

NOV 17 1980 RELISTED

NOV 10 1980 RELISTED

80-396

cert timely

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CITY OF NEWPORT V. FACT CONCERTS

DEC 1

1980 RELISTED

CA 1: BOWNES, COFFIN, CAMPBELL

DEC 15 1980

CERT. GRANTED

This case developed after several actions of the Newport City Council in 1975 with respect to resp's plan for a jazz concert in Newport. When one performer had to cancel her appearance, resp replaced her with a group called Blood, Sweat & Tears. When the City Council heard of the change, they became concerned because they believe the group was a rock group and not a jazz group, and that it would attract unruly ~~and unmanageable~~ audiences. They initiated efforts to force its removal from the program. After a hearing where the councillors ~~refuse~~ refused to verify resp's claims that the group was in fact a jazz group, had appeared at Carnegie Hall, gone on State Dept. jazz tours, etc, the Council voted to cancel the license unless the group was removed. Resps then hired a replacement group. But then, after the group threatened to sue the City, the City lawyer told resp that the group could play after all. But the mayor stuck by his position, and then announced that the resps could cancel the entire ~~sh~~ show or allow the group to play if it stuck to jazz. But resp never had the opportunity to respond to such an offer because the City Council then voted to cancel the contract because it found two provisions of the contract unmet:

one dealing with an auxiliary generator and one dealing with the way the seats would be wired together. Finding the contract breached, the City offered a new contract if the group were eliminated from the program. The resps refused and threatened suit. The mayor responded that the contract wsa cancelled. News of cancellation wsa broadcast extensively (this was the eve of the concert). But the next morning resp won an injunction from state court and the concert went on, but at a substantial loss because of low attendance.

Resps then brought a five-count complaint in d ct seeking declaratory relief, compensatory and punitive damages for violation of 1st and 14th amend. rights, and compensatory and punitive damages for three pendant state law claims. 1983 was the basis of the constitutional claims. The trial court sent two counts to the jury -- 1983 for revocation of the license was count I, and interference with contractual relationships was count II. The jury awarded compensatory damages against all the petrs for the amount of money lost on the concert, punitive damages against the city for \$200,000, \$20,000 punitive against the mayor and one councilman, \$10,000 against two other councilmen, and \$5,000 against the remaining two councilmen. The d ct denied petr's motion for judgment NOV, and the CA affirmed in all respects.

Petr alleges three errors: that a municipality cannot be liable for punitive damages in a 1983 action; that the cross-examination of one of the councilmen exceeded permissible limits; and that the alleged acts of petrs did not violate resp's constitutional rights.

With respect to punitive damages, it should first be noted that petr failed to object to the instruction on punitive damages at trial. Nonetheless, the CA considered the question. It admitted that this Court has not clearly indicated that punitive damages are permissible in 1983, but concluded that this Court has edged toward that conclusion, that the CA had found punitive damages available in other 1983 actions where there were, as here, aggravating circumstances, and that there was no body of law to the contrary. As best as I can tell, no CA has held that punitive damages are not available in 1983 actions.

The cross-examination claim is without merit. The councilman's credibility and good faith were at issue, and his prior comments and positions in other 1st amend. issues that had come before the city council were fair game.

Finally, petr's argument on the merits of the 1983 claim were clearly and properly rejected by both the d ct and the CA. The petrs deliberately interfered with resp's right to promote and produce a concert. Petrs do not dispute that the 1st amendment protects that right,

and resps do not dispute that petrs' actions could have been legitimate if based on a valid public safety reason rather than discrimination based on content.

Unless you feel the issue of punitive damages under 1983 deserves review, I would

DENY

EG

OPIN:CLIP

THERE IS A RESPONSE