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Recent Developments: Falwell v. Flynt: New York Times "Actual Malice" Standard Distinguished in Action for Emotional Distress

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students, most of whom were minors, from lewd and indecent language in a school-sponsored setting.

The Supreme Court of the United States reversed. Chief Justice Burger, speaking for the majority, distinguished *Tinker* as markedly different from the facts in this case. Specifically, that the penalties imposed on Fraser were unrelated to any political viewpoint. Moreover, the Chief Justice emphasized that "[i]n upholding the student's right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker*, this Court was careful to note that the case 'did not concern speech or action that intrudes upon the work of the schools or the rights of other students." 106 S.Ct. at 3163. It was against this background that the Court considered the level of First Amendment protection accorded to Fraser's nomination speech.

The Court first discussed the role and purpose of the American public school system. The Court stated that the objectives of public education were to inculcate "fundamental values necessary to the maintenance of a democratic political system." *Id.* at 3164, (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). Conceding that these "fundamental values" included tolerance of unpopular views, both political and religious, the Court determined that "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 3164. Moreover, the Court declared that while the first amendment guarantees adults wide protection in matters of public verbal expression, it does not follow that because adults are not prohibited from using offensive forms of expression when making a political point, that children in a public school must be given the same latitude.

Secondly, the Court expressed unequivocally that one of the functions of public school education is "to prohibit the use of vulgar and offensive terms in public discourse." *Id.* at 3165. The Court reasoned that the "fundamental values necessary to the maintenance of a democratic political system" discourage the use of highly offensive terms. Furthermore, the Court indicated that the Constitution is void of any language which prohibits the states from deciding that certain expressions are inappropriate and subject to sanctions. Realizing that the inculcation of these fundamental values are truly the responsibility of the schools, the Court left the determination of what speech was appropriate in the classroom or assembly to the school board.

The Court then turned its attention to first amendment jurisprudence concerning limitations on free speech where the speech is sexually explicit and reaches an unlimited audience, especially an audience including children. The Court acknowledged that these cases recognize a concerned interest on the part of parents and school authorities "to protect children – especially those in a captive audience – from exposure to sexually explicit, indecent, or lewd speech." *Id.*; *See Ginsberg v. New York*, 390 U.S. 629 (1968); *Board of Education v. Pico*, 457 U.S. 853 (1982). In addition, the Court cited cases which recognize an interest "in protecting minors from exposure to vulgar and offensive spoken language." 106 S.Ct. at 3165; *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Thus, the Court concluded that the first amendment did not prevent the school district from suspending Fraser in response to his offensively lewd and indecent speech, and further concluded that to permit such a speech would "undermine the school's basic educational mission." 106 S.Ct. at 3166. Remarking that "[a] high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students," the Chief Justice concluded that "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." *Id.*

The Court's holding in *Fraser* dangerously limits a high school student's first amendment right to free speech. Giving school officials the unbridled discretion to apply the nebulous standard of "indecency" in controlling the speech of high school students, certainly increases the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in the public schools. Language considered "indecent" in one segment of society may be common, household usage in another. Freedom to be different in one's individual manner of expression is a core constitutional value. The first amendment reflects the considered judgment of the Founding Fathers that government shall not be permitted to use their power to control individual self-expression.

Finally, the Court characterizes Matthew Fraser as a "confused boy" whose "lewd, indecent, and offensive" speech could be "seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality." 106 S.Ct. at 3165. The Supreme Court obviously fails to consider the everyday environment that these students live in. Fraser was speaking not to children, but to young adults. Most high school students are beyond the point of being sheltered from the many sights and sounds they encounter everyday. Although school officials and parents may be offended by certain utterances and actions, high school students, as young adults, should be able to determine for themselves whether such conduct is inappropriate and whether it should be disciplined.

–Steven M. Schrier

Falwell v. Flynt: NEW YORK TIMES "ACTUAL MALICE" STANDARD DISTINGUISHED IN ACTION FOR EMOTIONAL DISTRESS

In *Falwell v. Flynt, Hustler Magazine, Inc., and Flynt Distributing Co., Inc.*, ____ F.2d ____ (4th Cir. 1986), the United States Court of Appeals for the Fourth Circuit held that the level of protection available to a publisher in a suit by a public figure for emotional distress arising from a false publication is met by the recklessness standard of the tort itself. The court further held that a *New York Times v. Sullivan*, 376 U.S. 254 (1964), analysis is not required. In so holding, the court affirmed the decision by the United States District Court for the Western District of Virginia.

In *Falwell*, the lawsuit arose out of an "ad parody" that appeared in *Hustler* magazine, which attempted to satirize an advertising campaign for Campari Liqueur. In the actual Campari advertisements, celebrities talk about their "first time," meaning their first encounter with Campari Liqueur, but there is a double entendre with a sexual connotation. In the Falwell parody, he is the celebrity in the advertisement which contains his photograph and an interview which is attributed to him. In this interview, Falwell allegedly details an incestuous rendezvous with his mother in an outhouse in Lynchburg, Virginia. Falwell's mother is portrayed as a drunken and immoral woman and he is portrayed as a hypocrite and a habitual drunkard. Falwell filed suit in the United States District Court for the Western District of Virginia alleging three theories of liability: libel, invasion of privacy under Va. Code § 8.01-40 (1984), and intentional infliction of emotional distress. The district court dismissed Falwell's invasion of privacy claim and the jury returned a verdict for the defendants on the libel claim, finding that no reasonable man would believe that the parody was describing actual facts about Falwell. On the emotional distress claim, the jury

returned a verdict against Flynt and *Hustler* but not Flynt Distributing Co. *Falwell*, ____ F.2d at ____.

On appeal, the defendants made the constitutional argument that since Falwell is a public figure, the "actual malice" standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), must be met before he can recover for emotional distress. In *New York Times*, the Supreme Court determined that libel actions brought by public officials against the press can have a chilling effect on the press, inconsistent with the first amendment. Therefore, when a public official sues for libel based upon a tortious publication, the defendant is entitled to a degree of first amendment protection. *Falwell*, ____ F.2d at ____. This protection was extended to cases in which the plaintiff is a public figure. *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967). The court of appeals determined that "since Falwell is a public figure and the gravamen of the suit is a tortious publication, the defendants are entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in Falwell's claim for libel." *Falwell*, ____ F.2d at ____. The court of appeals reasoned that "to hold otherwise would frustrate the intent of *New York Times* and encourage the type of self censorship which the Supreme Court sought to abolish." *Id.* at ____.

The court of appeals determined that the issue then becomes what form the first amendment protection should take in an action for intentional infliction of emotional distress. Flynt and *Hustler* argued that Falwell must prove that the advertisement was published with ". . . knowing falsity or reckless disregard for the truth," which is the "actual malice" standard of *New York Times v. Sullivan. Id.* at ____.

Although the court agreed that the same level of protection is due the defendants, it did not believe that the literal application of the "actual malice" standard is appropriate in an action for intentional infliction of emotional distress. *Id.* at ____. The court rationalized that when the "actual malice" standard is applied to a defamation action, no elements of the tort are altered. Therefore, the "actual malice" standard merely increases the level of fault the plaintiff must prove in order to recover in an action based upon a publication. *Id.* at ____. If the plaintiff was required to prove the defendant's knowledge of falsity or reckless disregard of the truth in an action for intentional infliction of emotional distress, it would add a new element to this tort and significantly alter its nature. *Id.* at ____.

The court of appeals found that the *New York Times* standard was misread by the defendants because their argument emphasized the language "falsity or disregard for the truth." Properly read, *New York Times* focused on culpability, and the emphasis of the "actual malice" standard is "knowing . . . or reckless." *Id.* at ____.

The court of appeals analyzed the first of the four elements of intentional infliction of emotional distress under Virginia law, which requires that the defendant's misconduct be intentional or reckless. This element is precisely the level of fault that *New York Times* requires in an action for defamation. *Id.* at ____. The court found that "the first amendment will not shield intentional or reckless misconduct resulting in damage to reputation, and neither should it shield such misconduct which results in severe emotional distress." *Id.* at ____.

The court of appeals further held that when the first amendment requires the application of the "actual malice" standard, the standard is met when the jury finds that the defendant's "intentional or reckless misconduct" has proximately caused the alleged injury. Here, the jury made such a finding and thus the constitutional standard was satisfied. *Id.* at ____.

The *Falwell* decision clearly distinguishes recovery for emotional distress from recovery for defamation under the *New York Times* standard and emphasizes that the "actual malice" standard focuses on the defendant's alleged "intentional or reckless" conduct, not whether the plaintiff can prove the defendant's "knowledge of falsity or reckless disregard for the truth."

–J. Russell Fentress IV

Unkle v. Unkle: MARYLAND DEFINES MARITAL PROPERTY IN PERSONAL INJURY SUIT

In *Unkle v. Unkle*, 305 Md. 587, 505 A.2d 849 (1985), the Maryland Court of Appeals for the first time considered the issue of whether a spouse's inchoate personal injury claim which accrued during marriage was marital property within the contemplation of the Maryland Family Law Article's definition of marital property.

The facts of the case are uncontroverted. Gypsy Jo and William Edward Unkle were divorced a vinculo matrimonio on November 11, 1984, by the Circuit Court for Carroll County. In awarding marital property to Gypsy Jo, the court also awarded her 20% of any monies received by William from a pending personal injury case stemming from an injury received in August of 1983. The court awarded the money on an "if, as and when paid basis."

The parties were separated at the time of the accident. William resided with his parents and received no assistance from Gypsy. Although William had retained counsel to represent him in the personal injury case, no suit had been filed prior to the issuance of the divorce decree.

William appealed the circuit court's decision to the court of special appeals and the court of appeals granted certiorari prior to that courts consideration of the issue.

The court first undertook to define the meaning of the word property, noting that the Maryland cases have generally given the word a very broad definition. Specifically, the court quoted *Deering v. Deering*, 292 Md. 115, 437 A.2d 883 (1981), wherein the court defined property as "everything which has exchangeable value or goes to make up a man's wealth–every interest or estate which the law regards of sufficient value for judicial recognition." *Unkle*, 305 Md. at 590.

In *Deering*, the court recognized that a spouse's unmatured, fully vested pension rights were a form of marital property subject to equitable distribution under the Maryland statute. The court concluded that a spouse's pension right, "to the extent accumulated during the marriage", was a form of marital property and subject to distribution. The court specifically noted that a pension right was a contract right, derived from the terms of an employment contract. The court noted that a contract right is "Not an expectancy but a chose in action, a form of property." *Id.* at 591.

In addition, the court noted that in *Archer v. Archer*, 303 Md. 347, 493 A.2d 1074 (1985), it held that a professional de-