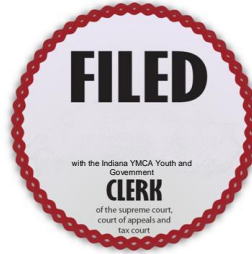


FOR PUBLICATION



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**IN THE
COURT OF APPEALS OF INDIANA YMCA YOUTH AND
GOVERNMENT**

DAN DEVINE; YONTO CHURCH, INC.)	
)	
Appellant-Defendants,)	
)	
vs.)	No. 96A04-1109-PL-999
)	
JOHN O’HARE)	
)	
Appellees-Plaintiff)	

Appeal from the Sippich Circuit Court, No. 96C01-0308-PL-321
The Honorable Roland Steele, Judge

July 27, 2010

Reuttiger, Chief Judge.

John O’Hare instituted this action in the Rockne Circuit Court against Yonto Church, Inc. (the “Church”) and several of its members (collectively, the “Defendants”). O’Hare’s lawsuit complains about a protest the Defendants conducted in Rockne, Indiana, near the funeral of

O'Hare's son Army Corporal James O'Hare, who tragically died in Iraq in October 2007, O'Hare's complaint alleged three state law tort claims: invasion of privacy by intrusion upon seclusion, intentional infliction of emotional distress (IIED) and civil conspiracy. After a trial in October 2009, the jury found the Defendants liable for ten million dollars in damages. We reverse the Circuit Court.

Facts and Procedural History

On October 3, 2007, Army Corporal James O'Hare was killed in Iraq in the line of duty. As James O'Hare had lived in Rockne, Indiana, and graduated from Rockne High School, Holy Cross Roman Catholic Church in Rockne was selected as the site for his funeral, which was scheduled for October 10, 2007. Obituary notices were placed in local newspapers providing notice of the time and location of the funeral.

Defendant Rev. Dan Devine, founded Defendant Yonto Church, Inc. in Yonto, Nebraska, in 1958. Since then, he has been the only pastor of the church. According to the testimony of Defendants' expert, the members of this church practice a "fire and brimstone" fundamentalist religious faith. The church believes that God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the United States military. Members of the Church have increasingly picketed funerals to assert these beliefs.

Devine testified that members of the Yonto Church learned of Cpl. O'Hare's funeral and issued a news release on October 9, 2007, announcing that members of the Devine family intended to come to Rockne, Indiana, and picket the funeral. On October 10, 2007, Devine and other church members arrived in Rockne to picket Cpl. O'Hare's funeral. None of the Defendants ever met any members of the O'Hare family.

Defendants' rationale was quite simple. They traveled to Cpl. O'Hare's funeral in order to publicize their message of God's hatred of America for its tolerance of homosexuality. In

Plaintiff's eyes, Defendants turned the funeral for his son into a "media circus for their benefit." By notifying police officials in advance, Defendants recognized that there would be a reaction in the community. They carried signs which expressed general messages such as "God Hates the USA," "America is doomed," and "Pope in hell." The signs also carried more specific messages, including: "You're going to hell," "God hates you," and "Thank God for dead soldiers." Devine testified that it was Defendants' "duty" to deliver the message "whether they want to hear it or not." It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church.¹

The Plaintiff's complaint alleged three state law tort claims: intrusion upon seclusion, publicity given to private life, IIED, and civil conspiracy. The Defendants moved for summary judgment on those claims, contending, among other things, that their challenged words "constitute expressions of opinion, which are not actionable." They asserted that their words "are clearly rhetorical, hypothetical, religious, and laced with opinion," and that "it is impossible to prove or disprove these things, particularly given that doctrinal viewpoints drive the opinions."

At trial O'Hare testified, "recount[ing] fond memories of his son . . . and the traumatic news of his passing." In its Post-Trial Opinion, the trial court summarized O'Hare's testimony:

He described the severity of his emotional injury, stating that he is often tearful and angry, and that he becomes so sick to his stomach that he actually physically vomits. He testified that Defendants placed a "bug" in his head, such that he is unable to separate thoughts of his son from the [Defendants'] actions: "there are nights that I just, you know, I try to think of my son at times and every time I think of my son or pass his picture hanging on the wall or see the medals hanging on the wall that he received from the Army, I see those signs." He testified also that "I want so badly

¹ We note that Indiana has had a statute specifically regulating funeral protests since 2006. P.L. 3-2006 § 1. Indiana Code § 35-45-1-3(c) makes disorderly conduct within five hundred feet of a funeral a class D felony if it adversely affects the funeral. The only other scenario in which disorderly conduct brings such a penalty is when it adversely affects airport security or is committed at an airport, I.C. 35-45-1-3(b). Disorderly conduct is otherwise a class B misdemeanor. I.C. 35-45-1-3(a). A federal statute similarly regulates activity near funerals of members of the military and veterans. 18 U.S.C. § 1388. Nevertheless, because Defendants complied with this statute, we do not consider the constitutionality of either of these statutes.

to remember all the good stuff and so far, I remember the good stuff, but it always turns into the bad.”

Plaintiff also testified as to the permanency of the emotional injury. He testified that “I think about the sign [i.e., Thank God for dead soldiers] every day of my life. . . . I see that sign when I lay in bed at nights. I had one chance to bury my son and they took the dignity away from it. I cannot re-bury my son. For the rest of my life, I will remember what they did to me and it has tarnished the memory of my son’s last hour on earth.” He stated also that “somebody could have stabbed me in the arm or in the back and the wound would have healed. But I don’t think this will heal.”

On October 31, 2009, the jury found for O’Hare on the three tort claims. After the circuit court entered judgment on November 5, 2009, the Defendants filed post-trial motions seeking judgment as a matter of law. The trial court denied each of these motions by its Post-Trial Opinion.

In its Post-Trial Opinion of February 4, 2009, the trial court disposed of the Defendants’ various legal challenges. The Post-Trial Opinion explained that this case “involves balancing [the Defendants’ First Amendment rights of religious expression] with the rights of other private citizens to avoid being verbally assaulted by outrageous speech and comment during a time of bereavement.” The court also rejected the Defendants’ post-trial contention that the court “should have held as a matter of law that [the Defendants] were entitled to First Amendment protection.” The court emphasized that it had permitted the jury to decide if the Defendants’ conduct was sufficient to hold them liable on the three Indiana tort claims, and the jury had found the Defendants liable.

On appeal Defendants challenge the jury verdict arguing that insufficient evidence supported it because their protests are an exercise of freedom of expression protected by the U.S. and Indiana constitutions.

Standard of Review

Our standard of review for a sufficiency of the evidence claim is well settled. In reviewing such a claim, we will affirm the conviction unless, considering only the evidence and all reasonable inferences favorable to the judgment, and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *See Blackman v. State*, 868 N.E.2d 579, 583 (Ind. Ct. App. 2007).

I. The Decision of the Rockne Circuit Court Violates the First Amendment to the United States Constitution.

The Defendants' primary appellate contention is that the judgment contravenes the First Amendment as it fully protects their speech at the Indiana protest. It is well established that tort liability under state law is circumscribed by the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 264–65 (1964). Although the Supreme Court in *New York Times* specifically addressed the common-law tort of defamation, the Court explained that its reasoning did not turn on the precise “form in which state power has been applied.” *Id.* at 265. Accordingly, the Court later applied the First Amendment to other torts not involving reputational damages, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) (IIED), and federal courts have applied these controlling principles to other state law torts, *see Food Lion v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 511, 522 (4th Cir.1999) (fraud, breach of duty of loyalty, and trespass). Thus, regardless of the specific tort being employed, the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant's speech. *See id.* at 523.

In a distinct but related line of decisions, the Court has recognized that there are constitutional limits on the type of speech to which state tort liability may attach. *See Hustler Magazine*, 485 U.S. at 50 (recognizing that certain types of speech are protected regardless of

plaintiff's status as private or public figure). Thus, although there is no categorical constitutional defense for statements of "opinion," the First Amendment will fully protect "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich*, 497 U.S. at 20.

In *Milkovich v. Lorain Journal Co.* 497 U.S. 1 (1990), which is a crucial precedent in our disposition of this appeal, the Supreme Court declined to adopt an artificial dichotomy between "opinion" and "fact." *See* 497 U.S. at 19. In *Milkovich*, the Court assessed whether a newspaper enjoyed First Amendment protection for a column that referred to a wrestling coach as a "liar," based on his allegedly deceitful testimony before a state athletics council. 497 U.S. at 4-5, n. 2. The newspaper maintained that the column merely stated its author's opinion and was thus subject to categorical First Amendment protection. *Id.* at 17-18. The Court rejected this contention, ruling instead that the "dispositive question" was "whether a reasonable factfinder could conclude that the statements in the [newspaper] column imply an assertion that [the coach] perjured himself in a judicial proceeding." *Id.* at 21. Because the column's assertions were "susceptible of being proved true or false," the Court determined that the speech was not protected. *Id.*

In light of *Milkovich*, we are obliged to assess how an objective, reasonable reader would understand a challenged statement by focusing on the plain language of the statement and the context and general tenor of its message. We must emphasize the "verifiability of the statement," because a statement not subject to objective verification is not likely to assert actual facts. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir.1993).

There are two subcategories of speech that cannot reasonably be interpreted as stating actual facts about an individual, and that thus constitute speech that is constitutionally protected. First, the First Amendment serves to protect statements on matters of public concern that fail to contain a "provably false factual connotation." *Milkovich*, 497 U.S. at 20. We assess as a matter of law whether challenged speech involves a matter of public concern by examining the content, form, and context of such speech, as revealed by the whole record. *See Dun & Bradstreet, Inc. v.*

Greenmoss Builders, Inc., 472 U.S. 749, 761, (1985). “Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community.” *Kirby v. City of Elizabeth City, N.C.*, 388 F.3d 440, 446 (4th Cir.2004).

Second, rhetorical statements employing “loose, figurative, or hyperbolic language” are entitled to First Amendment protection to ensure that “public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our Nation.” *Milkovich*, 497 U.S. at 20–21. The general tenor of rhetorical speech, as well as the use of “loose, figurative, or hyperbolic language” sufficiently negates any impression that the speaker is asserting actual facts. *Id.* at 21.

A good example of a case where the question of whether speech contains protected rhetorical hyperbole is *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 294 (4th Cir.2008). CACI was a civilian defense contractor that performed interrogation services for the military at Abu Ghraib prison in Iraq. CACI claimed that it had been defamed by a talk radio host who had made on-air statements blaming CACI for the mistreatment of detainees at the prison and criticizing the use of wartime contractors in general. *See id.* at 288–92. The radio host, for example, had claimed that CACI and other defense contractors employed “[m]ercenaries all over the country, killing people,” and she had characterized CACI as “hired killers.” *CACI*, 536 F.3d at 301. The court awarded judgment to the host, based in part on the determination that her statements were protected by the First Amendment because they “did not state actual facts about CACI.” and most people would understand the statements as “exaggerated rhetoric intended to spark the debate about the wisdom of the use of contractors in Iraq.” *Id.* at 301–02. The court said the host had simply used “loose and hyperbolic terms” to advance her policy argument.

In this proceeding, O’Hare was awarded judgment against the Defendants on three of the tort claims: intrusion upon seclusion, IIED, and civil conspiracy. The verdict in favor of O’Hare can only be sustained if it is consistent with the Defendants’ First Amendment guarantees.

The trial court erred when it utilized an incorrect legal standard in its Post-Trial Opinion. The court only assessed whether O'Hare was a "public figure" under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and whether Cpl. O'Hare's funeral was a "public event." However, the Supreme Court has created a separate line of First Amendment precedent that does not depend upon the public or private status of the speech's target. See *Milkovich*, 497 U.S. at 16. Thus, even if the circuit court concluded that O'Hare and his son were not "public figures," such a conclusion did not dispose of the Defendants' First Amendment arguments. In focusing on the status of the O'Hares and the funeral, and not the nature of the speech itself, the court failed to assess whether the statements could be interpreted as asserting "actual facts" about an individual or contained hyperbole.

The following signs displayed by the Defendants, which are similar in both their message and syntax, can readily be assessed together: "America is Doomed," "God Hates the USA/Thank God for 9/11," "No Gay Soldiers," "Pope in Hell," "Thank God for Dead Soldiers," "Don't Pray for the USA," and "Thank God for IEDs," As a threshold matter, as utterly distasteful as these signs are, they involve matters of public concern, including the issue of homosexuals in the military and the political and moral conduct of the United States and its citizens. Such issues are not subjects of "purely private concern," *Dun & Bradstreet*, 472 U.S. at 759, but rather are issues of social, political, or other interest to the community. For example, a public firestorm erupted in 2001 after two prominent religious figures, Jerry Falwell and Pat Robertson, alleged that the September 11th terrorist attacks represented God's punishment for our country's attitudes regarding homosexuality and abortion.

Additionally, no reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about O'Hare or his son. The signs reading "God Hates the USA/Thank God for 9/11" and "Don't Pray for the USA," for example, are not concerned with any individual, but rather with the nation as a whole. Other signs (those referring to "troops," and "dead soldiers") use the plural form, which would lead a reasonable reader to conclude that the speaker is referring to a group rather than an individual. Additional signs are concerned with individuals, such as the Pope, who are entirely distinct from O'Hare and his son, or with groups,

such as priests, to which neither O'Hare nor his son belong. Finally, those signs stating "Thank God for Dead Soldiers" and "Thank God for IEDs" only constitute a reference to O'Hare's son if the reader makes the assumption that their only object is Cpl. O'Hare and not the thousands of other soldiers who have died in Iraq and Afghanistan, often as a result of IEDs.

The statements are protected by the Constitution for two additional reasons: they do not assert provable facts about an individual, and they clearly contain imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned. Whether "God hates" the United States or a particular group, or whether America is "doomed," cannot be objectively verified. The statement "Thank God," is incapable of objective verification. Many of the signs also consist of offensive and hyperbolic rhetoric designed to spark controversy and debate. By employing God, the strong verb "hate," and graphic references to terrorist attacks, the Defendants used the sort of "loose, figurative, or hyperbolic language" that seriously negates any impression that the speaker is asserting actual facts about an individual. *Milkovich*, 497 U.S. at 21. Accordingly, we are constrained to agree that these signs—"America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Thank God for Dead Soldiers," "Don't Pray for the USA," and "Thank God for IEDs"—are entitled to First Amendment protection.

II. The Trial Court's Decision Violates Article 1, Section 9 of the Indiana Constitution.

Article 1, Section 9 of the Indiana Constitution provides "[n]o law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." This Court has never considered whether Article 1, Section 9 of the Indiana Constitution limits the availability of the torts of which O'Hare complains. However, Article 1, Section 9 of the Indiana Constitution has been used to limit the effect of private torts. For example, this Court has held that in the context of a defamation case, if the alleged defamatory statement was made regarding a matter of public concern, then the speech is protected by Article

1, Section 9 of the Indiana Constitution. *Aafco Heating & Air Conditioning Co. v. Nw. Publications, Inc.*, 679, 321 N.E.2d 580, 586 (Ind. Ct. App. 1974).

In the landmark case of *Price v. State*, 622 N.E.2d 954 (Ind. 1993), our Supreme Court held that Article 1, Section 9 provides protections to Indiana citizens of the right of freedom of expression independent of its federal counterpart and that the State may not materially burden political expression, which is a core value under Indiana's Bill of Rights. The Court reversed Price's conviction holding that her loud and profanity-laced complaints about police officers conducting an arrest of a third party and then of Price herself was political expression which the State could not materially burden.

Above, we held that Cpl. O'Hare's funeral was a public event and the matters upon which the Defendants spoke are matters of public concern. For these same reasons, the court's decision, which is a state action, violates Article 1, Section 9's protection of political expression.

Conclusion

Despite the distasteful and repugnant nature of the words being challenged in these proceedings, we are constrained to conclude that the Defendants' signs are constitutionally protected by the United States and Indiana constitutions.

ZAPPALA, J, concurs. CROOK, J., dissents with separate opinion.

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vs.)	No. 96A04-1109-PL-999
)	
JOHN O’HARE)	
)	
Appellees-Plaintiff)	

CROOK, Judge, dissenting

I respectfully dissent from the judgment of this Court because I conclude that neither the First Amendment of the U.S. Constitution nor Article 1, Section 9 of the Indiana Constitution provide protection to the Defendants.

I. First Amendment

The Supreme Court of the United States has long recognized that “not all speech is of equal First Amendment importance.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985). In *Dun & Bradstreet, Inc.*, the Supreme Court held that a private individual could recover damages under a common law defamation claim where the subject of the lawsuit was a matter of private concern. *Id.* at 763. The Supreme Court cited its previous

opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which it held that the First Amendment interest in protecting speech must be balanced against a state's interest in protecting its residents from tortious injury. Quite simply, the Supreme Court has recognized that there is not an absolute First Amendment right for any and all speech directed by private individuals against other private individuals.

Recognizing the significance of the Supreme Court's holding that "not all speech is of equal First Amendment importance," *Dun & Bradstreet, Inc.*, 472 U.S. at 758, Defendants argue that the funeral was both a matter of public concern and a public event. They further contend that Cpl. O'Hare became a public figure and his funeral became a public event when his father, John O'Hare, filed a notice of the funeral in the obituary section of a local newspaper and later spoke with reporters about his son. Defendants' theory is that an individual becomes a public figure upon the filing of information in the obituary section of any newspaper. This argument is without merit. The test for public figures was articulated by Justice Powell in *Gertz*:

For the most part, . . . [they] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

418 U.S. at 345. The evidence in this case was quite clear that John O'Hare did not "invite attention and comment" when he prepared a funeral for his son, but rather he intended for the funeral to be private.

Indeed, the evidence in this case was undisputed that Defendants traveled to the funerals of young men such as Cpl. O'Hare so as to publicize their religious opinions and the alleged participation of homosexuals in the military. While earlier religious demonstrations had received little publicity, the demonstrations by the Yonto Church at the funerals of soldiers generated

greater publicity. Rev. Devine explained the usual *modus operandi* of his church as applied to Cpl. O'Hare's funeral. First, Defendants provided notice to law enforcement personnel in Rockne, Indiana, of their intent to picket at Cpl. O'Hare's funeral. In light of past problems arising from the Yonto Church's demonstrations at military funerals, this notice necessarily resulted in increased police presence and media coverage at Cpl. O'Hare's funeral. Defendants cannot by their own actions transform a private funeral into a public event and then bootstrap their position by arguing that Cpl. O'Hare was a public figure.

By their own actions, Defendants also created an atmosphere of confrontation. This atmosphere was created by signs carrying both a general message as well as signs that could reasonably be interpreted as being directed at the O'Hare family. There were signs expressing general points of view such as "America is doomed" and "God hates America." However, there were also signs stating "Thank God for dead soldiers," "You are going to hell," and "God hates you." While signs expressing general points of view are afforded First Amendment protection, these additional signs, which could be interpreted as being directed at the O'Hare family, they were also found by the jury to constitute tortuous activity. The jury addressed these issues and determined that such comments on signs so outrageous as to inflict severe emotional distress and invade the privacy of a private citizen during a time of bereavement. Pursuant to *Gertz*, the Defendants' statements are not protected by the First Amendment.

II. Article 1, Section 9

While Indiana's Constitution provides for protection of speech when the matter touches upon a matter of public concern, the Indiana Constitution also provides that when a person abuses the right to free speech, that person will be responsible for the consequences of that abuse. The Indiana Supreme Court has long held that "[w]hen the expressions of one person cause harm to another in a way consistent with common law tort, an abuse under § 9 has occurred." *Price v. State*, 622 N.E.2d 954, 964 (Ind. 1993). Accordingly, the Supreme Court has held that even if the speech is protected, a person cannot use that right to inflict a private tort upon another.

In *J. D. v. State*, 859 N.E.2d 341 (Ind. 2007), our Supreme Court held that speech, albeit political, was not entitled to constitutional protection under Article 1, section 9 of the Indiana Constitution where the speech "consisted of persistent loud yelling over and obscuring of [the arresting officer's] attempts to speak and function as a law officer." *Id.* at 344. The Court, distinguishing the facts from those in *Price*, concluded that the speech "clearly amounted to an abuse of the right to free speech" and thus subjected J.D. to accountability under Article 1, section 9. *Id.* Similarly, we recently held in *Al-Awadi v. State*, 901 N.E.2d 81 (Ind. Ct. App. 2009), that an arrestee's "partially political and partially personal" speech about the war in Iraq and consisting of "belligerent, aggressive, loud, and hostile . . . talking very loudly and making gestures with his arms" "is precisely the kind of speech found not to be protected in *J.D.*"

In the instant case, the Defendants were speaking regarding matters of public concern. Normally this speech would be protected. However, because the jury found that the torts committed by the Defendants constituted private torts, an abuse of the Defendants' free speech rights has occurred. Accordingly, the Defendants' speech is not protected by Article 1, Section 9 of the Indiana Constitution.

I therefore dissent.

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Indiana Code Title 35 Article 45, <http://www.in.gov/legislative/ic/code/title35/ar45/ch1.html>

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Case Based On

SCOTUSblog entry on *Snyder v. Phelps* (summary, link to oral argument audio, academic and news coverage, U.S. Supreme Court briefs, 4th Circuit opinion)
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