opprobrious effecuation of constitutional free speech rights. However, permitting recovery under the tort of emotional distress would have nullified the constitutional protections clearly enunciated by *New York Times* and its progeny. First, damages could be recovered regardless of whether the alleged defamatory statement was true or a purely personal opinion. Second, the vague standard of outrageousness would permit juries to award damages based solely upon their own subjective standards of decency. Satirists would be burdened with the untenable standard of having to predict what a jury would find outrageous, and relegated to publicizing only unprovoking political cartoons—the antithesis of their intended purposes. The Supreme Court in *Hustler Magazine Inc. v. Falwell* correctly recognized the constitutional import of permitting damage recoveries under the tort of intentional infliction of emotional distress. Permitting a public figure to recover under the emotional distress claim absent a showing that the publication contained a false statement of fact would not only negate the necessity to plead a libel allegation to recover damages, but would essentially negate the first amendment protections guaranteed to defamation defendants under the first amendment. The *Hustler Magazine Inc. v. Falwell* case stands as assurance that the freedoms of speech guaranteed under the first amendment and recognized in *New York Times* will not merely be blindly applied, but will accord protection to even the most offensive speech, thusly ensuring freedoms of speech to us all.

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