Braun v. Soldier of Fortune Magazine, Inc.: Advertisement for Hit Man Brings Four Million Dollar Hit to Publisher

I. INTRODUCTION

In *Braun v. Soldier of Fortune Magazine, Inc.*,[1] the Eleventh Circuit affirmed a district court's holding that the First Amendment does not insulate a magazine publisher from liability for publishing a commercial advertisement that presents a substantial danger of harm to the public.[2] In adopting this affirmative duty to examine an advertisement's language, the court imposed tort liability on Soldier of Fortune Magazine ("SOF") for the criminal acts of its advertiser, a third party not joined in the suit.[3] This decision strikes the correct balance between preserving the free flow of commercial information through advertisement with the need to prevent publication of those advertisements that subject the public to deadly harm.

II. STATEMENT OF THE FACTS

For ten consecutive months, SOF ran the following personal advertisement for Michael Savage:

> "GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [sic] and very private. Body guard, courier, and other special skills. All jobs considered."[4]

Savage received thirty to forty phone calls per week during the ten month period. Only one call generated noncriminal employment.[5]

Using the advertisement, Bruce Gastwirth hired Savage to murder his business partner, Richard Braun. Accompanied by two others, Savage killed Braun in the driveway of Braun's suburban Atlanta home. Braun's

---

1. 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1028 (1993).
2. 968 F.2d at 1119. The First Amendment of the United States Constitution states that no law shall abridge the freedom of speech or the press. U.S. CONST. amend. I.
3. 968 F.2d at 1121.
4. *Id.* at 1112. The advertisement also included two telephone numbers and an address.
5. *Id.*

sixteen year old son, Michael, witnessed the execution and sustained injuries from the gunfire himself.[6]

Michael Braun and his brother sued to recover damages for the death of their father, and Michael alone sued for his personal injuries. Plaintiffs alleged that SOF negligently published a personal advertisement that solicited criminal activity, therefore subjecting the public to an unreasonable risk of harm. Plaintiffs submitted evidence of magazine articles and law enforcement investigations linking SOF personal service advertisements to criminal convictions, including murder.[7]

Under Georgia tort law,[8] courts recognize a legal duty not to subject others to an unreasonable risk of harm.[9] In applying this duty to publishers, the district court found that they must refrain from publishing advertisements that subject the public to a clearly identifiable and unreasonable risk of criminal activity.[10] The court informed the jury that the First Amendment protects advertisers from this duty unless the advertisement's language, on its face, creates a "clear and present danger."[11] The jury returned a verdict in favor of plaintiffs on all claims.[12]

The appellate court addressed two issues of law in reviewing the district court's opinion. First, it addressed whether SOF had a duty to plaintiffs under state law, and second, whether the First Amendment prohibits the imposition of such a duty.[13]

III. THE COURT'S OPINION

A. *Majority Opinion*

The threshold question of law was whether a publisher owes a legal duty to the public for advertisements it chooses to print.[14] To impose a duty on publishers to refrain from printing certain advertisements, the advertisement must subject the public to an "unreasonable risk of harm."[15] SOF argued that the risk of harm rises to unreasonableness only

---

6. *Id.*
7. *Id.* at 1112-13.
8. *Id.* at 1114. The district court, sitting in Alabama and having jurisdiction based on diversity of citizenship, applied Alabama conflict of laws. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 494 (1941). Under Alabama law, the substantive law where the injury occurred controls. Bodnar v. Piper Aircraft Corp., 392 So. 2d 1161, 1162 (Ala. 1980).
9. 968 F.2d at 1114 (citing Bradley Ctr., Inc. v. Wessner, 250 Ga. 199, 200, 296 S.E.2d 693, 695 (1982)).
10. *Id.*
11. *Id.* at 1113.
12. *Id.* at 1114.
13. *Id.* at 1114, 1116.
14. *Id.* at 1114.
15. *Id.*

if the advertisement explicitly solicits criminal activity.[16] The Eleventh Circuit rejected this argument as inconsistent with Georgia law.[17] In Georgia, the reasonableness of an activity depends upon the risk-utility analysis formulated in *United States v. Carroll Towing Co.*[18] Liability turns on whether the burden of taking precautions is greater than the product of the probability of harm and the gravity of the injury.[19] Simply stated, if the risk outweighs the utility of the activity, the activity is unreasonable.[20]

In applying the risk-utility balancing test, the court weighed the competing interests of compensating injured victims of tortious conduct against providing First Amendment protection to advertisers who seek to promote their goods and services.[21] The court found liability to exist "only if the advertisement on its face contain[s] a 'clearly identifiable unreasonable risk' of harm to the public."[22] The court determined that the burden on SOF to examine advertisements was not too great because it imposed liability only for advertisements with a clearly identifiable risk of harm and not for those with ambiguous messages or messages requiring interpretation.[23] Thus, as a matter of law, publishers have a duty to examine the face of advertisements and to refrain from publishing those with clear risks of criminal solicitation.[24]

After deciding that a duty exists, the court addressed whether the First Amendment bars the imposition of liability on publishers of commercial advertisements.[25] The Supreme Court has determined that commercial advertisements deserve First Amendment protection.[26] Advertising is afforded this protection because it disseminates information about the supply of goods in the marketplace that consumers need to make intelligent economic decisions.[27] If liability under a criminal statute is unconstitutional, liability under a state's tort law is likewise unconstitutional.[28]

---

16. *Id.* at 1115.
17. *Id.*
18. 159 F.2d 169 (2d Cir. 1947).
19. 968 F.2d at 1115 (citing 159 F.2d at 173).
20. *Id.*
21. *Id.*
22. *Id.* at 1116.
23. *Id.* at 1115-16.
24. *Id.* at 1116.
25. *Id.*
26. *Id.* at 1117; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1873).
27. 968 F.2d at 1117; 425 U.S. at 765.
28. 968 F.2d at 1116 n.5 (citing New York Times v. Sullivan, 376 U.S. 254, 277 (1964)).

Therefore, in imposing a negligence standard, a state must show sensitivity to the First Amendment's protection of expression.[29]

"[I]f state tort law places too heavy a burden on publishers with respect to the advertisements they print, the fear of liability might impermissibly impose a form of self-censorship on publishers."[30] The court noted that this case represents a higher risk of chilling freedom of speech than normal commercial speech cases because it deals with liability of the publisher rather than the actual advertiser itself.[31] The publisher only provided a forum for the advertiser and therefore had less economic interest in advancing the product or service.[32] Imposing liability on publishers could result in depriving commercial speech "of a legitimate and recognized avenue of access to the public."[33]

The Eleventh Circuit determined that the district court showed proper sensitivity to the chilling effect publisher liability can have on First Amendment speech by imposing a "modified" negligence standard.[34] This negligence standard, labeled "modified," required the jury to find SOF liable only if a prudent publisher would interpret the face of the advertisement as containing an identifiable risk that criminal activity was being sought.[35] In determining whether this standard satisfies the limitations of the First Amendment, the court relied on the law of defamation for publishers of noncommercial speech.[36]

In *Gertz v. Robert Welch, Inc.*,[37] the Supreme Court considered whether a publisher could be liable in tort for a defamatory statement.[38] The court determined that a state could impose liability based on negligence only if the duty was modified not to require an investigation by the publisher of each advertisement it printed.[39] Therefore, the court required that the message carry an obvious risk of harm before liability could be imposed.[40]

---

29. *Id.* at 1118.

30. *Id.* at 1117 (citing Michael I. Meyerson, *This Gun for Hire: Dancing in the Dark of the First Amendment*, 47 WASH. & LEE L. REV. 267, 270 (1990)).

31. *Id.*

32. *Id.* at 1117-18. *See* Lisa F. Firenze, *Publishers' Liability for Commercial Advertisements: Testing the Limits of the First Amendment*, 23 COL. J.L. & SOC. PROBS. 137, 167 (1990).

33. 968 F.2d at 1117 (quoting Manual Enterprises, Inc. v. Day, 370 U.S. 478, 493 (1962)).

34. *Id.* at 1118.

35. *Id.*

36. *Id.*

37. 418 U.S. 323 (1974).

38. *Id.* at 325.

39. *Id.* at 347.

40. *Id.* at 348.

By analogy, the Eleventh Circuit adopted the same requirement in the context of a commercial advertisement. It upheld the jury's finding of liability against SOF because the face of the advertisement itself presented an obvious risk of danger to the public.[41] The court recognized the *absence* of a duty to investigate the advertisements as the key element in satisfying the First Amendment.[42] Therefore, the district court's modified negligence theory, and its articulation to the jury that the facial content of the advertisement must pose a clear risk of criminal activity, satisfied the First Amendment prohibitions on a state's regulation of commercial speech.[43]

Since the case involved a First Amendment challenge, the Eleventh Circuit conducted an independent review of the record as required by First Amendment jurisprudence.[44] The court read the advertisement and determined that "Gun for Hire," "professional mercenary," "very private," and "other special skills" clearly implied that Savage was soliciting illegal jobs.[45] The court concluded that the jury correctly found that SOF had a legal duty to refrain from publishing the advertisement.[46] Furthermore, the court upheld the jury's decision that the publication was the proximate cause of Braun's injuries because the third party's illegal conduct was reasonably foreseeable when SOF published the advertisement.[47] Thus, the court affirmed the judgment in favor of the Braun brothers.[48]

B. Judge Eschbach's Dissent

In dissent, Senior Circuit Judge Eschbach determined that the words of the advertisement were ambiguous rather than obviously seeking illegal jobs.[49] Judge Eschbach also expressed concern over the ambiguity of the district court's jury instructions.[50] For these reasons, he declined to uphold third party liability against SOF.[51]

---

41. *Braun*, 968 F.2d at 1119 (citing *Gertz*, 418 U.S. at 348).
42. *Id.*
43. *Id.* at 1120.
44. *Id.* The Supreme Court requires that appellate courts independently review the record to ensure that the trial court has not overly intruded into one's freedom of expression. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984).
45. 968 F.2d at 1121.
46. *Id.*
47. *Id.* at 1121-22.
48. *Id.* at 1122.
49. *Id.*
50. *Id.*
51. *Id.*

IV. ANALYSIS

In *Braun* the Eleventh Circuit answered the question the Fifth Circuit was able to circumvent in *Eimann v. Soldier of Fortune Magazine, Inc.*,[52] a similar case against SOF: Can this duty survive a First Amendment commercial speech challenge?

The Fifth Circuit avoided the constitutional issue because it failed to find a duty of publishers to recognize potentially dangerous advertisements under Texas law.[53] Specifically, the Fifth Circuit found the burden side of the *Carroll Towing* equation[54] too heavy because it would require publishers to interpret advertisements based on their context.[55] The Fifth Circuit viewed a duty to scrutinize potentially dangerous advertisements as more burdensome than a duty to investigate them, which other cases have held is not required.[56] Therefore, the court held, as a matter of law, that publishers had no duty reasonably to recognize potentially harmful advertisements.[57]

In *Braun* the Eleventh Circuit distinguished *Eimann* based on the respective jury instructions.[58] In *Eimann* the district court failed to require a clear and unambiguous risk of harm.[59] The Eleventh Circuit interpreted the *Eimann* court's instructions to require rejection of *all* ambiguous advertisements rather than only those clearly dangerous.[60] The court further distinguished the two cases by the words of the advertisements themselves.[61] The court classified the *Eimann* advertisement as "ambiguous in its message" but classified the *Braun* advertisement as conveying a clear offer to commit crimes.[62]

---

52. 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990). In this case, a victim's son and mother brought a wrongful death claim under Texas law for the victim's assassination. SOF's advertisement read:

> EX-MARINES—67-69 'Nam Vets, Ex-DI, weapons specialist—jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas.

The Fifth Circuit overturned a $9,400,000 judgment for plaintiffs. The court ruled that SOF had no duty to scrutinize an ambiguously worded advertisement that did not expressly solicit illegal activity.

53. 880 F.2d at 838.

54. *See supra* notes 18-20.

55. 880 F.2d at 835-36.

56. *Id.* at 837 (citing Pittman v. Dow Jones & Co., 662 F. Supp. 921, 923 (E.D. La. 1987)).

57. *Id.* at 837-38.

58. 968 F.2d at 1115-16.

59. *Id.* at 1116.

60. *Id.*

61. *Id.* at 1116 n.3.

62. *Id.*

Despite the distinctions between the jury instructions and the advertisements in the two cases, the decisions of the Eleventh Circuit and the Fifth Circuit are not easily reconciled. The decision in *Braun* requires at least a duty to examine an advertisement's language to determine if it exposes the public to an unreasonable risk of harm. In contrast, the court in *Eimann* refused to impose any duty of recognition or scrutiny by publishers. In effect, that court allows publishers to enjoy nearly unconditional immunity from civil liability. The court in *Eimann* stated that permitting tort exposure of publishers in this situation would invite "liability in an indeterminate amount" that would ultimately cause consumers to absorb the costs, or publications to stop circulation.[63]

The court in *Eimann* determined this without ever addressing the First Amendment issue. To the contrary, the Eleventh Circuit considered all these factors, along with the First Amendment freedom of speech issue, and still imposed a legal duty. The court determined that this limited liability would have only a minimum impact on a publisher's ability to publish commercial and noncommercial speech.[64]

This apparent split between two circuits on cases so factually similar presents a First Amendment issue ripe for resolution by the Supreme Court. However, the Court has denied SOF's writ of certiorari in *Braun*.[65] The Court has let stand SOF's liability for providing a forum that brought together a contract killer and his client.

While publishers are merely conduits for advertisers and their audience, they do not deserve absolute constitutional immunity from messages they print. They must comply with a minimum standard of care like publishers of defamatory material. When an advertisement has an obvious motive to invite lawless activity that subjects the public to a risk of bodily harm, society has little interest in protecting such speech. Like the advertiser itself, the publisher should be discouraged from promoting dangerous or violent conduct. SOF has a historical and an evidentiary link to criminal activity and must be held accountable for future violence when the solicitation is obvious.[66]

Imposing a modified duty that requires publishers like SOF to reasonably recognize dangerous advertisements is not constitutionally burdensome. This standard requires no investigation of the advertiser behind the advertisement nor does it require an analysis of the ad's message in light of its context. The standard simply requires an inspection of the advertisement's face, a standard far below strict liability.

---

63. 880 F.2d at 837 (quoting Yuhas v. Mudge, 322 A.2d 824, 825 (App. Div. 1974)).
64. 968 F.2d at 1119.
65. 113 S. Ct. 1028 (1993).
66. *See supra* note 7.

V. Conclusion

The modified negligence standard imposed by the Eleventh Circuit properly balances a tort victim's right to redress against the constitutional need to disseminate commercial information. Liability conditioned on a clear and apparent danger of harm allows the First Amendment to continue protecting the free flow of ideas while driving out irresponsible or negligent agents of the press.

Mae Charles Babb