



Mutlimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491 (Ga. Ct. App. 1994)

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Recommended Citation

Gracia M. Shiffrin, *Mutlimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491 (Ga. Ct. App. 1994), 5 DePaul J. Art, Tech. & Intell. Prop. L. 219 (1995)

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Multimedia WMAZ, Inc. v. Kubach,

443 S.E.2D 491 (GA. CT. APP. 1994).

INTRODUCTION

AIDS patient brought action for public disclosure of private facts against a television station for the broadcast of his identifiable image during a live call-in show on AIDS. The Bibb Superior Court entered an award for general and punitive damages in favor of the plaintiff. The television station appealed. The Court of Appeals of Georgia, en banc, held that (1) the plaintiff did not waive his right to bring an action on grounds that the plaintiff had previously revealed his disease to the public; and (2) the television station was not shielded from liability on policy grounds.¹

FACTS

Plaintiff suffers from Acquired Immune Deficiency Syndrome (AIDS). Defendant Multimedia WMAZ, Inc. is a television station (the “station”) that produced a live call-in show on the topic of AIDS and drug use (the “show”) in which plaintiff participated. Plaintiff agreed to participate through his physician, Dr. Harold Katner, on the condition that his face would not be recognizable to the television audience. The station planned to electronically distort plaintiff’s image through a process called digitization.

Previously, the station had aired another program on AIDS in which some of Dr. Katner’s female patients appeared with their faces digitized. An employee of the station testified that he pre-set the level of digitization, and that he thought it was sufficient. He did not use plaintiff to pre-set the digitization even though he was there and available. He did not allow plaintiff to see the level of digitization to give him the opportunity to approve it as it was done with the female patients. The employee also testified that he did not like to put the level of digitization too high because if he did, the viewing audience would lose interest. During the show’s broadcast, the digitization was inadequate and plaintiff was recognizable for the first seven seconds.

After the broadcast, plaintiff became withdrawn, extremely depressed and almost suicidal. He refused to leave his home for fear of being recognized and harassed. Dr. Katner testified that plaintiff’s physical condition, particularly his immune system condition, dropped dramatically after the broadcast. He further stated that stress and emotional upset often have a detrimental effect on the physical condition of AIDS patients, and that in plaintiff’s case it manifested

1. The Court’s discussion of damages, jurors, and damage to reputation is omitted from this summary.

itself in shingles, an extremely painful disease associated with stress. This extreme situation lasted about a year; since then, plaintiff has improved, but his condition is still worse than it was before the broadcast.

Plaintiff sued the station for invading his privacy by publicly disclosing private facts about him, and the station appeals from the jury's verdict for the plaintiff.

LEGAL ANALYSIS

The first issue before the court was whether plaintiff had "waived" his right to bring an action for public disclosure of private facts by making the fact that he had AIDS "public" prior to the broadcast. The court concluded that the station's disclosure had gone far beyond the scope of any prior disclosure by plaintiff, in terms of both audience and purpose. Among the elements necessary to establish a cause of action for public disclosure of embarrassing private facts is the requirement that the facts disclosed to the public must be private, secluded or secret and not public.² Accordingly, "the protection afforded an individual's right to privacy may be waived or withdrawn to whatever degree and in whatever connection his life has ceased to be private."³ The station contended that because plaintiff had previously appeared on a national television show and he had acknowledged his disease to family members, friends, medical personnel and members of his AIDS support group, plaintiff had waived his right to keep his illness from the public by making the disclosure prior to the station's show.

The court explained that the degree and context of plaintiff's disclosure was relevant to the inquiry of a waiver. As to the national television show, plaintiff's privacy had been protected by concealing his identity either by digitizing his face or by showing only his back. With regard to the individuals to whom plaintiff had revealed his illness, plaintiff thought they had a reason to know of his disease. Plaintiff disclosed his illness to his family, friends, medical personnel, and members of his support group because he wanted these individuals to know because they cared about him and/or because they also had AIDS. Even if the court had accepted the station's estimate of those who knew of plaintiff's condition, approximately 60 individuals, the number was relatively small in relation to the television viewing public in Macon, Georgia.

The court further noted that the station had explicitly agreed to respect plaintiff's privacy in order to secure his participation in the show and therefore the jury was authorized to find that the fact that plaintiff had AIDS was not public prior to the broadcast of the show.

The next issue before the court was whether liability attached for disclosure of plaintiff's identity as an AIDS patient when the disclosure occurred during a broadcast on a matter of public interest. The court rejected the station's contention that first amendment interests in free expression outweighed plaintiff's right to privacy in a show about AIDS. The court distinguished the present case from

2. *Cabaniss v. Hipsley*, 151 S.E.2d 496, 501 (Ga. Ct. App. 1966).

3. *Id.* at 502.

the case law relied on by the station because the identity of those suffering from AIDS, unlike the identity of those involved in criminal cases or investigations, did not further a legitimate public interest.

The court pointed out that the Georgia legislature has recognized that the identities of those suffering from AIDS are generally not a matter of public interest. The legislature has placed restrictions on disclosure of "AIDS confidential information,"⁴ which includes the fact that a person is being treated for AIDS,⁵ and has made it a misdemeanor to violate those restrictions.⁶ The court also stressed that the station was in the position to disclose plaintiff's identity as an AIDS patient only because of its promise to plaintiff that there would be no such disclosure.⁷

The station argued that the court should fashion a rule analogous to the Good Samaritan Statute⁸ to provide broadcasters insulation from liability for anything that happens as a result of their negligence when they broadcast a "public service" show. The court found that this argument did not support the station's contention. If the verdict were upheld broadcasters may shy away from producing such shows; but, if it were not upheld, AIDS patients who had not publicly acknowledged their disease may refuse to participate in such shows. The court also noted that in any case, policy decisions were for the legislature to make.

CONCLUSION

The Court of Appeals of Georgia, en banc, affirming the judgment of the Bibb Superior Court, held that (1) the AIDS patient had not waived his right to bring action for public disclosure of private facts by previously revealing his disease to his family, friends, medical personnel and members of his support group; and (2) the television station which revealed the AIDS patient's identity during the show was not shielded from liability on policy grounds.

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4. OCGA § 24-9-47 (b).

5. OCGA § 31-22-9.1(2).

6. OCGA § 24-9-47 (c).

7. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (recognizing that the First Amendment does not prohibit recovery of damages from newspaper for breach of promise to keep source's name confidential).

8. OCGA § 51-1-29.

