CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Steiner v Superior Court 11/26/13

In Limine Motions; Prior Restraint of Free Speech; Attorney Advertising; CCP section 611

Plaintiffs filed a personal injury action alleging cancer caused by exposure to asbestos in friction automobile parts manufactured and distributed by Volkswagen and Ford. After the jury was impaneled, Volkswagen moved for an order requiring the plaintiffs' attorney, Simona Farrise, to remove during trial two pages from her law firm website touting her recent successes against Ford in similar asbestos cases. The pages described two recent verdicts against Ford for the same tort, resulting in awards in excess of one million dollars. Volkswagen asserted that, "human nature being what it is" it believed that in the interests of a fair trial, the information would be "provocative and prejudicial" and should not intentionally be prominently displayed on the internet by counsel during the trial.

Ford joined in the motion. Both defendants urged that the information would obviously prejudice the jury process during the trial and deliberations in the case, if encountered by a juror. Plaintiffs argued that the request infringed upon counsel's constitutional right of free speech and the more appropriate remedy was to admonish the jury not to search the internet for information about the attorneys. The trial court, however, granted the motion. After the hearing, the trial court clarified that the order was to have counsel remove the pages, not take down the whole website.

The trial court admonished the jurors not to Google the attorneys. It also gave the standard admonishments prior to opening statement, including CACI 100, which included reference to prohibiting the use of the internet in any way to

search for information about the case. Plaintiffs sought a writ of mandate seeking to reverse the trial court's order, which was denied by the Second District Court of Appeal. Plaintiffs then petitioned the California Supreme Court for review on the basis that the order required counsel take down her entire website. The Supreme Court granted review and ordered the DCA to issue an order to show cause. At the Second DCA, plaintiffs conceded they had erroneously overstated the scope of the trial court's order, and acknowledged it was limited to taking down only the pages relating to the two verdicts. Counsel did restore the pages following completion of the trial in October 2011.

Because the order raised questions as to a trial court's authority to restrict an attorney's free speech rights during trial to prevent jury contamination, the Justices agreed that it raised an issue of broad public interest that is likely to evade timely review. (*Nebraska Press Assn. v Stuart* (1976) 427 U.S. 539) The 2nd DCA began its opinion by noting that plaintiffs correctly asserted that the trial court placed a direct restraint on counsel's right to freedom of speech under the United States and California Constitutions.

Orders which restrict or preclude a citizen from speaking in advance are known as "prior restraints" and are disfavored and presumptively invalid. (*Hurvitz v Hoefflin* (2000) 84 Cal.App.4th 1232) An order restricting the speech of trial participants, typically known as a "gag order," is a prior restraint. (*Saline v Superior Court* (2002) 100 Cal.App.4th 909) A court seeking to ensure a fair trial may not impose a prior restraint unless "the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Volkswagen argues that whenever an attorney's exercise of free speech potentially conflicts with a party's right to a fair trial, the trial court may reasonably impose a prior restraint on such speech. (*Gentile v State Bar of Nevada* (1991) 501 U.S. 1030) The DCA distinguished that case as involving criminal proceedings and a disciplinary rule regulating speech by attorneys. Instead, the Justices inquired whether the gag order here is subject to strict judicial scrutiny. Under this standard, the gag order may not be imposed unless (1) the speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest; (2) the order is narrowly tailored to

protect that interest; and (3) no less restrictive alternatives are available. (*Maggi v Superior Court* (2004) 119 Cal.App.4th 1218)

Volkswagen contends the order is not subject to strict scrutiny, but rather to the less restrictive standard for commercial speech. Typically, lawyer advertising is commercial speech and is accorded an intermediate measure of First Amendment protection. (*Revo v Disciplinary Bd. Of the Supreme Court* (10th Cir. 1997) 106 F. 3d 929) Plaintiffs acknowledge Farrise's website advertises her legal services and thus contains elements of commercial speech.

Under the intermediate scrutiny standard, the Supreme Court developed a four-prong test to examine whether state regulations on commercial speech are constitutionally valid: First, the court must determine whether the speech concerns lawful activity and is not misleading. If it satisfies that criteria, the court must decide whether the asserted governmental interest is substantial, whether the restraint directly advances that interest and whether it is more extensive than is necessary to serve that interest. (*Central Hudson Gas v Public Service Comm'n* (1980) 447 U.S. 557)

Volkswagen cites no cases applying the *Central Hudson* standard to judicial restraints on commercial speech. Plaintiffs contend it is irrelevant which standard is applied because the trial court's order does not pass muster even under the less restrictive *Central Hudson* test. Volkswagen asserts the restraint was proper under the first prong of the *Central Hudson* test because the challenged speech was misleading. It claims the two web pages omitted pertinent information, such as that a settlement in one case resulted in dismissal of all claims. The Justices pointed out that VW sought removal of the pages to prevent the jury from accessing them until the trial was over. It did not seek removal to prevent deceptive or misleading advertising. Accordingly there is no basis to make the determination whether the challenged speech was misleading.

The parties agree that the second prong is met, as there is a substantial governmental interest in assuring the parties receive a fair trial. Turning to the third and fourth prongs, however, even if it is assumed the restraint advanced a governmental interest, the question in the fourth prong is whether it was more extensive than necessary to serve that interest. There must be a fit between the

government's ends and the means chosen to accomplish those ends. It must be a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means, but a means narrowly tailored to achieve the desired objective. (*Florida Bar v Went For It, Inc.* (1995) 515 U.S. 618) VW maintains the restraint was necessary to reduce the chance of an expensive and time-consuming new trial, but the Second DCA stated that it had not demonstrated that "alternative, less speech restrictive measures would be less efficient or effective in accomplishing the government's objective. As emphasized by the U.S. Supreme Court, if the First Amendment means anything, it means that regulating speech must be a last—not first—resort. (*Thompson v Western States Medical Center* (2002) 535 U.S 357)

Frequent and specific cautionary admonitions and jury instructions constitute the accepted, presumptively adequate, and plainly less restrictive means of dealing with the threat of jury contamination. Cautionary admonitions and instructions serve to correct and cure myriad improprieties, including the receipt by jurors of information that was kept from them. To paraphrase Justice Holmes, it must be assumed that a jury does its duty, abides by cautionary instructions, and finds facts only because those facts are proved. (*NBC Subsidiary (KNBC-TV) Inc. v Superior Court* (1999) 20 Cal.4th 1178) Here, the trial court ordered Farrise to remove information from her website regarding prior verdicts involving Ford, but the order did not apply to any other websites discussing such verdicts. Thus, the trial court's admonitions not to research the parties or their attorneys did more to prevent potential jury misconduct than the removal of some of the available information on the internet.

Volkswagen cites the vastly increased risk of prejudice from extrajudicial sources and how such information has increased the risk of prejudice and weakened the courts' ability to filter or control the flow of information. But VW cites no authority suggesting the prior restraint of speech is the appropriate means of handling the threat of jury contamination. The Justices observe that the first line of defense against juror legal research is to address the issue in jury instructions. Given the ease of access to extraneous information about the law and the facts, trial judges are well advised to reference Internet searches specifically when they instruct jurors not to conduct their own research or

investigations. Statutes were amended by the Legislature in 2011 to clarify and codify an informal practice among trial courts to authorize courts to appropriately admonish jurors against the use of electronic and wireless devices to communicate, research, or disseminate information about an ongoing case.

Among other things, the law amended Code of Civil Procedure section 611 to require the trial court to admonish the jury that the prohibition on research, dissemination of information, and conversation applies to all forms of electronic and wireless communication. The adoption of these amendments underscores that trial courts are appropriately focusing on tougher admonition rules and contempt consequences, rather than on trying to restrain speech on the Internet. This is consistent with the tenet that admonitions are the presumptively reasonable alternative to restricting free speech rights. (*NBC Subsidiary*, at p. 1221)

Here the trial court properly admonished the jurors not to Google the attorneys and also instructed them not to conduct independent research. The Justices accept that jurors will obey such admonitions. If a juror ignored these admonitions, the court had tools at its disposal to address the issue. It did not, however, have authority to impose, as a prophylactic measure, an order requiring Farrise to remove pages from her law firm website to ensure they would be inaccessible to a disobedient juror. Notwithstanding the good faith efforts of a concerned jurist, the order went too far.

The trial court's order constituted an unlawful prior restraint on Farrise's constitutional right to free speech. Because the order is no longer in effect, the trial court need not take any action. The parties shall bear their own costs.

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