HINSHAW

Alerts

Supreme Court Broadens First Amendment Protection Against State Tort Claims

March 10, 2011
Professional Lines Alert

In *New York Times vs. Sullivan,* 376 U.S. 254, 279-80 (1964), the Supreme Court recognized that the First Amendment provides a defense to defamation actions. The Court held that a public figure or public official may only sue for defamation involving a false statement of fact when the statement was made with knowledge of its falsity or with a reckless disregard for its truth. Subsequently, the Court applied the holding of *New York Times* to a claim of intentional infliction of emotional distress in *Hustler Magazine v. Falwell,* 485 U.S. 46, 55-56 (1988), concluding that "public figures and public officials" can not recover for intentional infliction of emotional distress absent a false statement of fact either made intentionally or with a reckless disregard for its truth.

In *Hustler Magazine,* the Supreme Court rejected the notion that the concept of "outrageousness," which is an element of the tort of intentional infliction of emotional distress, would provide sufficient protection to the First Amendment rights of a defendant. An "outrageousness" standard is inherently subjective and would permit a jury to potentially impose liability based on "their dislike of a particular expression." The Court reiterated that a person's speech does not lose the protection of the First Amendment simply because it is hurtful or offensive:

The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenent of the First Amendment that the government must remain neutral in the market place of ideas.

Thus, the Supreme Court's conclusion in *Snyder v. Phelps,* 2011 WL 709517 (U.S. Mar. 2, 2011) that defendants' conduct in picketing military funerals was protected by the First Amendment should come as no surprise. The picketing in question took place on public land, approximately 1,000 feet from the church where the funeral of Marine Lance Corporal Matthew Snyder was taking place. The picketers "peacefully" displayed signs bearing statements such as: "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys" and "You're Going to Hell." In summing up its reasoning as to why the First Amendment barred plaintiff's state law claims, the Court explained:

Attorneys

Steven M. Puiszis

Service Areas

Accountants Liability
Architects & Engineers Liability
Directors & Officers Liability
Insurance Agents & Brokers Liability
Litigators for the Profession®
Professional Liability
Securities Brokers' Liability
Technology Errors & Omissions

Speech is powerful, it can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. The choice requires that we shield [defendants] from tort liability for its picketing in this case.

Snyder is significant because the Supreme Court extended the First Amendment's protection to a claim brought by a person who would not be considered a public figure or public official under the rationale of *New York Times*—Lance Corporal Snyder's father. The Court also extended the protection of the First Amendment beyond actions for intentional infliction of emotional stress to include claims for the violation of plaintiff's privacy rights and for civil conspiracy. In doing so, the Court did not apply the test from *New York Times* and*Hustler Magazine,* but rather applied a test fashioned from First Amendment employee speech claims.

The Supreme Court in *Snyder* explained that in this context, whether the First Amendment protects speech turns on whether it addresses a matter of "public or private concern" because "speech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" The public versus private concern test was borrowed from a line of decisions addressing when a public employee's speech is protected by the First Amendment.

In making the determination as to whether a statement involves a matter of public or private concern, courts are instructed to examine the "content, forum and context" of the speech. In other words, a court will examine "what was said, where it was said, and how it was said." In *Snyder,* the Supreme Court found that the content of defendants' speech plainly involved a matter of public import rather than a purely private concern. The Court recognized that while defendants' messages "may fall short of refined social or political commentary," because they addressed the moral conduct of the United States, its military and the Catholic clergy, they raised broad issues of interest to society at large.

While the speech occurred in the context of a private funeral, the location where the picketing occurred, on a public street, appears to have tipped the scales in favor of the First Amendment's application. The Supreme Court noted that there was no pre-existing relationship or conflict between defendants and plaintiff that would suggest that defendants' speech on a public matter "was intended to mask an attack on [plaintiff] over a private matter. Ultimately, because defendants "conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street," the First Amendment was held to bar plaintiff's state law tort claims.

Practice Note

While the Supreme Court in *Snyder* characterized its holding as "narrow," the decision clearly extends the First Amendment's protection to potentially any type of tort claim brought in response to speech or expressive activities encompassed by the First Amendment.

It should be noted that *Snyder* did not involve a defamation claim and thus, the Supreme Court did not address how its First Amendment test might play out when a defamation claim is joined with other types of tort claims like those at issue in *Snyder*. The Court made no suggestion that it was displacing its test from *New York Times* for defamation actions. However, it is unclear whether the Court intends that the test applied in *New York Times* and *Hustler Magazine* should continue to be applied to any type of tort claim brought by a public figure and limit *Snyder* to tort claims brought against persons who are not public figures, or whether *Snyder's* test should be applied generally to any nondefamation tort claim brought by any plaintiff, even those who are considered public officials or public figures.

For further information, please contact Steven Puiszis or your regular Hinshaw attorney.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.