

Paul; Two G: (1) why can't a

City, as a regulatory "time, place & manner" proscribes Rock music?

SEE REVERSE

pwc 10/29/80

(2) Even tho no conflict why is int punitive damage issue serious & imp?

Resp promoted a jazz concert in City of Newport, & wanted to bring in a "rock band" when on original performer ~~that~~ dropped out. City Council vacillated as to whether it would allow concert to be held. "Rock concerts" have caused disorder. But finally, concert - with "Rock" - was held.

Attendance was small. Resp. blamed loss on City's "off-again/on-again" performance. Then 1983 suit was

brought, with compensatory damages, ^{against City} and substantial PRELIMINARY MEMORANDUM punitive damages being awarded vs City and Council members.

November 7 Conference

List 1, Sheet 3

No. 80-396

Cert to CA1 (Coffin, Campbell, Bownes)

CITY OF NEWPORT, R.I., et al.

v.

FACT CONCERTS INC., et al.

Federal/Civil

Timely

1. SUMMARY: The principal questions are whether punitive damages and lost profits are recoverable against a municipality in a § 1983 suit.

2. FACTS AND DECISION BELOW: Resp was the promoter for a major jazz concert in Newport, R.I. The city had issued a Though petri's arguments are appealing, there is no conflict. Moreover, the basis for the jury verdict could have been pendent state law claims.

Paul C.

One "punitive damage" issue, no objection made at trial.

OK

permit for the concert. One scheduled performer withdrew, so resp substituted the group "Blood, Sweat & Tears" (BS&T). The Newport city council was not enthusiastic about the change, because council members thought that BS&T was a "rock" group rather than a jazz group. (In the past, the city had experienced disturbances at large rock festivals.)

The city council held a special meeting to consider revoking the permit to hold the concert. Resp argued that BS&T was a respectable group that would not attract the kind of crowd that would riot. But the city council voted to revoke the permit unless resp removed BS&T from the program. Faced with this ultimatum, resp acceded and canceled BS&T.

A few days later, the city solicitor told resp that the council had changed its mind. According to the city solicitor, the council now would permit BS&T to perform after all, provided that the group promised not to play rock music. On the strength of the city solicitor's information, resp then rehired BS&T.

At a council meeting the next day, however, resp learned that the matter was still up in the air. In addition to debating the various sorts of music, the council learned from the city manager that resp had failed to fulfill portions of its permit requiring it to wire the seats together and install an auxiliary electrical generator. The council, viewing these omissions as material, decided to cancel the permit. It then offered resp a new permit for the same dates, specifically

excluding BS&T. Resp threatened to sue if the original contract were not honored, but the city stood firm. News of the cancellation was widely disseminated.

On the day of the concert, resp obtained an injunction in state court preventing the city from interfering with the concert. The concert thus was held as originally scheduled, with the participation of BS&T. However, because of the uncertainty, only about 6,000 of the possible 14,000 tickets were sold. Resp lost about \$73,000 in expected profits.

Resp then sued in district court, alleging a violation of § 1983 in addition to pendent state law contract and tort claims. The jury, in a general verdict, granted \$73,000 in compensatory damages, punitive damages of \$5,000 to \$20,000 against individual council members, plus \$200,000 in punitive damages against the city itself. Resp accepted a remittitur of \$125,000 in the punitive damage award against the city.

✓ CA1 affirmed. In pertinent part, the CA held: (1) The lawsuit was properly brought under § 1983 because resp had alleged that the city intentionally interfered with resp's first amendment right to promote and produce a concert. The compensatory damages were cognizable under § 1983 because the lost profits were caused by the city's acts. (2) The award of punitive damages against the city was not plain error. (No objection to the award of punitive damages against the city had been raised at trial.) (3) The trial judge had not abused his discretion in permitting certain cross-examination of a council

member.

3. CONTENTIONS: Petr contends that the CA made three errors. (1) No § 1983 claim existed. There was no violation of resp's first amendment rights because the concert was allowed to proceed. Every scheduled musician performed. Any lost profits could be recovered only under state law. (2) [✓]Punitive damages are not recoverable against the city entity. The purpose of punitive damages is to punish and deter. While punitive damages are properly recoverable under § 1983 against individuals, no punishment or deterrent purpose would be served in a punitive award against the city. The sole effect of an award against the city is to force city taxpayers to unjustly enrich resp. (3) The district judge at trial permitted improper cross-examination of one council member.

Resp says review should be denied. (1) A § 1983 claim did exist because resp had a first amendment right to produce a program without interference with its content. The council interfered with content, and damages resulted. Section 1983 permits suit to recover those damages. In any event, resp says the question is moot because the jury's general verdict did not explain whether it was awarding compensatory damages on the § 1983 claim or on the pendent state law claim. (2) There is no conflict over whether punitive damages may be awarded against a municipality under § 1983. Policy supports the award of punitive damages. If taxpayers are forced to shoulder the burden of their officials' mistakes, the taxpayers will have an

incentive to elect new officials. In any event, ✓ petr failed to object to the award of punitive damages at trial. (3) The cross-examination was proper, and the issue is not worth review.

4. DISCUSSION: (1) Review of the compensatory damages issue probably is undesirable because the jury's general verdict did not make clear whether they were awarded under § 1983 or the pendent state law claims. (Resp is simply wrong, however, in characterizing the issue as "moot" for that reason.) (2) There is no conflict on the punitive damages question. (3) The scope of cross-examination is a subject best left to the trial judge's discretion.

There is a response.

10/29/80

Cane

Opn in petr.

- ① I think the cases establish that excluding only rock music would be a content restriction, not a time/place/manner restriction. (The City, in this case doesn't even try to argue this point.)
- ② I think the punitive damages Q is important, even without a conflict. The problem is ~~that the jury had before it a state law precedent claim under which it could have awarded punitive damages. The general verdict did not make clear which theory was the basis of punitive damages. This does not preclude review, but the result on a remand might be no different.~~
- ~~Paul C.~~

that no objection to the punitive damages instruction was made at trial. Thus, the Court would have to say that any ~~too~~ error was plain error.

Paul C.