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Freedom of Speech and Press

Goetz v. Kunstler[448]
(decided March 14, 1995)

Plaintiff, Bernhard Goetz, commenced an action against William Kunstler and Carol Communications, Inc., to recover damages for "certain false, scandalous, malicious and defamatory statements" made about him in an autobiography entitled "My Life as a Radical Lawyer" by William M. Kunstler and published by Carol Communications Inc.[449] Kunstler argued that his statements were protected free expression under the New York State[450] and the United States Constitutions.[451] On a motion for summary judgment, the Supreme Court, New York County, held that: (1) a majority of statements, including those describing the individual as a "murderous vigilante" and as having "developed a hatred toward black people" were nonactionable opinion, and (2) remaining statements were either true or not actionable because plaintiff was unable to prove that he was exposed to "public contempt, ridicule, aversion or disgrace," or that the statements induced "an evil opinion of him in the minds of right-thinking persons, and . . . deprive[d] him of their friendly intercourse in society."[452]

The allegedly defamatory chapter of the book entitled "Defending Blacks in a Racist Country," described some of the African American clients Kunstler had represented throughout his career.[453] In one such chapter, Kunstler discusses one of his

448. 164 Misc. 2d 557, 625 N.Y.S.2d 447 (Sup. Ct. New York County 1995).

449. *Id.* at 559-60, 625 N.Y.S.2d at 450.

450. N.Y. CONST. art. I, § 8. This section emphatically commands: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and *no law* shall be passed to restrain or abridge the liberty of speech or of the press." *Id.* (emphasis added).

451. *Goetz*, 164 Misc. 2d at 559, 625 N.Y.S.2d at 450. *See* U.S. CONST. amend. I. The First Amendment provides that: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.*

452. *Id.* at 564, 625 N.Y.S.2d at 453.

453. *Id.* at 558, 625 N.Y.S.2d at 449. Some of the clients Kunstler represented include:

African American clients, Darrell Cabey, and in a four paragraph passage, makes statements about Bernhard Goetz that are the basis of this defamation action.[454]

James Dixon York and Anthony La Borde, former Black Panthers accused of killing two New York City Police Officers; Wayne Williams, the convicted killer in the Atlanta child murder cases; Larry Davis, who was charged with the attempted murder of six police officers; Alcee Hastings, an impeached Federal Judge; Yusef Salaam, one of the youths charged with raping a Central Park jogger; and Washington, D.C. Mayor Marion Barry.

Id.

454. *Id.* at 558, 625 N.Y.S.2d at 449. Kunstler wrote:

On a crowded subway train a few days before Christmas, 1984, four black kids aggressively panhandled Bernhard Goetz for five dollars, and he pulled out a gun and shot them. He was immediately hailed as a hero, while the four kids, falsely reported to be armed with sharpened screwdrivers, were labeled as evil wrongdoers. As it turned out, the kids had not been armed, and Goetz was nothing more than a murderous vigilante. What if the kids had been white? I'm certain that Goetz would have been condemned by the same people who so quickly rushed to praise him.

Goetz shot those four youths because he is paranoid and has venomous feelings against black people. As he said publicly, he had been mugged previously and had developed a hatred toward all blacks. In 1986, he was convicted of weapons possession rather than attempted murder because the white public still viewed him as a hero, and he served a reduced sentence of six months.

A year earlier, in 1985, I had been contacted by Shirley Cabey, whose son, Darrell, was one of Goetz's victims. She wanted to sue Goetz because, as a result of the shooting, her son was paralyzed and would never walk again. Also, the Cabey family had incurred enormous medical expenses and needed help to pay the bills. Along with Ron, I brought a $50 million lawsuit and felt confident that we would eventually win because what Goetz had admitted to the police in Concord, New Hampshire, where he fled after the shootings. He told them that, after he shot Darrell and the others, he walked up to Darrell as he lay wounded on the seat of the subway car and said, "You seem to be all right. Here's another."

Goetz then shot him again, and it was apparently this second bullet that had severed Darrell's spinal column.

Goetz admitted this when we took his deposition for the Cabey family's lawsuit. I asked, "Did you say these things to Darrell?" and he said, "Yes." When we gave this information to the press, he lost much of his widespread support in the white community. Ron and I have also filed a

Specifically, plaintiff claims that certain comments made by defendant in his book were "false, scandalous, malicious and defamatory,"[455] and that "defendants allowed these statements to be published 'knowing they were not true, and did so with actual malice and ill-will toward the plaintiff, and for the expressed purpose of injuring the plaintiff's good name, reputation, feelings and public standing, exposing him to public ridicule and loss of esteem in the minds of a substantial number of persons in the community.'"[456]

Defendants argued that the allegedly defamatory statements were constitutionally protected expressions of opinion and were nonactionable under the defense of truth, and, therefore, summary judgment should be granted dismissing the complaint.[457]

The Supreme Court, New York County, granted defendants' motion for summary judgment.[458] The court cited *Immuno A.G. v. J. Moor-Jankowski*[459] after it explained that "[t]he free speech provision of the New York State Constitution is broader than the

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claim on Darrell's behalf with the Crime Victims Board which is still pending, as is the lawsuit. Meanwhile, our client spends his days in a wheelchair in his family's apartment, watching television, another victim of the cancer of racism.

Id. at 558-59, 625 N.Y.S.2d at 449-50.

455. *Id.* at 559-60, 625 N.Y.S.2d at 450.

456. *Id.* at 560, 625 N.Y.S.2d at 450.

457. *Id.*

458. *Id.* at 565, 625 N.Y.S.2d at 453.

459. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 500 U.S. 954 (1991). The plaintiff brought suit for libel based on a letter to the editor published in the Journal of Medical Primatology, a journal co-founded and edited by the defendant Dr. J. Moor-Jankowski. *Id.* at 240, 567 N.E.2d at 1227, 566 N.Y.S.2d at 908. The letter criticized the plaintiff's planned use of chimpanzees to conduct hepatitis research in Africa. *Id.* The letter stated that plaintiff's plan was motivated by a desire to avoid restrictions on the importance of chimpanzees which could eventually decimate the wild chimp population, and could spread hepatitis to the whole chimpanzee population. *Id.* Plaintiff also objected to an article in another magazine in which defendant is quoted as criticizing the plaintiff's plan. *Id.* at 241, 567 N.E.2d at 1272-73, 566 N.Y.S.2d at 908-09.

Federal Constitution."[460] In reaching its decision as to whether a particular communication is actionable, the court referred to a standard which state and federal law have both recognized.[461] In *Immuno*, the court began its defamation inquiry with the key question of whether the "challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact."[462] The *Immuno* court added that the impression created by the statements and the general tone of the expressions must be considered as viewed by the reasonable person.[463]

Furthermore, relying on the framework set out in *Gross v. New York Times Co.*,[464] the court concluded that the statements complained of were constitutionally protected opinion.[465] The court in *Gross* stated that there is a

> distinction between a statement of opinion that implies a basis in facts which are not disclosed to the reader or listener, [as opposed to] a statement of opinion that is accompanied by a recitation of the facts on which it is based or one that does not imply the existence of undisclosed underlying facts.[466]

The reason the courts have found such statements to be actionable is because a reasonable reader or listener would infer that the writer or speaker knows certain facts, unknown to said reader or

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460. *Goetz*, 164 Misc. 2d at 561, 625 N.Y.S.2d at 451.

461. *Id.* The court held "[b]oth State and Federal defamation law have recognized a distinction between expressions of opinion, which are not actionable, and assertions of fact, which may form the basis of a viable defamation claim. *Id.* (citing Immuno A.G. v. J. Moor-Jankowski, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 500 U.S. 954 (1991)). *See also* Gross v. New York Times Co., 82 N.Y.2d 146, 623 N.E.2d 1163, 603 N.Y.S.2d 813 (1993); 600 West 115th Street Corp. v. Von Gutfeld, 80 N.Y.2d 130, 145, 603 N.E.2d 930, 938, 589 N.Y.S.2d 825, 833 (1992).

462. *Immuno*, 77 N.Y.2d at 243, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909.

463. *Id.* at 243, 567 N.E.2d at 1273-74, 566 N.Y.S.2d at 909-10.

464. 82 N.Y.2d 146, 623 N.E.2d 1163, 603 N.Y.S.2d 813 (1993).

465. *Goetz*, 164 Misc. 2d at 562, 625 N.Y.S.2d at 451.

466. *Gross*, 82 N.Y.2d at 153, 623 N.E.2d at 1168, 603 N.Y.S.2d at 818 (citations omitted).

listener, which support the opinion and are detrimental to the person toward whom the communication is directed.[467]

In the *Goetz* case, the court concluded that the statements in Kunstler's book are very likely to be read as an opinion, rather than objective fact since they were apparently "a biased point of view of an activist lawyer."[468] Therefore, the court held that the statements in Kunstler's book complained of by the plaintiff were constitutionally protected opinion.[469] Furthermore, the court, in *Goetz*, found that the characterization of plaintiff, a public figure, as "paranoid" would not be found by the ordinary intelligent reader to impute to Goetz an actual mental or physiological affliction, and even if it were actionable, he could not recover, absent allegation of special damages.[470]

Finally, Goetz's claim that he made the alleged racial epithets at a time when he was still an emotional victim of a mugging is not sufficient to support his claim that he was defamed by statements alluding to his hatred toward blacks.[471] The court concluded that the law in New York is that there is no actionable defamation if statements complained of are substantially true.[472]

In sum, when the assertion of an alleged opinion is being analyzed by the courts in order to determine whether it is protected speech, it is given greater deference by the New York State Constitution than it is afforded under the Federal Constitution.[473] For example, under a federal constitutional analysis, courts will apply *Milkovich v. Lorain Journal Co.*[474] and classify the communication by *type* rather than by looking at

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467. *Id.* at 153-54, 623 N.E.2d at 1168, 603 N.Y.S.2d at 818.

468. *Goetz*, 164 Misc. 2d at 563, 625 N.Y.S.2d at 452.

469. *Id.* at 562, 625 N.Y.S.2d at 451.

470. *Id.* at 563, 625 N.Y.S.2d at 452. *See also* O'Brien v. Lerman, 117 A.D.2d 658, 498 N.Y.S.2d 395 (2d Dep't 1986); Moore v. Francis, 121 N.Y. 199, 23 N.E. 1127 (1890).

471. *Goetz*, 164 Misc. 2d at 564, 625 N.Y.S.2d at 452-53.

472. *Id.* (citing Han v. State, 186 A.D.2d 536, 588 N.Y.S.2d 358 (2d Dep't 1992)).

473. *See generally* 600 West 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 145, 603 N.E.2d 930, 938, 589 N.Y.S.2d 825, 833 (1992).

474. 497 U.S. 1 (1990).

the circumstances and context surrounding the communication.[475] New York, on the other hand, refuses to stop at *Milkovich* and looks at the surrounding circumstances. For example, in *Immuno*, the court stated that the federal test which consists of "[i]solating challenged speech and first extracting its express and implied factual statements, without knowing the full context in which they were uttered, indeed may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context."[476] The State of New York chose to look at the surrounding circumstances from a reasonable person perspective specifically for the purpose of giving its citizens extra protection beyond that afforded under the Federal Constitution.

Rojas v. Debevoise & Plimpton[477]
(decided October 27, 1995)

The plaintiff argued that statements made by the plaintiff's former employer to employees constituted actionable defamation.[478] In response the defendants argued that the statements were protected by a qualified privilege.[479] The court, agreeing with the defendants, held that the statements were protected by a qualified privilege, which was not overcome by a

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475. *Id.* at 21.

476. *Immuno*, 77 N.Y.2d at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

477. 634 N.Y.S.2d 358 (Sup. Ct. New York County 1995).

478. *Id.* at 361-62. In addition to the cause of action for defamation, the complaint alleged a second cause of action for breach of employment relationship. *Id.* at 359. This breach of employment relationship arose out of an allegation that because the plaintiff "testified truthfully to the FBI" during the course of an investigation of her employer, she was requested to resign from her position within the law firm. *Id.* at 360. The court dismissed this cause of action because the plaintiff did not proffer any "facts . . . to show that defendants frustrated plaintiff's compliance with the core purposes of her employment" and therefore there was "no breach of contract claim stated." *Id.* at 361.

479. *Id.* at 362.