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# Recent Developments: Rice v. Paladin Enters. Inc.: The First Amendment Does Not Act as an Absolute Bar to a Finding of Liability in a Civil Aiding and Abetting Cause of Action

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## *Rice v. Paladin Enters. Inc.:*

In a case of first impression, the United States Court of Appeals for the Fourth Circuit in *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4<sup>th</sup> Cir. 1997), held that the First Amendment does not pose a bar to a finding of civil liability against a publisher in a state wrongful death action. While acknowledging that the U.S. Constitution does offer protection for speech representing the abstract advocacy of lawlessness, the court found that this shelter is not absolute and the speech engaged in by Paladin Press does not warrant protection.

On March 3, 1993, James Perry ("Perry") murdered Mildred Horn, her eight year old quadriplegic son Trevor, and Trevor's nurse. Perry was hired to commit these murders by Mildred Horn's ex-husband, Lawrence Horn, who hoped to receive the two million dollars that his son received as settlement for the injuries which had left him paralyzed. In preparation for these murders, Perry closely followed the directions contained in *Hit Man: A Technical Manual for Independent Contractors* ("*Hit Man*") and *How to Make a Disposable Silencer, Vol II*, both of which are published by Paladin Enterprises, Inc. ("Paladin").

Upon discovering the pivotal role that *Hit Man* played in the execution of this crime, the relatives and representatives of the murder victims brought a wrongful death action against Paladin. The complaint alleged that Paladin aided and abetted Perry in the commission of these

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murders through the publication of *Hit Man* with its explicit instructions on how to commit and cover-up a contract murder. The United States District Court for the District of Maryland granted Paladin's motion for summary judgment and held that the plaintiffs' claims were barred by the First Amendment as a matter of law. The plaintiffs appealed, and the United States Court of Appeals for the Fourth Circuit granted certiorari.

The court of appeals opened its opinion by quoting various passages of *Hit Man* that are representative of the instructions within its pages. *Rice*, 128 F.3d at 235-39. The court then specifically outlined how Perry, relying on these instructions, committed the murders and then attempted to cover them up. *Id.* at 239-241.

Beginning its analysis, the court examined the distinction between protected speech and that which is afforded no constitutional protection. *Id.* at 243-44. The court first referred to *Brandenburg v. Ohio* as the leading case recognizing that "abstract advocacy of lawlessness

is protected speech under the First Amendment." *Id.* at 243 (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). The court of appeals determined that this right, however, is not absolute. *Id.* at 243. The court recognized that speech which "is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated. . . ." *Id.* In support of this, the court looked to two Supreme Court decisions. *Id.* In *Giboney v. Empire Storage & Ice Co.*, the Supreme Court rejected "a First Amendment challenge to an injunction forbidding unionized distributors from picketing to force an illegal business arrangement." *Id.* (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949)). The court next cited *Brown v. Hartlage* as a recent example of the Supreme Court's decision not to allow a First Amendment defense when the activity sought to be protected involved illegal activity. *Id.* at 243, 244 (citing *Brown v. Hartlage*, 456 U.S. 45 (1982)).

The court of appeals next analyzed whether the First Amendment posed a bar to liability for aiding and abetting a criminal offense. *Id.* at 244. In a case the court of appeals called "indistinguishable in principle" from the instant case, the Ninth Circuit held that the First Amendment "does not provide publishers a defense as a matter of law to charges of aiding and abetting a crime. . . ." *Id.* at 244 (citing *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982)).

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Furthermore, the Fourth Circuit previously held that the First Amendment offered no protection to speech which was not abstract in its criticism of tax law, but instead urged people to file false tax returns, with the expectation that this advice would be heeded. *Id.* at 245, 246 (citing *United States v. Kelly*, 769 F.2d 215, 217 (4th Cir. 1985)). The court of appeals, through *Barnett* and *Kelly*, justified its analysis that speech which is found criminally liable may likewise be subjected to civil liability. *Id.* at 247.

The court then identified two possible qualifications to this conclusion. *Id.* at 247. The first involved a "heightened intent requirement" to prevent the punishment or abolishment of innocent and lawfully useful speech. *Id.* The court stated that in some contexts, foreseeability or knowledge that the offered information may be used for an improper purpose was not enough to impose liability. *Id.* The court then distinguished the case at bar from this exception by implying that liability is not absolved when "those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment." *Id.* at 248.

The second qualification identified by the court was that the First Amendment imposed similar limitations on the imposition of civil liability for abstract advocacy as it would for the imposition of criminal punishment for the same type of speech. *Id.* at 248-49. Because the court firmly believed that Paladin's speech was "so comprehensive and detailed" in its

narration and instruction on murder, the speech, under no circumstances could be considered abstract advocacy, and therefore this qualification was inapplicable. *Id.* at 249. After determining that the Supreme Court has left unprotected the type of speech *Hit Man* delivered, the court held "that the First Amendment [did] not pose a bar to the plaintiffs' civil aiding and abetting cause of action against Paladin Press." *Id.* at 250.

Turning its focus to the analysis of Maryland law, the court of appeals next identified two errors committed by the district court when it ruled in favor of Paladin. *Id.* The first error was the district court's failure "to realize that Maryland does recognize a civil cause of action for aiding and abetting" at the time of its initial ruling. *Id.* at 250-51. The court, after discussing the intent standard implicit in Maryland's aiding and abetting civil tort law, determined that Maryland would allow a cause of action in the instant case. *Id.* at 251-52.

Additionally, Paladin stipulated that it intended and had knowledge that *Hit Man* would be used by criminals to commit murder. *Id.* at 252-53. Moreover, Paladin conceded that it engaged in a marketing strategy to attract and assist these individuals in the pursuit of this information. *Id.* at 253-54. Therefore, the court held that a reasonable jury could find that Paladin possessed the requisite intent under Maryland law as well as the heightened First Amendment standard. *Id.* at 255.

The second error identified by the court was the district court's

misunderstanding of the Supreme Court's holding in *Brandenburg*. *Id.* at 264. The court of appeals emphasized that Paladin's speech, because it was so detailed and methodical in its explanations and instructions on how to plan, commit, and cover-up the crime of murder, was not abstract speech and therefore could be afforded no protection by the First Amendment. *Id.* at 256. In explanation, the court examined *Hit Man* chapter by chapter, and concluded that the book published by Paladin did not contain the character of speech that *Brandenburg* sought to protect. *Id.* at 262.

By holding that the First Amendment would not shield Paladin from civil liability, the Court of Appeals for the Fourth Circuit clarified the distinction between speech that is afforded constitutional protection and that which is not. In stark and compelling language, the court found that *Hit Man* served no legitimate purpose but instead gave specific instructions on reprehensible criminal conduct. While the ramifications from this holding have yet to be seen, the court should be mindful of the slippery slope which it is approaching. The First Amendment is a fundamental principle of our constitutional system, and it allows for the free flow of ideas and discussion. In most circumstances, this privilege to speak one's mind occurs without the threat of legal repercussions. It is for these core constitutional values that, if not rigidly construed, this landmark decision will open avenues of tort liability many thought closed.