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Sigma Chi Fraternity v. George Mason University, 993 F.2D 386 (4th Cir. 1993)

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CASE SUMMARIES

Sigma Chi Fraternity v. George Mason University,

993 F.2D 386 (4TH CIR. 1993).

Introduction

George Mason University sanctioned the Sigma Chi fraternity for conducting an "ugly woman contest" because it allegedly had racial and sexual overtones. Sigma Chi brought suit against George Mason University seeking a declaratory judgement that the sanctions were violative of the First Amendment. The District Court for the Eastern District of Virginia granted summary judgment to Sigma Chi on the First Amendment claim. The United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court, holding that there was no outstanding issue of material fact as to whether the fraternity's conduct was expressive.

Facts

The IOTA XI Chapter of Sigma Chi fraternity ("the Fraternity") held an "ugly woman contest" during its annual Derby Days event in order to raise funds for charity. During the contest, "fraternity members appeared as caricatures of different types of women", including one of a black woman with stringy black hair in curlers and exaggerated breasts and buttocks.

Following the contest, over two hundred students signed a petition protesting the event as racist and sexist in nature. The Dean of Student Affairs discussed the situation with representatives of the objecting students, the Fraternity, and student government. George Mason University ("the University") found that the Fraternity's "behavior created a hostile learning environment for women and blacks." Multiple sanctions were then imposed on the Fraternity.

The Fraternity brought this action under 42 U.S.C. § 1983 to nullify the imposition of the sanctions as violative of the First and Fourteenth Amendments. The University submitted an affidavit describing the University's "mission" as one "committed to promoting a culturally and racially diverse student body" and "committed to teaching the values of equal opportunity and equal treatment."[1] It maintained that such a "mission" could not be attained "if behavior like that of Sigma Chi is perpetuated on . . . campus."[2] The District Court granted the Fra-

1. Sigma Chi Fraternity v. George Mason University, 933 F.2d 386, 388 (4th Cir. 1993).
2. Id. at 389.

ternity summary judgment on its First Amendment claim, and the University appealed.

Legal Analysis

The issue before the court was whether the ugly woman contest was sufficiently expressive to bring it within First Amendment protection. The court used two different analytical approaches to determine this issue. First, the court noted that short of obscenity, live entertainment is generally protected under the First Amendment. Live entertainment that is devoid of "ideas," but with entertainment value, may also be protected because it is too difficult to distinguish the line between the informing and the entertaining.[3]

The court held that the low quality of the entertainment here was not a consideration in deciding whether First Amendment protection was warranted. The court noted that "unquestionably, some forms of entertainment are so inherently expressive as to fall within the First Amendment's ambit regardless of their quality."[4] Music[5], motion pictures[6] and crude street skits[7] were cited as examples. The Supreme Court's concession in *Barnes v. Glen Theatre, Inc.*[8] was also cited. The Court in *Barnes* found that nude dancing is expressive conduct entitled to First Amendment protection because it is "inherently expressive entertainment" conveying emotions and ideas understood by its viewers.[9] The Fraternity's skit, as "inherently expressive entertainment" was therefore entitled to First Amendment protection regardless of its low quality of entertainment.

The second approach the court used to decide whether the "ugly woman contest" was protected by the First Amendment focused on the Fraternity's intent, by their conduct, to communicate a message to the observers. The expressive conduct test used by the court to make this determinaton involved two parts. The first prong was whether an intent to convey a particularized message was present. The second prong was whether the likelihood was great that the message would be understood by those who viewed it.[10]

The court found that the Fraternity had the requisite intent to convey a particularized message. The Fraternity intended to convey the message that the University's policies concerning racial and sexual themes should be taken less seriously. The affidavits filed by the University officials showed that they believed the Fraternity intended to convey a message. Also, the Fraternity members apology, post-conduct contriteness, and purposeful nonsensical treatment of the sexual and racial themes showed that the Fraternity intended to convey a message. The

3. Winters v. New York, 333 U.S. 507, 510 (1948).
4. *Sigma Chi* 933 F.2d at 390.
5. Ward v. Rock Against Racism, 491 U.S. 781 (1989), *reh'g denied*, 492 U.S. 937 (1989).
6. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
7. Schacht v. United States, 398 U.S. 58 (1970).
8. 111 S.Ct. 2456, 2460 (1991).
9. *Id.*
10. Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405 (1974)).

court found that no evidence suggested that the Fraternity advocated segregation or inferior social status for women.

The court found that the second prong of the expressive conduct test was also satisfied. There was a "great likelihood that at least some of the audience viewing the skit understood the Fraternity's message of satire and humor." This was evident since "some students paid to attend the performance and were entertained." Despite the sparsity of evidence in the record, the court concluded that the Fraternity's "ugly woman contest" satisfied the test for expressive conduct.

The court noted that its decision to protect the Fraternity's conduct was consistent with recent content and viewpoint discrimination cases. In *R.A.V. v. City of St. Paul,*[11] the Court struck down the City of St. Paul's hate speech ordinance which prohibited views that ran counter to the city's ideas of racial or religious equality. St. Paul's city ordinance prohibited displays of symbols that aroused anger, alarm or resentment in others on the basis of race, color, creed, religion or gender, but permitted displays of symbols which advanced ideas of racial or relgious equality. "The First Amendment does not permit St. Paul to impose prohibitions on those who express views on disfavored subjects."[12] Likewise, the University may not sanction the Fraternity for the message conveyed by the "ugly woman contest" because it went against the views supported by the University, while permitting consistent views. The problem was the University's punishment of those who disagreed with its goals of racial integration and gender neutrality while encouraging those that would further the University's viewpoint. The court also noted, without elaborating, that the University had a substantial interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education. However, there were numerous alternatives to imposing punishment on students based on the viewpoints they express. The First Amendment forbids the government from restricting expression because of the message or ideas expressed.[13] Thus, the majority concluded that the University must not regulate speech based on its content or viewpoint.

The concurring opinion agreed with the majority's affirmance of the district court's grant of summary judgment for the Fraternity, but felt that the reasoning unnecessarily went too far beyond the contours of the requirements of the First Amendment. According to the concurrence, the Supreme Court has repeatedly held that a content-based regulation of protected expression survives judicial scrutiny if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.[14] The concurrence noted that the educational forum is unique in nature. Since universities are maintained primarily for the benefit of the student body, Universities must maintain the ability to refuse to sanction certain behavior which infringes on the rights of other students. While the con-

11. 112 S.Ct. 2538 (1992).

12. Id. at 2541, 2547.

13. Police Dept. v. Mosley, 408 U.S. 92, 95 (1972).

14. Simon & Schuster, Inc. v. New York Crime Victims Bd., 112 S. Ct. 501, 509 (1991) (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

currence found that forbidding the skit or requiring substantial amendment was not beyond the University's power, its finding of unconstitutionality was based on the University's "unrevoked permission to give the skit."

Conclusion

The Fourth Circuit Court of Appeals affirmed the District Court's granting summary judgment to the Fraternity on the First Amendment issue since there was no outstanding issue of material fact. The fraternity's "ugly woman contest" was "inherently expressive" and entitled to protection under the First Amendment. Alternatively, the Fraternity had the requisite intent to convey the particularized message that the University's views on race and gender should be taken less seriously and this message was understood by those students who paid to view the skit and were entertained. Finally, the University could not further its "mission" by regulating speech on the basis of its content of viewpoint. Thus, the First Amendment prohibited the University from sanctioning the Fraternity.

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