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Recent Developments: NOW v. Operation Rescue: Injunction Prohibiting Blocking Access to Abortion Facilities in Violation of Civil Rights Conspiracy Statute Upheld

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("EAJA") to the language of Rule 11 which it considered analogous.

Under the EAJA, the federal government must be "substantially justified" for its action or inaction. If litigants are forced to challenge the federal government's activities in court, attorney fees may be awarded against the government unless its activities were "substantially justified." A district court's decision on that issue is reviewed under an abuse of discretion standard. *Id.* at 2459-60 (citing *Pierce v. Underwood*, 487 U.S. 552, 559-60 (1988)).

The Court reasoned that determining whether an action was "substantially justified" under the EAJA was analogous to determining whether an attorney's complaint was factually well-grounded and legally tenable for Rule 11 purposes. Both situations require fact-specific findings which, according to the Court, the district courts are in a better position to make. Furthermore, district courts are "best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence." *Id.* at 2460. Since an abuse of discretion standard had been applied to district court findings under the EAJA, the Court held that the same standard of review was appropriate for district court findings under Rule 11. *Id.* at 2460-61.

Finally, the Court considered the petitioner's contention that the court of appeals erroneously found that Rule 11 sanctions may include attorney fees incurred as a result of an appeal of the sanction. The Court interpreted the language of Rule 11 and the drafter's comments as limited to those costs directly incurred as a result of the filing of the frivolous suit. The Court reasoned that the attorney fees on appeal did not stem from the filing of the complaint, but rather from the imposition of the sanctions by the district court. *Id.* at 2461. In that Rule 38 provides attorney fees and damages for wrongful appeal, the Court reasoned, the scope of Rule 11 is naturally limited to fees connected with the filing of the complaint. *Id.* at 2462. Following the American rule that the prevailing litigant would not ordinarily be entitled to attorney fees, the Court reversed on this issue. *Id.*

In *Cooter & Gell*, the decision of the

Court clarifies the manner in which Rule 11 should be applied by district courts. Now, even if a plaintiff voluntarily dismisses a suit, the district court may impose sanctions for violation of Rule 11 on both the plaintiff and the plaintiff's attorney, subject only to review for abuse of discretion.

— Laura Campbell

***NOW v. Operation Rescue*: INJUNCTION PROHIBITING BLOCKING ACCESS TO ABORTION FACILITIES IN VIOLATION OF CIVIL RIGHTS CONSPIRACY STATUTE UPHeld**

In *NOW v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit held that pro-life demonstrators could be enjoined from blocking entry to an abortion clinic on the ground that it denied women their constitutional right to interstate travel in violation of the civil rights conspiracy statute. The court affirmed the district court injunction on the ground that there was no abuse of discretion.

The plaintiffs/appellees (hereinafter "NOW") were nine clinics that provided abortion-related services and five organizations devoted to preserving women's rights to obtain abortions. Defendants/appellants (hereinafter "Operation Rescue") were Operation Rescue, a pro-life organization, and six individuals who opposed abortion and sought to have the procedure made illegal.

NOW filed a motion for a temporary restraining order in the United States District Court for the Eastern District of Virginia. They sought to enjoin Operation Rescue from blocking entry to and exit from facilities that offered abortion and abortion-related services. The motion was filed, and granted, in anticipation of rescue demonstrations which were scheduled to take place in the immediate future in the Washington metropolitan area. Although the court enjoined the defendants from "trespassing on, blockading, impeding or obstructing access to or egress from the [listed] premises," it declined to extend the injunction to the activities that tended to "intimidate, harass or disturb patients or potential patients." *Id.* at 584.

The district court concluded that the defendants' activities violated the provisions of 42 U.S.C. §1985(3) (1988) by depriving women seeking abortions and abortion-related services of their constitutional right to travel interstate in search of medical facilities. *Id.* To bring a successful action under §1985(3), the court noted, a plaintiff must prove a conspiracy to deprive any person, or class of persons, of the equal protection of the laws, or of the equal privileges and immunities under the law. In addition, the plaintiff must prove that the conspirators committed acts in furtherance of their goals, thus causing injury to persons or property, and depriving any right or privilege of a citizen of the United States. *NOW v. Operation Rescue*, 914 F.2d at 584 (citing 42 U.S.C. §1985(3)). The district court reasoned that rescue demonstrations were acts in furtherance of a conspiracy which interfered with the right to travel in that many women in the Washington metropolitan area traveled interstate to obtain abortions and abortion related services. *Id.* at 585.

Finally, the district court concluded that injunctive relief was appropriate because: "(i) there was no adequate remedy at law; (ii) the balance of equities favored the plaintiffs; and (iii) the public interest was served by granting the injunction." *Id.*

The defendants appealed the order, arguing that there was insufficient evidence to grant relief against three of their members. *Id.* at 586. NOW cross-appealed on the ground that the scope of the injunction was too narrow, contending that the district court abused its discretion in limiting the injunction to Northern Virginia and for refusing to grant the requested relief on a permanent basis. *Id.* The arguments of both parties were duly noted, but the United States Court of Appeals for the Fourth Circuit affirmed the ruling of the lower court.

Citing the ruling of the district court, the fourth circuit court agreed that the defendants' conduct crossed the line from persuasion to coercion, denying women the exercise of legally protected rights. *Id.* at 585. Further, the court noted that the district court holding was consistent with at least six other circuit courts of appeals which have similarly

interpreted the "purpose" element of §1985(3) such that "gender-based animus" fulfilled its terms. *Id.* The circuit court also referred to *New York NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990). In *New York NOW*, a factually similar case, the second circuit court of appeals held that blocking access to abortion facilities that served interstate clientele violated the constitutional right to travel. *NOW v. Operation Rescue*, 914 F.2d at 585.

In determining whether the district court acted properly in granting the injunction, the circuit court noted *Prendergast v. New York Tel. Co.*, 262 U.S. 43, 50-51 (1923), as providing the appropriate standard of review. In *Prendergast*, the Court held that the factors to be considered in reviewing whether there was an abuse of discretion are the entry, duration, and scope of the injunction. The circuit court held there was no abuse of discretion in *NOW v. Operation Rescue* because the lower court ruling substantially conformed to the rulings of other circuit courts on the relevant questions of law. *NOW v. Operation Rescue*, 914 F.2d at 585. The court of appeals also found that the scope of the injunction was reasonable because, although the district court limited the injunction to Northern Virginia for a definitive period of time, it was implicit in the district court opinion that the relief was granted against particular individuals and particular acts. The circuit court also affirmed the district court's decision not to expand the injunction to encompass activities tending to "intimidate, harass or disturb patients or potential patients" on the grounds that those activities were protected by the first amendment. *NOW v. Operation Rescue*, 914 F.2d at 584. Members of Operation Rescue were free, by verbal means, to attempt to persuade women not to seek the services of abortion facilities and to "'impress upon members of society' the moral rightness and intensity of their opposition to abortion." *Id.* at 586 (quoting *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1488 (E.D. Va. 1989)).

By its ruling, the United States Court of Appeals for the Fourth Circuit established that right-to-life demonstrators could be enjoined from blocking access

to abortion and abortion related facilities located in the fourth circuit jurisdiction. In addition, *NOW v. Operation Rescue* is significant as it holds that a woman's right to travel cannot be infringed upon by demonstrators' first amendment rights to freedom of speech.

—Michael Scott Cohen

***Illinois v. Rodriguez*: WARRANTLESS ENTRY VALID IF BASED ON THE REASONABLE BELIEF THAT A CONSENTING THIRD PARTY POSSESSED COMMON AUTHORITY OVER THE PREMISES**

The Supreme Court recently expanded the scope of third party consent upon which government authorities may rely when entering a defendant's home. In *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990), the Supreme Court held that a warrantless entry by police was valid when based upon the consent of a third party whom police reasonably believed possessed common authority over the premises.

Gail Fischer, who previously lived with Edward Rodriguez in his apartment, was assaulted by Rodriguez and summoned police to her mother's home to report the assault. Facilitating Rodriguez's arrest, Fischer accompanied police to Rodriguez's apartment and consented to their entry using a key that she possessed. The police had neither an arrest warrant for Rodriguez nor a search warrant for the apartment. The police believed that Fischer had authority to consent based upon several references to the apartment as "our" apartment and her statement that she had clothing and furniture in the apartment. Upon entering Rodriguez's apartment, the police observed drug paraphernalia and cocaine in plain view and, discovering Rodriguez asleep in his bedroom, they arrested him. *Rodriguez*, 110 S. Ct. at 2797 (1990).

Rodriguez moved to suppress all evidence seized at the time of the arrest, claiming that Fischer had vacated the apartment several weeks earlier and thus no longer possessed authority to consent to the entry. The trial court agreed and granted Rodriguez's motion to suppress. The Appellate Court of Illinois affirmed, and the Illinois Supreme Court denied the state's Petition for Leave to Appeal. The United States

Supreme Court granted certiorari. *Id.* at 2797.

The Court began its analysis by examining *United States v. Matlock*, 415 U.S. 164 (1974) and the fourth amendment's general prohibition against warrantless entry into a person's home. *Rodriguez*, 110 S. Ct. at 2797 (citing *U.S. v. Matlock*, 415 U.S. 164 (1974)). In *Matlock*, police officers entered premises without a warrant but with the consent of a third party who, because of joint access or control of the premises, possessed common authority to consent to the entry. *Id.* at 2797 (1990) (citing *U.S. v. Matlock*, 415 U.S. at 171 (1974)). The Court upheld the validity of the police entry, reasoning that when an individual permits another joint access to or control of his home, his expectation of privacy is lowered. However, the *Matlock* Court left unresolved the issue of the validity of a warrantless entry based upon consent of a third party, whom the police reasonably believe has common authority to consent. *Id.* at 2801 (1990) (citing *U.S. v. Matlock*, 415 U.S. at 177 (1974)).

The *Rodriguez* Court, addressing the unresolved issue in *Matlock*, held that the reasonableness, and not the correctness, of the police officers' belief in the third party's authority to consent is the standard by which fourth amendment rights should be measured. *Id.* at 2800. The Court found *Stoner v. California*, 376 U.S. 483 (1964) consistent with its reasoning in *Rodriguez*. *Rodriguez*, 110 S. Ct. at 2800 (1990). In *Stoner*, the Court held that police improperly entered Stoner's hotel room because it was unrealistic to believe in the "apparent authority" of a hotel clerk. *Id.* at 2801 (citing *Stoner v. California*, 376 U.S. 483 (1964)).

In distinguishing *Rodriguez* from *Stoner*, the Court emphasized that it was unreasonable for police to believe that a hotel clerk possessed common authority to consent to an entry, whereas Fischer may have appeared to have such authority because of her joint control. *Id.* at 2801. The Court, therefore, remanded the case for a determination as to whether the police had sufficient grounds to support a reasonable belief that Fischer had authority to consent. *Id.* at 2801. If on remand it was determined that the police officers were reasonable in believing that Fischer had authority,