81512-1

FILED
Court of Appeals
Division I
State of Washington
12/7/2020 3:57 PM

Docket No. 81512-1

IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE

WASHINGTON LEAGUE FOR INCREASED TRANSPARENCY & ETHICS, a Washington non-profit corporation, JOHN & JANE DOES 1-1000

Plaintiffs/Appellants

v.

FOX CORPORATION, a Delaware corporation; FOX NEWS NETWORK, LLC, a Delaware corporation d/b/a FOX NEWS CHANNEL; FOX BUSINESS NETWORK, a for profit company d/b/a/ FOX BUSINESS; JOHN MOE and JANE MOE, 1-100

Defendants/Respondents.

APPPELLANT'S REPLY BRIEF

Catherine C. Clark
THE LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 Sixth Avenue, Suite 1250
Phone: (206) 838-2528
Fax: (206) 374-3003
Email: cat@loccc. com
Attorneys for Washington League For
Increased Transparency & Ethics

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

The opening sentence of Fox's brief reflects its effort to misdirect this court from the real issue in this case—whether the First Amendment protects Fox from its false statements of fact. Fox states:

> In this case, WASHLITE launched a frontal assault on the First Amendment by seeking a gag order preventing Fox News from airing commentary about the Covid-19 pandemic

Reply Brief, p. 2.

In so doing, Fox specifically ignores the following statement, and others like it, in WASHLITE's opening brief

> Below, Fox complained that WASHLITE is attempting to restrict its First Amendment rights on the cable medium by characterizing the existence of COVID-19 as a political issue. Fox conflates the existence of the virus as a threat to human life with a discussion on the appropriate response to it. The former is a fact, not an idea. The latter involves a discussion of ideas. This is a critical difference.

Appellant's Brief, p. 28-29.

In essence, Fox asks this court to grant to it the absolute freedom to share falsehoods relating to the public health, safety and welfare as a defense to WASHLITE's claims. The law does not support Fox.

II. AUTHORITIES AND ARGUMENT

A. THIS CASE IS ABOUT SPREADING FALSEHOODS, NOT ABOUT COMMENTARY OR OPINION

Throughout its brief, Fox continues to complain that WASHLITE is seeking to punish it for its commentary regarding COVID-19. This is incorrect. Rather, WASHLITE's position in this case is fairly simple.

First, WASHLITE acknowledges the right to freedom of speech under the First Amendment. It also acknowledges that Fox has a derivative right of free speech under the currently developed federal law. Thus, Fox's freedom of speech derives through the right of those owning the cable infrastructure here AT&T, Comcast and Sprint. It does not have a stand-alone right on the cable networks.

Second, WASHLITE also acknowledges that there are limitations on the freedom of speech in the United States as a litany of cases have acknowledged. This legal point is so well known that the court could take judicial notice of it. ER 201; *See also* Ronald K. L. Collins, *Exceptional Freedom – The Roberts Court, The First Amendment, and the New Absolutism,* 76 ALB. L. REV. 409, 417-422 (2013) (listing 43 separate categories of unprotected speech); *see also United States v. Alvarez,* 567 U.S. 709, 717, 132 S. Ct. 2537 (2012) (recognizing the exceptions to the First Amendment). In *Alvarez,* the Court specifically stated that "speech presenting some grave and

imminent threat the government has the power to prevent may be restricted citing to *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 716, 51 S. Ct. 625 (1931). 567 U.S. at 717. As stated in the opening brief, the right to freedom of speech does not protect against claims of slander/defamation and terroristic threats as two examples of the point.

Third, it is widely acknowledged that false statements of fact do not enjoy constitutional protection.[1]

> False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. See *Gertz*, 418 U. S. , at 340, 344, n. 9.

Hustler Magazine v. Falwell, 485 U. S. 46, 52, 108 S. Ct. 876, 880 (1988). "Untruthful speech, commercial or otherwise, has never been protected for its own sake." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U. S. 748, 771, 96 S. Ct. 1817, 1830 (1976).

In *Gertz v. Robert Welch*, 418 U. S. 323, 94 S. Ct. 2997 (1974), the Court recognized that while some tolerance of falsehoods is

---

[1] Fox puts great weight on *Snyder v. Phelps,* 562 U.S. 443, 460, 131 S. Ct. 1207 (2013). However, the United States Supreme Court specifically limited that case to its facts "Our holding today is narrow. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us." Given this, *Snyder* is not helpful to this case.

necessary for a free exchange of ideas, it notes that such tolerance is not absolute.

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. See *New York Times Co*. v. *Sullivan, supra*, at 293 (Black, J. , concurring); *Garrison* v. *Louisiana*, 379 U. S. , at 80 (DOUGLAS, J. , concurring); *Curtis Publishing Co*. v. *Butts*, 388 U. S. , at 170 (opinion of Black, J.). Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law [of] defamation.

Id., 418 U. S. at 341. When discussing the right to protect one's good name, the Court further stated:

> "reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system. " *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion).

Gertz, 418 U. S. at 341. Thus, the law requires a consideration of the various interests at work as recognized by *Alvarez*

> As our law and tradition show, then, there are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true speech could not be. This opinion does not imply that any of these targeted prohibitions are somehow vulnerable. But it

> also rejects the notion that false speech should be in a general category that is presumptively unprotected.

567 U.S. at 721-722. And the court has noted that truthful speech may be penalized:

> Indeed, in *Cox Broadcasting*, we pointedly refused to answer even the less sweeping question "whether truthful publications may ever be subjected to civil or criminal liability" for invading "an area of privacy" defined by the State. 420 U.S., at 491. Respecting the fact that press freedom and privacy rights are both "plainly rooted in the traditions and significant concerns of our society," we instead focused on the less sweeping issue "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records -- more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." *Ibid.* We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.

Fla. Star v. B. J. F., 491 U.S. 524, 533, 109 S. Ct. 2603, 2609 (1989).

In this case, we are faced with Fox's false statements of fact relating to the COVID-19 pandemic: It repeatedly stated on air that the virus is a hoax and is not a threat to human life. The statements reflected in the opening brief are a mere sampling of those statements. The false statements by Fox regarding the threat posed by COVID-19, which continued at least through the summer, to human life are so pervasive that the court may also take judicial notice of them as well. ER 201. As of the date of this brief, the Center for

Disease Control reports that 281,253 Americans have died from COVID-19.[2] That number is expected to steadily rise through the coming months.

Fourth, this case asks the court to consider the interests of freedom of speech with that of a larger societal good namely the protection of the public health, safety and welfare.

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U. S. 568, 571-72, 62 S. Ct. 766, 769 (1942). *See also* Daniel Goodman, *Ethical Falsehood: Towards a Moral Values Paradigm in False-Speech Adjudication*, 55 Tex. L. Rev. 71 (2013-2014) (advocating for the point that "moral ethics has a role in First Amendment adjudication"); Christopher P. Guzelian, *True and False Speech*, 51 B. C. L. Rev. 669 (2010) (advocating for the point that

[2] https://covid. cdc. gov/covid-data-tracker/#cases_totalcases

scientific speech, a form of speech readily determined to be true or false, should face additional scrutiny.)

The competing interest here relative to the freedom of speech is the protection of the public health, safety and welfare against falsehoods relating to the very real threat that COVID-19 poses to human life.

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:
>
> > "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs. " 1 Journals of the Continental Congress 108 (1774).

Roth v. United States, 354 U. S. 476, 484, 77 S. Ct. 1304, 1308-09 (1957) (holding no First Amendment protection for obscene speech).

Fifth, consumers have the right to receive accurate information on the subject of the public health, safety and welfare among other topics particularly when they are paying a fee for access to the content that Fox provides. *See Kleindienst v. Mandel*, 408 U. S. 753, 762-763, 92 S. Ct. 2576 (1972) ("It is now well established that the Constitution

protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive . . . . ").

> It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U. S. 748, 765, 96 S. Ct. 1817, 1827 (1976) (acknowledging that the practice of pharmacy affects the public health, safety and welfare).

Again, the focus of this case is not opinion or commentary. Rather, this case asks the court to focus on the false statements of fact by Fox that COVID-19 is not a threat to human life but a hoax. There is no constitutional protection for such statements.

B. THE DOCTRINE OF PRIOR RESTRAINT HAS NOT BEEN TRIGGERED

Fox curiously contends that WASHLITE somehow has waived its claims by not seeking injunctive relief afforded under RCW 19. 86 and as pled in the amended complaint. No Washington case has made such a holding outside a foreclosure process under RCW 61. 24 that the undersigned can locate. Even more curiously, Fox complains that the amended complaint seeks injunctive relief and that such a request constitutes a prior restraint. The argument is illogical and non-sensical.

Simply put, a prior restraint attempts to prohibit future speech or other expression rather than punish past expression. It has been described as “any government action that tends to suppress or interfere with protected expression before it is ultimately punished through civil or criminal sanctions in a court of law.” *Forbes v. Pierce County*, 5 Wn. App. 2d 423, 438, 427 P. 3d 675 (2018), *citing State v. J-R Distribs. , Inc. ,* 111 Wn. 2d 764, 776, 765 P. 2d 281 (1988).

The crux of the prior restraint claim is that the underlying speech is protected. Speech which is not protected is not subject to the prior restraint doctrine. The First Circuit has noted:

> An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint.

Auburn Police Union v. Carpenter, 8 F. 3d 886 (1st Cir. 1993); *see also Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 57 Cal. Rptr. 3d 320, 156 P. 3d 339 (Cal. 2007), *as modified* (Apr. 26, 2007) (holding that an injunction prohibiting defendant from repeating speech determined by a finder of fact, after a trial on the merits, to be slanderous or defamatory was not a prior restraint, but nonetheless reversing because the injunction issued was overbroad); *Flint v. Smoke Burner Co.* , 110 Mo. 492, 19 S. W. 804, 806 (Mo. 1892) ("After verdict

in favor of the plaintiffs, they can have an injunction to restrain any further publication of that which the jury has found to be an actionable libel or slander. "). Again, Fox's argument is illogical.

C. FOX'S ARGUMENT THAT WASHLITE HAS NOT PROVEN ITS CASE IGNORES THE STANDARD OF REVIEW UNDER CR 12(B)(6)

Fox complaints that WASHLITE did not prove the essential elements of its case and thus the case should be dismissed. Again, the trial court decided the motion under Civil Rule 12(b)(6). Thus, hypothetical facts not included in the record are appropriately considered by the court. *Holiday Resort Comm. Assoc. v. Echo Lake Assoc., LLC,* 134 Wn. App. 210, 135 P. 3d 499 (2006). Further, the allegations in the amended complaint, and all reasonable inferences are drawn in WASHLITE's favor. *Gorman v. City of Woodinville,* 175 Wn. 2d 68, 71, 283 P. 3d 1082 (2012). More specifically, Fox complains that WASHLITE cannot prove a proximate causation between its false statements of facts and damages to WASHLITE or its members. Again, it has long been the rule in Washington State that a "consumer need not show specific monetary damages to recover under the" CPA. *E.g. St. Paul Fire & Marine Ins. Co. v. Updegrave,* 33 Wn. App. 653, 656 P. 2d 1130 (1983). Fox's argument fails under the applicable standard of review.

D. THERE IS NO WASHINGTON AUTHORITY FOR INCLUDING ELECTRONIC WORKING COPY FEES WITHIN FILING FEES UNDER RCW 4. 84. 010

Fox has cited a number of trial court decisions for its argument that it is entitled to recover fees imposed by the King County Superior Court for working copies to be transmitted to the assignment judge. These decisions do not have precedential value. *E.g. Puget Sound Energy v. Dep't of Revenue*, 158 Wn. App. 616, 623, 248 P. 3d 1043 (2010) (trial court decisions do not have precedential value).

Fox further contends that the legislature did not define what constitutes a filing fee in RCW 4. 84. 010 nor did *Boeing Co. v. Sierracin Corp. ,* 108 Wn. 2d 38, 738 P. 2d 665 (1987). Thus, it argues that electronic working copy charges are properly included within the definition of "filing fee." This is incorrect.

RCW 4.84.010 was first enacted in the Remington Revised Statutes under Section 474. It was later amended several times[3] and in 1983, the legislature added a list of recoverable expenses which included "filing fees" at RCW 4. 84. 010(1). *Laws of 1983, 1st ex. s. ch. 45, §7*. King County adopted KCC 4A.630.190 in 2008 imposing a

[3] The legislative history of the statute is as follows: Laws of 2009 ch. 240 § 1; Laws of 2007 ch. 121 § 1; Laws of 1993 ch. 48 § 1; Laws of 1984 ch. 258 § 92; Laws of 1983 1st ex. s. c. 45 § 7; Code 1881 § 505; 1877 p 108 § 509; 1869 p 123 § 459; 1854 p 201 § 367; RRS § 474.

charge for electronic working copies, 25 years after the Legislature authorized recovery of filing fees under RCW 4.84.010(1). As the requirement to pay an electronic working copy fee was enacted after the legislature approved the recovery of filing fees, such electronic working copy fees were not within the mind of the legislature.

Bauman v. Turpen, 139 Wn. App. 78, 160 P. 3d 1050 (2007) is instructive. *Bauman* involved a dispute over a restrictive covenant which stated: "only one (1), one (1) story house with garage attached not less than five (5) rooms. House must be completed before occupancy. " *Id.* at 83. The date of the covenant at issue in *Bauman* was 1949.

This court concluded that the term "one story" could not be defined by any later enacted building codes such as the 1997 Uniform Building Code or Seattle's adopted version of it. *Id.* at 86. The court stated:

> Neither the 1997 UBC nor the 1997 SBC was in effect when Gilbert drafted the "one story" covenant that restricts building on the Turpen lot. The trial court could not define the intent or purpose of a covenant drafted in 1949 by these later-enacted codes. Its ruling on summary judgment was correct.

Id. at 86.

The same is true here. The obligation to pay an electronic working copy fee under KCC 4A.630.190 is outside the term "filing fee"

as codified in RCW 4.84.010(1) as it was enacted 25 years afterward. Thus, electronic working copy fees are not within the definition of RCW 4.84.010 as a matter of law. As such, they are not recoverable.

E. FOX IS NOT ENTITLED TO FEES

Fox claims that it has an unfettered right under the First Amendment to misrepresent the truth about the threat to the public health, safety and welfare that COVID-19 poses and that sanctions should be imposed by this court against those who have the temerity to disagree. Again, this case relates to Fox's clear and admitted misrepresentations on the threat posed, which constitute falsehoods not entitled to constitutional protection.

RAP 18.9(a) allows for the imposition of fees as sanctions on appeal if the matter is frivolous.

> To determine whether an appeal is sufficiently frivolous to warrant sanctions, the court must consider the following: (1) a civil appellant has the right to appeal; (2) any doubt as to whether the appeal is frivolous is resolved in the appellant's favor; (3) the court must consider the record as a whole; (4) an appeal is not frivolous simply because it is affirmed and its arguments are rejected; and (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Streater v. White, 26 Wn. App. 430, 435, 613 P. 2d 187 (1980).

First, WASHLITE has a right to an appeal under RAP 2. 2(1). There is no dispute on that point.

Second, it appears that the essence of Fox's contention is that there is no debatable issue upon which reasonable minds might differ and that the appeal is so devoid of merit that there's no reasonable possibility of reversal. This is incorrect.

In order for the court told that this matter is frivolous and devoid of merit such that sanctions are warranted, it must conclude that there are no exceptions to the First Amendment guarantee of the right of free speech. When considering the record as a whole, it is clear that that is not the case. Rather, as noted above, there are numerous exceptions to the right of free speech.

In this case, WASHLITE asks the court to examine whether Fox may claim a First Amendment protection for its statements claiming that COVID-19 is a hoax (a false statement of fact relating to the public health, safety and welfare). There is no question that such statements are false. The only question is whether or not Fox is entitled to an absolute defense under the First Amendment for such false statements of fact. Such a question is an open one under the law and one which needs to be developed by the courts in the United States.[4] As such,

---

[4] *Denver Area Educ. Telcoms Consortium v. FCC,* 518 U.S. 727, 741, 116 S. Ct. 2374 (1996) (the "First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the

even if WASHLITE ultimately loses (again the decision below was decided under CR 12(b)(6)), the question is an important one and deserves the courts' attention. There is nothing frivolous about the threat that COVID-19 poses to human life or the debatable questions raised in this appeal.

III. CONCLUSION

Fox seeks protections that no one in the United States enjoys—the right to make false statements of fact which threaten the public health, safety and welfare. The United States Supreme Court has long held that First Amendment rights do not serve as a license to commit fraud and injure the public.

> Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience.

Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems.").

Cantwell v. Connecticut, 310 U.S. 296, 306-07, 60 S. Ct. 900, 904-05 (1940). The trial court should be reversed and this matter remanded for further proceedings.

Dated this 7th day of December, 2020.

LAW OFFICE OF CATHERINE C. CLARK PLLC

By: */s/ Catherine C. Clark*
Catherine C. Clark, WSBA 21231
2200 Sixth Avenue, Suite 1250
Seattle, WA 98121
Phone: (206) 838-2528
Fax: (206) 340-3003
Email: cat@loccc. com
Attorney for Plaintiff Washington League for Increased Transparency & Ethics

LAW OFFICE OF CATHERINE C. CLARK PLLC

December 07, 2020 - 3:57 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	81512-1
Appellate Court Case Title:	Wa League for Increased Transparancy, Appellant v. Fox Corporation, Respondent

The following documents have been uploaded:

- 815121_Briefs_20201207155533D1326541_6736.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was 2020.12.07 Appellants Reply Brief FINAL.pdf

A copy of the uploaded files will be sent to:

- ajdick@jonesday.com
- catherineclark499@gmail.com
- cjlovrien@jonesday.com
- egoldbergknox@jonesday.com
- erinf@harriganleyh.com
- florinef@harriganleyh.com
- kristinb@harriganleyh.com
- macarvin@jonesday.com
- tylerf@harriganleyh.com

Comments:

Sender Name: Catherine Clark - Email: cat@loccc.com
Address:
2200 6TH AVE STE 1250
SEATTLE, WA, 98121-1820
Phone: 206-838-2528

Note: The Filing Id is 20201207155533D1326541