Ninth Circuit Holds Blogger Entitled to Protection Under Gertz

Reverses $2.5 Million Verdict and Remands for New Trial

By Michael K. Cantwell

In a case involving critical comments on a blog that had previously attracted widespread attention for having been adjudicated on a strict liability basis, the Ninth Circuit has explicitly held that the constitutional limitations on defamation claims applicable under *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974), are not limited to cases involving institutional media defendants. *Obsidian Finance Group, LLC v. Cox*, No. 12-35238 (9th Cir., Jan.17, 2014) (Alarcón, Smith, Hurwitz, JJ.).

Reversing the district court's refusal to apply *Gertz* to the defendant blogger, as well as its holding that her postings (including allegations of criminal activity) had not involved matters of public concern, the appellate court remanded the case for a new trial.

The court did not reach the most far-reaching of defendant's contentions, namely, that *Gertz* applies even to speech that is purely a matter of private concern. That latter issue was explored in a MLRC Bulletin article. *See* Michael K. Cantwell, "Exploring the Issue of 'Strict Liability' for Defamation," MLRC Bulletin, 2012:3 (December 2012), hereafter "Exploring 'Strict Liability' for Defamation."

The jury awarded compensatory damages in the amounts of $1.5 million for Padrick and $1 million for Obsidian.

Finally, the Ninth Circuit affirmed the lower court's rulings that (1) plaintiffs are not public officials required to prove constitutional malice as a prerequisite to recovery and (2) other of the defendant's allegedly defamatory statements are nonactionable expressions of opinion.

Background

Plaintiff Kevin Padrick is a senior principal with plaintiff Obsidian Finance Group, LLC ("Obsidian"), an advisory and investment firm that was hired by Summit Accommodators, Inc. ("Summit"), in connection with a contemplated bankruptcy. After Summit filed for bankruptcy, Padrick was appointed Chapter 11 trustee. Because Summit had misappropriated funds from clients, Padrick's principal task was to marshal Summit's assets for the benefit of those clients. Slip op. at 3-4.

Defendant Cox published numerous posts on several web sites she'd created, accusing Padrick and Obsidian of engaging in a variety of illegal activities in connection with the Summit bankruptcy. Pointing to their hyperbolic language and inability to be proven true or false, the trial court held all but one of the posts to be non-actionable expressions of opinion. However, the court found several "fairly specific allegations" in a lengthy posting published by Cox on December 25, 2010 (the "December 25 blog post") that could be understood "to imply a provable fact assertion" and allowed that claim to proceed to trial. *Id*. at 4.

In a pre-trial memorandum, Cox (at that point proceeding *pro se*) argued that, because the blog postings involved matters of public concern, the plaintiffs were required to prove negligence in order to recover for defamation and actual malice in order to recover presumed damages. Alternatively she argued that plaintiffs were public figures required to prove actual malice as a prerequisite to any recovery. *Id*. at 5.

The district court rejected both arguments and directed the jury that "[d]efendant's knowledge of whether the statements at issue were true or false, and defendant's intent or purpose in publishing those statements, are not elements of the claim and are not relevant to a determination of liability." *Id*. at 5-6. Cox neither proposed jury instructions of her own nor objected to the court's instructions.

The jury awarded compensatory damages in the amounts of $1.5 million for Padrick and $1 million for Obsidian. Following the verdict, and now represented by noted constitutional scholar Eugene Volokh, Cox moved for a new trial. Once again, the district court rejected her arguments that the plaintiffs were public figures and that the December 25 blog post involved matters of public concern. *Id*. at 6. The district court also rejected a newly raised argument that

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the plaintiffs were public officials. *Obsidian Finance Group, LLC v. Cox*, 2012 WL 1065484, Slip at *3.

Both parties appealed, Cox from the denial of her motion for a new trial and the plaintiffs from the district court's refusal to submit Cox's other blog posts to the jury.

Cox argued that the district court had erred in allowing liability to be imposed without a showing of fault or actual damages and in ruling that the plaintiffs were not public officials. She did not contest the district court's ruling that the December 25 blog post contained an assertion of fact or the jury's verdict that the post was false and defamatory. She also did not contest the district court's holding that the plaintiffs were not public figures.

Ninth Circuit Decision

The court began by rejecting plaintiffs' argument that Cox had waived her First Amendment objections to the jury instructions by refusing to object to them prior to their submission to the jury. Because the district court had been fully informed of (and had explicitly rejected) Cox's First Amendment arguments at the time, further objection was unnecessary to preserve them. *Id*. at 7-8.

The court then rejected plaintiffs' claim that *Gertz* is limited to suits against the institutional media. Not only was there was no such explicit requirement in *Gertz*, but the Supreme Court has repeatedly refused to afford greater protection to the institutional media than other defendants in non-defamation contexts. *Id*. at 9-10 (*citing Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Cohen v. Cowles Media Co*., 501 U.S. 663 (1991); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Henry v. Collins*, 380 U.S. 356 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). And in *Citizens United v. Federal Election Commission*, the Court specifically noted: "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." 558 U.S. 310, 352 (2010).

Although the appellate court concluded by joining its sister circuits in holding that *Gertz* is not limited to institutional speakers, this was only the first step in deciding the appeal. Plaintiffs argued – and the court below had held – that the *Gertz* negligence standard was inapplicable because the December 25 blog post was not on a matter of public concern. The trial verdict and damage award would stand unless the Ninth Circuit either held that the speech involved a matter of public concern or that *Gertz* applies even to speech on matters of private concern.

The Supreme Court had yet to address the applicability of the *Gertz* negligence standard in the private-private context, having considered only on the prong of *Gertz* that requires proof of actual malice as a prerequisite to recovery of presumed or punitive damages (and holding such a requirement inapplicable in the private-private context). *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

Because the speech involved a matter of public concern, the district court had erred by failing to instruct the jury that it could not find Cox liable for defamation unless it found she was negligent and that it could not award presumed damages without finding that she acted with actual malice.

However, in a decision cited by Cox in her brief, the Ninth Circuit had previously stated that negligence is a prerequisite to recovery even to speech that is not on a matter of public concern. *See Newcombe v. Adolf Coors Co*., a 157 F.3d 686, 694 n.4 (9th Cir. 1998). ("A private person who is allegedly defamed concerning a matter that is not of public concern need only prove, in addition to the requirements set out by the local jurisdiction, that the defamation was due to the negligence of the defendant.") The statement was dictum because the panel had already ruled that the challenged language was not libelous on its face and plaintiff had failed to prove special damages, as required under the California defamation statute. 157 F.3d at 695.

Rather than revisit this issue, the Ninth Circuit took what would seem the less controversial route of ruling that the December 25 blog post qualified as a statement on a matter of public concern. In support, the court cited various of its prior holdings as well as decisions from its sister circuits that "[p]ublic allegations that someone is involved in crime generally are speech on a matter of public concern." *Id*. at 13.

The court went on to explain that Cox's allegations were similarly a matter of public concern, noting that plaintiffs had been hired to advise "a company that had defrauded its investors through a Ponzi scheme" prior to Padrick's

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appointment as a Chapter 11 in connection with the company's bankruptcy, and that Cox's posts questioned whether plaintiffs "were failing to protect the defrauded investors because they were in league with their original clients." *Id*. at 13-14.

Finally, and in contrast to the speech held to be on a matter of private concern in *Dun & Bradstreet*, the December 25 blog post was not "solely in the interest of the speaker and its specific business audience" but rather was published to the public at large. Because the speech involved a matter of public concern, the district court had erred by failing to instruct the jury that it could not find Cox liable for defamation unless it found she was negligent and that it could not award presumed damages without finding that she acted with actual malice. *Id*. at 14.

However, the court rejected Cox's claim that plaintiffs were "tantamount to public officials" because of Padrick's status as a court-appointed bankruptcy trustee, holding that he "was neither elected nor appointed to a government position, and he did not exercise 'substantial . . . control over the conduct of governmental affairs." *Id*. at 15 (*citing Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)).

Finally, the court rejected the plaintiffs' cross-appeal that Cox's other blog posts – including, *inter alia*, allegations that plaintiffs had engaged in "illegal activity," "corruption," "fraud," "tax crimes," and "fraud against the government" and may have "hired a hit man to kill her" – were non-actionable statements of opinion.

Applying the Ninth Circuit's three-part test for determining "whether a statement contains an assertion of objective fact," *see Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), the court found that the general tenor of the other blog posts as well as her use of extreme and hyperbolic language negated the impression she was asserting objective facts, and that, "in the context of a non-professional website containing consistently hyperbolic language," the other blog posts were "not sufficiently factual to be proven true of false." *Id*. at 16-17.

Discussion

Although the court declined to express a view on the cutting edge issue of whether *Gertz* applies in the private-private context, a holding that *Gertz* is not limited to the institutional media and that blog posts accusing a court-appointed trustee of criminality are speech on a matter of public concern is far less likely to be questioned than a holding announcing that *Gertz* applies even to speech on matters of private concern.

Nonetheless, there are still aspects of this case that would present less than an ideal context for any further appeal. Indeed, the Ninth Circuit itself raised questions about Cox and her posts, noting that "Cox apparently has a history of making ... allegations [of "fraud, corruption, money-laundering, and other illegal activities"] and seeking payoffs in exchange for retraction." *Id*. at 4. Moreover, this unattractive set of facts might also not be the ideal context in connection with the Ninth Circuit's somewhat cursory disposition of the plaintiffs' claim that Cox's other posts involved statements of fact and should have been submitted to the jury.

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