

Florida Court Reverses Injunction Prohibiting Television Station From Broadcasting Documents

By Judith M. Mercier and Charles D. Tobin

A Florida appeals court has overturned an injunction that prohibited an Orlando television station from broadcasting the contents of documents about a political consultant that the station lawfully obtained from a source. *Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 2007 WL 2890115 (Fla. 5th Dist. Ct. App. Oct. 4, 2007).

The court found that – even though the documents purportedly included medical records and attorney-client communications – the plaintiff, Douglas M. Guetzloe, had failed to meet his "heavy burden" to justify entry of the prior restraint.

Background

Guetzloe is a well-known Central Florida political operative. A source, who bought the 80 boxes of records at auction from a storage facility after the facility said Guetzloe had failed to pay his storage bill, brought the records to Post-Newsweek station WKMG after recognizing Guetzloe's name on the documents.

After WKMG advised Guetzloe that it intended to publish portions of the contents of the records in its broadcast, Guetzloe filed

suit in the state court seeking declaratory and injunctive relief and replevin.

Guetzloe asserted privacy interests in the records, claiming that they contained medical records and attorney-client communications.

Without notice to WKMG, Guetzloe sought a temporary injunction. Circuit Court Senior Judge Rom W. Powell granted Guetzloe's *ex parte* motion and enjoined WKMG from publicly airing the contents of the records. When it received notice, WKMG moved to dissolve on the basis that the injunction was "an unconstitutional prior restraint on its right to broadcast news based on lawfully obtained information." A few days after the hearing on WKMG's dissolution motion, the trial court refused to set it aside, but modified the injunction to solely prohibit the publication of medical records of Guetzloe and his family and communications between Guetzloe and his attorneys.

The court acknowledged that "in over two centuries, the Supreme Court has never sustained a prior restraint involving pure speech, such as the one at issue here."

Reversal of Unconstitutional Prior Restraint

The Florida Fifth District Court of Appeal, in an opinion by Judge Vincent G. Torpy, Jr., on October 5, 2007, reversed the temporary injunction. In doing so, the court followed traditional prior restraint law in recognizing that "the censorship of publication has been considered acceptable only in 'exceptional cases'" and holding that Guetzloe failed to meet his "heavy burden" for the imposition of such censorship.

The court acknowledged that "in over two centuries, the Supreme Court has never sustained a prior restraint involving pure speech, such as the one at issue here." The court held that Guetzloe did not establish that the records in the boxes are "sufficiently sensitive," giving rise to a privacy interest that would outweigh WKMG's First Amendment right to broadcast them. The court rejected the lower court's reliance on HIPAA, finding it inapplicable under these facts, and also rejected Guetzloe's constitutional right of privacy arguments, holding that those privacy rights only apply in actions involving the government.

The court also noted that regardless of Guetzloe's claim that the storage company did not have legal authority to auction his documents, he offered no proof that WKMG engaged in unlawful conduct to gain possession of the documents. Finally, the court held that Guetzloe's claim that some of the documents contain attorney-client communications also would not justify a prior restraint.

According to the court, attorney-client privilege may only justify a prior restraint, if ever, when a defendant's fair trial rights are at stake, according to the court (citing *United States v. Noreiga*, 752 F. Supp. 1045 (S.D. Fla. 1990)).

Judith M. Mercier and Charles D. Tobin are partners in the Orlando and Washington, D.C. offices, respectively, of Holland & Knight LLP. Along with Sanford L. Bohrer (in Miami) and David C. Borucke (in Tampa), they represented amici curiae Florida Association of Broadcasters, Tribune Company, Inc., Fox Television Stations, Inc., The Hearst Corporation, E.W. Scripps, Company, News-Journal Corporation, The New York Times Company, Gannett Company, Inc., The Associated Press, The Washington Post, Cable News Network, Inc., The Florida Press Association, The First Amendment Foundation. Monterey Campbell, Jack A. Kirschenbaum and Maureen A. Vitucci, of Gray Robinson, P.A., Melbourne, Florida, represented WKMG. Frederic B. O'Neal, Windermere, Florida, represented Douglas Guetzloe.