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Court of Appeals
Division I
State of Washington

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

WASHINGTON LEAGUE FOR INCREASED TRANSPARENCY & ETHICS, a Washington non-profit corporation, Appellants, v. FOX NEWS, FOX NEWS GROUP, FOX NEWS CORPORATION, RUPERT MURDOCH, AT&T TV, COMCAST, Respondents.	No. 81512-1-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, A.C.J. — The Washington League for Increased Transparency and Ethics (WASHLITE) challenges the dismissal of its lawsuit against the Fox Corporation (Fox) in which it alleged that Fox television personalities violated Washington's Consumer Protection Act[1] (CPA) by making false statements on-air about the COVID-19 pandemic. Because the First Amendment to the United States Constitution bars WASHLITE's action, we affirm the dismissal of the lawsuit. We reverse the cost award.

[1] RCW ch. 19.86.

FACTUAL BACKGROUND

Beginning in early 2020, the coronavirus spread rapidly throughout Washington and the rest of the country, killing hundreds of thousands and forcing the widespread closure of businesses, schools, social programs, and the suspension of court proceedings. The impact of the disease was sweeping and devastated our communities and economy. Predictably, the pandemic and local, state, and federal government responses to it became the subject of extensive conversation and debate at home, in newspapers, on internet forums, and on cable news programs. Fox, a program content provider in Washington, participated in this debate.

On April 2, 2020, WASHLITE brought this lawsuit, alleging that Fox hosts and television personalities[2] violated the CPA by making statements, on-air, downplaying the danger posed by the coronavirus, describing the pandemic as a "hoax," and accusing government officials and media organizations of exaggerating the danger posed by COVID-19 in an attempt to undermine former President Donald J. Trump.[3] WASHLITE sought to enjoin Fox from airing any further misinformation about COVID-19, to require Fox to retract prior false statements, and to pay damages to unnamed "John Doe" consumers.

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[2] The complaint identifies statements made by Sean Hannity, Geraldo Rivera, Laura Ingraham, Trish Regan, Judge Jeanine Pirro (ret.), Pete Hegspeth, Matt Schlapp, Ainsley Earhardt, and others.

[3] WASHLITE alleged, for example, that on March 7, 2020, Fox host Judge Jeanine Pirro (ret.) stated on her show that "the talk about coronavirus being much more deadly (than the flu) doesn't reflect reality." On March 8, 2020, host Pete Hegspeth stated "[t]he more I learn about coronavirus, the less concerned I am." On March 11, 2020, host Matt Schlapp stated "[i]t is very very difficult to contract this virus." And on March 13, 2020, host Ainsley Earhardt stated "it is actually the safest time to fly."

Fox moved to dismiss the complaint under CR 12(b)(6), arguing that the lawsuit was precluded by the First Amendment.[4] The trial court granted Fox's motion, concluding the challenged speech involves matters of public concern and WASHLITE's CPA claim thus runs afoul of the First Amendment. It awarded costs of $334.94 to Fox. WASHLITE appeals the order dismissing its CPA claim and a portion of the cost award.

ANALYSIS

We review a dismissal under CR 12(b)(6) de novo and presume the plaintiff's factual allegations to be true. Gorman v. City of Woodinville, 175 Wn.2d 68, 71, 283 P.3d 1082 (2012). Under CR 12(b)(6), we may also consider hypothetical facts not part of the formal record. Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 120, 744 P.2d 1032 (1987) (citations omitted). For the purposes of this analysis, we will take at face value WASHLITE's allegations that the challenged statements are objectively false.

WASHLITE argues that the trial court erred in concluding that its CPA claim is barred by the First Amendment for two reasons. First, it contends that because Fox provides its programming content through third party cable providers, it has no First Amendment rights independent of these cable providers. Second, it maintains that false statements relating to a global pandemic are not protected speech. We reject both arguments.

[4] Fox also argued that WASHLITE's claim for treble damages under the CPA was based on "vague and unspecified harms." WASHLITE, in response, submitted declarations from four of its members describing the harm they claim to have sustained after listening to Fox commentators, including lost business opportunities, lost wages due to contracting the virus and missing work, and the inability to use a recently purchased house and car located in Alaska during the lockdown.

A. Fox Has an Independent Free Speech Right

WASHLITE initially argues that Fox's cable content does not enjoy full independent protections under the First Amendment because cable providers, through which Fox offers its programming, retain a degree of editorial control over that content. This argument is based on an incorrect reading of First Amendment jurisprudence.

WASHLITE relies on Justice Thomas's concurring opinion in Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 812-826, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996), to support this argument. In that case, the Supreme Court held that a statute authorizing cable operators to refuse to carry indecent programming on leased channels did not violate the First Amendment. Id. at 737-53 (plurality opinion), 819-31 (Thomas, J., concurring in the judgment in part and dissenting in part). In his concurring opinion, Justice Thomas stated that "the programmer's right to compete for channel space is derivative of, and subordinate to, the operator's editorial discretion." Id. at 816-17. WASHLITE cites this language in Justice Thomas's concurrence to argue that, "as a matter of law, Fox does not have a free standing unrestricted First Amendment right. Rather, it is subject to the editorial control of cable operators such as AT&T, Comcast and Spectrum at a minimum."

But even if Justice Thomas's concurrence were binding precedent, the Supreme Court did not hold that cable programmers' First Amendment rights are always derivative of the rights enjoyed by cable providers. The statute at issue in Denver did not directly regulate cable content, but merely permitted cable system

operators the authority to prohibit offensive or indecent programming on their own channels. Id. at 737. The fact that a cable operator may curtail the speech of Fox hosts on its own channels does not mean that the State, through judicial action, may do the same. To the contrary, the decision in Denver was premised on a balancing of the First Amendment interests of multiple parties—namely those of the programmer who leases the channel and those of the operator who owns the channel. Id. at 743-44. The only First Amendment interest implicated in the present case is Fox's free speech right.

Nothing in Denver stands for the proposition that cable programmers lack freestanding First Amendment rights. And the argument is inconsistent with the court's holding in Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 626, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994), where the court addressed a challenge to a law requiring cable operators to devote a portion of channels to the transmission of local broadcast television stations. In that case, the court recognized that both "[c]able programmers and cable operators engage in and transmit speech" and thus "are entitled to the protection of the speech and press provisions of the First Amendment." Id. at 636. The fact that Fox offers its programming through cable providers does not lessen the extent of the First Amendment protections it enjoys in the context of direct state regulation.

B. False Statements Enjoy First Amendment Protections

WASHLITE next argues that Fox's statements regarding the coronavirus and the disease it causes, COVID-19, made during a global pandemic, are not

protected because they are false.[5] We reject this contention because the challenged statements implicate matters of public concern and thereby fall squarely within First Amendment protections.

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002). Speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection. Connick v. Myers, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest." Snyder v. Phelps, 562 U.S. 443, 453, 131 S. Ct. 1207, 179 L. Ed. 2d. 172 (2011) (citations omitted).

To determine whether speech is of public concern, courts examine the content, form, and context of the speech. Id. In Snyder, parents of a Marine killed in the line of duty in Iraq sued a religious group picketing the Marine's funeral with offensive signs for defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. Id. at 448-50.

[5] Fox contends that WASHLITE may not raise this argument under RAP 2.5 because it has been raised for the first time on appeal. But the record demonstrates that the issue was adequately addressed below. WASHLITE raised this argument in their response to Amici Curiae, asserting "neither Amici, [n]or Fox, have provided any authority that [a First Amendment right to lie] is a defense to a state consumer protection act claim by customers of cable television services where such cable programmers transmit blatant falsehoods regarding a threat to public health." The trial court directly addressed this argument in its order to dismiss, concluding that WASHLITE had failed to demonstrate how its CPA claim might fall under the narrow range of First Amendment exceptions applying to falsehoods. We therefore review this issue on appeal.

A jury found for the parents on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims and the district court awarded $5 million in damages. Id. at 450. The Supreme Court determined that, despite the outrageous nature of the religious group's message, their speech addressed public content (the political and moral conduct of the United States and its citizens) and occurred in a public context (on a public street) and was therefore entitled to special protection under the First Amendment. Id. at 454-58. The court thus set aside the verdict imposing liability for intentional infliction of emotional distress, concluding that the First Amendment's special protections of speech on matters of public concerns cannot be overcome by the jury's findings. Id. at 458-59.

The trial court in this case also found that the challenged speech involves matters of public concern. WASHLITE does not dispute this finding, but instead contends that content-based regulation is permissible in this instance because false statements regarding threats to public health fall within an exception to the First Amendment's broad protections. To support its assertion, WASHLITE argues content-based regulation of speech is permissible in several instances: false statements to the government prohibited under 18 U.S.C § 1001 and RCW 9A.76.175, speech inciting lawless action, terroristic threats, and defamation. WASHLITE argues false statements regarding threats to public health are analogous and that, "[b]ootstrapping these concepts to this case, Fox cannot reasonably deny that it knew that characterizing COVID-19 as a hoax was false. . . . It acted with reckless disregard for the truth of COVID-19 when it regularly

broadcast that the virus was a hoax or words to that effect." There are several problems with this argument.

First, the challenged statements, concerning a global pandemic affecting the entire country and made in the context of cable news programs watched by millions of viewers, clearly implicate matters of public concern and receive special First Amendment protections no matter how outrageous the statements may be. As in Snyder, the pandemic, COVID-19, and government responses to this health threat represent legitimate news interests and are a matter of social and political concern to all Americans. Id. at 453. Just as the jury's finding of intentional infliction of emotional distress could not overcome these special First Amendment protections in Snyder, WASHLITE's claim that Fox acted with reckless disregard for the truth is similarly unavailing.

Second, none of the limited exceptions to the First Amendment apply to the false statements made by Fox hosts and guest commentators. "[T]he Constitution demands that content-based restrictions on speech be presumed invalid." Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 660, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004). "[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar." United States v. Alvarez, 567 U.S. 709, 717, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012) (plurality op.) (quotations omitted). These include incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, and true threats. Id. "Absent from those few categories where the law allows content-

based regulation of speech is any general exception to the First Amendment for false statements." Id. at 718.

WASHLITE analogizes this case to the defamation exception under which courts may award damages for false statements made with actual knowledge of their falsity or a reckless disregard for their falsity. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). But WASHLITE brought a claim under the CPA; it has not alleged defamation.

The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. A CPA civil suit for damages may be brought by "[a]ny person who is injured in his or her business or property by a violation" of the act. RCW 19.86.090. To succeed on a private CPA claim, a plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. Panag v. Farmers Ins. Co., 166 Wn.2d 27, 37, 204 P.3d 885 (2009). The CPA does not require proof that a defendant had actual knowledge that its statements were deceptive or that a defendant made false statements in reckless disregard for their truth. See Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc., 162 Wn.2d 59, 74-75, 170 P.3d 10 (2007) ("An unfair or deceptive act or practice need not be intended to deceive—it need only have the capacity to deceive") (quotations omitted).

In State v. TVI, Inc., d/b/a Value Village, No. 80915-6-I, slip op. (Wash. Ct. App. Aug. 16, 2021) http://www.courts.wa.gov/opinions/pdf/809156.pdf, this court

recently rejected a similar attempt to graft a mens rea onto the elements of a CPA claim so that a challenge to speech would pass constitutional muster.

In TVI, the State brought a CPA claim against a for-profit company operating Value Village thrift stores, claiming that its advertisements misled consumers into believing that TVI's sales directly benefited charities. Id., slip. op. at 1. TVI contended that holding it liable under CPA was an unconstitutional regulation of protected speech. Id. at 6. To address TVI's First Amendment challenge, the trial court required the State to prove that TVI "knew or should have known" that its marketing was deceptive. Id. at 5. This court held that the trial court "erred in rewriting the law to include a 'knew or should have known' mens rea element [in an effort] to avoid constitutional infirmity." Id. at 18-19. It held that the CPA "lack[s] the exacting proof requirements 'critical to First Amendment concerns' and [does] not give 'sufficient breathing room for protected speech.' " Id. 16 (quoting Illinois ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003)). We will not rewrite the CPA to include an "actual knowledge" or "reckless disregard" mens rea where none exists in that statute.

Finally, WASHLITE cites no authority for the proposition that false statements about threats to public health, even if recklessly made, fall within any exception to the First Amendment. To the contrary, the Supreme Court in Alvarez disavowed the principle that false expressions in general receive a lesser degree of constitutional protections simply by virtue of being false. The court stated that its precedent restricting the value or protections afforded objectively false statements

> all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation. In those decisions the falsity of the speech at issue was not irrelevant to our analysis, but neither was it determinative. The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.

Id. at 719. The court went on to explain that,

> [w]ere the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition.

Id. at 723.

WASHLITE's allegations that the challenged statements are false and recklessly made simply cannot overcome the protections afforded speech on matters of public concern under the First Amendment, even in the face of the State's undoubtedly compelling interest in the public dissemination of accurate information regarding threats to public health.

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

United States v. Stevens, 559 U.S. 460, 470, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397,

414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989). Although WASHLITE pursues the meritorious goal of ensuring that the public receives accurate information about the COVID-19 pandemic, the challenged statements do not fall within the narrow exceptions to the First Amendment's protections. We affirm the trial court's conclusion that, however laudable WASHLITE's intent, its CPA claim is barred by the First Amendment.

C. Cost Award

WASHLITE contends the trial court erred in awarding costs of $134.94 to Fox.[6] WASHLITE argues these costs were not "filing fees" recoverable under RCW 4.84.010(1). We agree.

RCW 4.84.010 provides

> [T]here shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:
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> (1) Filing fees;
>
> . . . .
>
> (6) Statutory attorney and witness fees; . . .

Former King County Code (KCC) 4A.630.190, entitled "Preparing and providing documents to the court," provided

> The department of judicial administration [of King County Superior Court] is hereby authorized to assess and collect a fee for preparing and providing copies of documents to the court. This fee only applies when documents have been electronically submitted to the clerk by parties who wish to have copies provided to the respective judicial officer. The fee assessed shall be twenty dollars per submission.[7]

[6] WASHLITE does not challenge the award of $200 in statutory attorney fees.
[7] According to WASHLITE, the department of judicial administration also charges a $2.49 e-commerce fee on top of the $20 per submission charge. The fee was increased to $30 per

Under King County Local Civil Rule (KCLCR) 7(b)(4)(F)(i) and (iii), a party filing a motion with the court must deliver working copies of the motion pleadings to the hearing judge either electronically using the clerk's "eFiling application," or in paper form. If a party elects to have the working copies submitted electronically, "[t]he clerk may assess a fee for the electronic submission of working copies." KCLCR 7(b)(4)(F)(i). If the party elects to deliver the working copies in paper form, they must be delivered to the judge's mailroom in the courthouse where the judge is located. KCLCR 7(b)(4)(F)(iii).

Fox submitted a cost bill seeking statutory attorney fees of $200 under RCW 4.84.010(6) and RCW 4.84.080, and $134.94 in fees it paid to electronically file its acceptance of service, a notice of appearance, a motion for limited admission, its motion to dismiss, its motion to dismiss first amended complaint, and its reply brief in support of its motion to dismiss. The trial court concluded that Fox was entitled to recover these costs.

We agree with WASHLITE that there is a difference between a "filing fee," as that term is used in RCW 4.84.010(1) and the fees the clerk is legally authorized to charge a party electing to deliver working copies to a judge via an electronic filing portal. First, a "filing fee" is generally defined as "[a] sum of money required to be paid to the court clerk before a proceeding can start." BLACK'S LAW DICTIONARY 773 (11th ed. 2019). Second, while one could argue that a "filing fee" means any fee a clerk assesses for filing a court document or pleading, the record

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submission effective January 1, 2021. See KCC Ord. 19193 § 1. See also King County Superior Court and Clerk's Fee Schedule, https://kingcounty.gov/~/media/courts/Clerk/docs/misc/2021_Fee-Schedule.ashx?la=en (identifying the fee for "electronic working copies").

here does not support the contention that Fox incurred these costs to "file" pleadings. It apparently incurred the costs because it chose, for convenience, to submit working copies via the court's electronic filing application. But it was not required to do so. While it may be less expensive than a messenger physically transporting paper copies to the courthouse, the court continues to accept working copies for judges in paper format. For this reason, we conclude that the fees the clerk of King County Superior Court charges to electronically deliver working papers to the assigned judge are not "filing fees" under RCW 4.84.010(1). We reverse the cost award of $134.94 and remand for the court to amend the judgment accordingly.

Fox also seeks an award of attorney fees on appeal under RAP 14.2. Because WASHLITE's appeal was not frivolous, we decline to award attorney fees on appeal.

Andrus, A.C.J.

WE CONCUR:

Coburn, J.