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Gun for Hire Advertisement that Backfired and Hit the Publisher in the Pocketbook

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"GUN FOR HIRE" ADVERTISEMENT THAT BACKFIRED AND HIT THE PUBLISHER IN THE POCKETBOOK

In the world of make-believe, "The Equalizer"[1] advertises his gun for hire in a New York newspaper. All jobs are completed with a happy ending. Recently, *Soldier of Fortune Magazine* was sharply reminded that real life "gun for hire" scenarios rarely have the same Hollywood-made endings.[2]

In *Norwood v. Soldier of Fortune Magazine,*[3] (*"Norwood"*) the district court of Arkansas held that *Soldier of Fortune Magazine* ("Magazine") did not have an absolute First Amendment privilege to print "gun for hire" advertisements in its magazine.[4] The Magazine could therefore be held liable for any adverse consequences flowing from the advertisements.[5] By issuing such a ruling, the court was, in effect, cautioning the media to exercise the right to free speech responsibly, further reminding them that the right to free speech does not automatically carry a preferred status over other individual rights.

In *Norwood,* plaintiff Norman Douglas Norwood sought damages against defendant Soldier of Fortune Magazine, Inc., and several individual defendants, for physical injuries allegedly suffered by him as a result of attempts by some of the individual defendants to injure or murder him.[6] Norwood's nightmare occurred at a time when he thought he had no reason to worry. He was in the midst of completing a law degree and

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1. *The Equalizer* is a prime-time television action-drama aired by CBS. The main character is a former secret government agent who offers, albeit with good intentions, his gun for hire by placing an ad in the local paper.

2. After the district court denied *Soldier of Fortune Magazine's* request for summary judgment, the magazine quickly settled out of court. The exact settlement agreement remains undisclosed. However, Norwood requested four million dollars in damages. Kennedy, *Bumbling Gang of Killers Left Trail of Death, Terror,* L.A. Times, Sept. 6, 1987, Part I, at 35, col. 3.

Similarly, in a proceeding brought in Houston, Texas, *Soldier of Fortune Magazine* was ordered by a jury to pay $9.4 million for publishing a like advertisement. The case brought in Texas involved Sandra Black, who was shot to death in her home by John W. Hearn, the individual who placed the advertisement in *Soldier of Fortune Magazine.* Robert Black, Mrs. Black's husband, paid John Hearn $10,000 to murder his wife. Belkin, *Magazine Is Ordered to Pay $9.4 Million for Killer's Ad,* N.Y. Times, March 4, 1988, Part I, at 9, col. 1.

3. 651 F. Supp. 1397 (W.D. Ark. 1987).

4. *Id.* at 1399-1400.

5. *Id.* at 1402.

6. *Id.* Norwood alleged that defendant Larry Gray responded to separate advertisements placed by defendants Savage and Jackson. Gray conspired with each, on different occasions, to injure or murder Norwood. *Id.*

beginning a promising relationship with Cathy Gray. Unfortunately, Larry Gray wanted Norwood injured, if not murdered, for dating his estranged wife.[7]

Gray allegedly found a means to carry out his intent. He contacted defendants Michael Wayne Jackson ("Jackson") and Richard Savage ("Savage"),[8] two former law enforcement agents, after reading the separate "gun for hire" advertisements they placed in *Soldier of Fortune Magazine*.[9] The publication of the advertisements allegedly provided the causal nexus for Larry Gray to conspire with Savage and Jackson to have Norwood murdered. Jackson and Savage succeeded in physically injuring Norwood. Norwood contended that the Magazine, as well as the individual defendants, should be held liable in damages for the physical injuries he incurred as a result of the conspiracy.[10]

The Magazine moved for summary judgment in the district court on two grounds. First, the Magazine argued that the language of the advertisements was absolutely privileged under the protections of the First Amendment. Specifically, it argued that the "gun for hire" advertisements were within the ambit of speech protected by the First Amendment.[11] In support of its position, the Magazine cited *New York Times Co. v. Sullivan*[12] *("Sullivan")* and *Rosenblatt v. Baer*[13] as controlling au-

7. Kennedy, *supra* note 2, at 34, col. 1.

8. Savage pursued several legitimate business ventures which failed before placing his advertisement in the Magazine. He was also a policeman in Oklahoma for six weeks. Likewise, Jackson was in law enforcement for a short stint. He was a Texas police chief for only three weeks. He had problems with refraining from using his gun and with disrupting city counsel meetings. *Id.* at 34, col. 2.

9. Norwood v. Soldier of Fortune Magazine, 651 F. Supp. 1397, 1398 (W.D. Ark. 1987). In 1985, *Soldier of Fortune Magazine* ran two "gun for hire" advertisements. The advertisement for defendant Savage read as follows: "GUN FOR HIRE: 37 year-old-professional mercenary desires jobs. Vietnam Veteran. Discreet and very private. Bodyguard, courier, and other special skills. All jobs considered. Phone (615) 891-3306 (I-03)." *Id.*

Similarly, the advertisement for Jackson read: "GUN FOR HIRE. NAM sniper instructor. SWAT. Pistol, rifle, security specialist, body guard, courier plus. All jobs considered. Privacy guaranteed. Mike (214) 756-5941(101)." *Id.*

On the strength of these seemingly inconspicuous, innocuous, and yet candid advertisements, Jackson and Savage were able to attract a considerable amount of business. Norwood alleged that defendant Gray saw one advertisement and called. Kennedy, *supra* note 2, at 1, col. 6.

10. *Norwood*, 651 F. Supp. at 1397.

11. The relevant portion of the First Amendment reads as follows: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance." U.S. CONST., amend. I.

12. 376 U.S. 254 (1964). This suit involved libel against a public figure. The Court held that a public official who believes that he has been libeled by newspaper articles about his job cannot sue the newspaper unless he proves "actual malice." "Actual malice" exists when the

thority.[14] Second, the Magazine contended that Norwood could not recover because it was not foreseeable that his alleged physical injuries would result from the advertisements.

The district court disagreed with both contentions and denied the Magazine's motion. The court concluded that the Magazine did not have absolute First Amendment protection against Norwood's suit. Further, the court held that genuine issues of material fact existed as to whether plaintiff's alleged injuries were foreseeable consequences of the "gun for hire" advertisements.[15]

The district court began its analysis by stating that the Magazine incorrectly identified the dispositive issue.[16] The court reasoned that since Norwood was simply seeking damages for the consequences of the advertisements, not an injunction, the Magazine was inappropriately arguing that a decision against it would constitute an unlawful regulation of its right to freedom of the press.[17] Despite this finding, the court discussed the First Amendment issue in order to justify its position that the issue raised by the Magazine was not dispositive.

In addressing the First Amendment argument, the court stated that the Magazine was trying to extend the *Sullivan* holding far beyond its intended result by suggesting that it provided defendant's "gun for hire" advertisements with an absolute privilege under the First Amendment.[18] The *Norwood* court believed that the United States Supreme Court in

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statement is made with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.* at 279.

13. 383 U.S. 75 (1966). The Court applied the *Sullivan* principle to the facts of the case. *Id.* at 77. In *Rosenblatt,* a former county recreation area supervisor brought a libel suit against a columnist, who stated in his article that the recreation area was doing one hundred percent better than it had in the years under plaintiff's supervision. The column made no express reference to plaintiff. The Court held that a plaintiff, who is a public official, must prove actual malice to recover damages.

14. Norwood v. Soldier of Fortune Magazine, 651 F. Supp. 1397, 1398 (W.D. Ark. 1987).

15. *Id.* at 1402-03. According to the Federal Rules of Civil Procedure, the court is not to grant a Rule 56 summary judgment motion unless there are "no genuine issue[s] as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56. Here, the court found that "reasonable jurors could find . . . that plaintiff was entitled to a verdict." *Norwood,* 651 F. Supp. at 1402-03.

16. *See Norwood,* 651 F. Supp. at 1400. The dispositive issue identified by the court was whether the Magazine could be held liable for damages if a jury believed, after a trial of the case, that the exercise of defendant's right of publication infringed the equally important personal integrity rights of the plaintiff. *Id.*

17. *Id.*

18. *Id.* at 1398. In support of its position, defendant contended that "the First Amendment carries with it the right to be shielded from civil suits for damages which just as surely would suppress or hinder the First Amendment rights . . . ." *Id.* However, the Magazine's absolutist position has never been accepted by the Supreme Court. *See* NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT 2-3 (1984).

Sullivan "did not rule that newspapers that criticize public officials can never be sued and are never responsible for their actions."[19] Second, the court suggested that the *Sullivan* case was factually distinguishable, since that case involved a libel action brought by a public official against critics of his official conduct. This case, on the contrary, was a privacy suit involving commercial speech and the infringement of personal rights.

The *Norwood* court further reasoned that the Supreme Court has, in other decisions,[20] permitted regulation of commercial speech to a degree not tolerated with respect to non-commercial speech.[21] The court accepted the historical development of the different treatment of commercial and non-commercial speech and stated that the *Sullivan* and *Rosenblatt* cases could not "be stretched to the point argued by defendant, even in a 'public official case' such as those two cases were, and certainly not in a 'commercial speech' case."[22]

In discussing the Magazine's foreseeability defense, the court addressed two claims: (1) it was unforeseeable that Norwood would be physically injured as a result of the advertisements, and (2) it was not foreseeable that lawbreakers would partake of the services advertised in the magazine.[23] Regarding the first claim, the court believed that a reasonable jury could conclude that a reasonable magazine publisher should have foreseen that someone might be hurt because the language used in the advertisements was explicit.[24] The majority further asserted that a reasonable person should not be surprised to hear that someone was hurt by a hired gun advertised in its paper because guns are designed to hurt people.[25]

Lastly, the court relied on *Franco v. Bunyard*[26] to support its con-

19. *Norwood,* 651 F. Supp. at 1399.

20. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). In *Zacchini,* the Court upheld the power of the state to allow a damage action brought by a performer against a television broadcasting station which telecasted a videotape of the plaintiff's entire fifteen second human-cannonball act. *Id.* at 578.

21. In Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), Justice Stevens, writing for the majority, adhered to the principle that the difference between commercial price and product advertising and ideological communication permits regulation of the former "that the First Amendment would not tolerate with respect to the latter." *Id.* at 69 n.32.

22. *Norwood,* 651 F. Supp. at 1400.

23. *Id.* at 1402.

24. *Id.* at 1401-02. The court referred to such language as "gun for hire," "professional mercenary," "all jobs considered," and "Vietnam Veteran." *Id.*

25. *Id.* at 1402.

26. 261 Ark. 144, 547 S.W.2d 91 (1977), *cert. denied,* 434 U.S. 835 (1978). The *Norwood* court found that the consequences of defendant's conduct in *Franco* were as foreseeable as the consequences flowing from the advertisements in *Norwood. See Norwood,* 651 F. Supp. at 1402-03.

clusion that it is entirely foreseeable that outlaws take advantage of the services advertised in magazines.[27] In *Franco,* a gun seller sold a weapon to an escaped convict without obtaining the appropriate identification required by law. As a result, an innocent person was murdered. The court reasoned that since the very purpose of the law was to keep firearms out of the hands of fugitives from justice, it could not be said that use of the gun was unforeseeable. The *Norwood* court adopted this reasoning and found that the Magazine's conduct was at least as foreseeable.

At first glance, it appears that the court's lengthy discourse regarding the First Amendment issue was unnecessary because it was not the dispositive issue. However, a closer look at the case suggests that a discussion of the different treatment of commercial and non-commercial speech was necessary in order to distinguish the issue in *Sullivan* from the issue in this case to determine the appropriate rule to apply.

When the concept of "free speech" first developed, the United States Supreme Court accorded non-commercial speech special protection. The Court never accepted the concept of absolute free speech under the First Amendment, even at its inception.[28] In grappling with the limits of free speech, the courts have applied a balancing test of one form or another.[29] Since then, the courts have recognized another type of speech—commercial speech.

Commercial speech is speech that advertises a product or service with a "primary purpose" of profit or business.[30] In applying the primary purpose test, courts in the past have looked to whether the speaker has a "commercial interest."[31] Commercial speech is a relatively recent development and has yet to enjoy the same degree of protection as pure speech.[32]

Non-commercial speech, on the other hand, at least comprises ideo-

27. *Norwood,* 651 F. Supp. at 1402-03.

28. *See, e.g.,* Schenck v. United States, 249 U.S. 470 (1918). In *Schenck,* Justice Holmes gave us his classic illustration of unprotected speech: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." *Id.* at 1400.

29. NIMMER, *supra* note 18 at 2-9, 2-15. There are two recognized approaches to balancing: ad hoc and definitional. Ad hoc balancing consists of determining which of two conflicting interests demand the greater protection under the particular circumstances presented. *Id.* at 2-9. Definitional balancing, on the other hand, consists of balancing for the purposes of defining the nature and extent of the free speech guarantee under the First Amendment. An example of definitional balancing is found in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). NIMMER, *supra* note 18 at 2-15.

30. *See* Valentine v. Chrestensen, 316 U.S. 52, 55 (1942).

31. Youngs Drug Products Corp. v. Bolger, 526 F. Supp. 823, 827 n.5 (D.D.C. 1981). *See also* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980).

32. Norwood v. Soldier of Fortune Magazine, 651 F. Supp. 1397, 1399 (W.D. Ark. 1987).

logical communication,[33] such as speech found in political, cultural or philosophical debate. The primary distinguishing factor is its content.[34] Pure speech or speech dealing directly with the governing process is accorded a substantial degree of First Amendment protection because "freedoms of speech and press have contributed greatly to the development and well-being of our free society."[35] It is beyond serious dispute that *Sullivan* is an example of pure speech, even though it involved a solicitation to contribute money.[36]

In *Sullivan,* the plaintiff was a political official and the advertisement expressed a negative view regarding his performance in office. The public official brought a libel suit against the newspaper that ran the allegedly offensive paid advertisement, claiming that the advertisement defamed him. However, the United States Supreme Court held that a public officer who believes that he has been libeled regarding his public duty must show actual malice to maintain a defamation action. With the actual malice standard, the Court in effect defined what constitutes the First Amendment freedom to engage in "defamatory speech" against public officials.[37] The advertisement in *Sullivan* involved the reporting of events, but more importantly, it was pure speech because it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[38]

With that background in mind, the Court correctly suggested that the Magazine's reliance on *Sullivan* was misplaced.[39] In *Norwood,* the plaintiff was not a public official and the "gun for hire" advertisement was not an attack on his political position. Although Norwood may have found the advertisement offensive, he did not claim defamation to his character. Indeed, Norwood's name was not even mentioned in the advertisement. Therefore, inasmuch as the *Norwood* court distinguished the Magazine's situation from that of *Sullivan,* the court did not deviate from the prior ruling; that is, the court correctly gave the Magazine's

33. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 69 (1976).

34. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

35. Smith v. California, 361 U.S. 147, 155 (1959).

36. *See Virginia State Bd. of Pharmacy,* 425 U.S. at 761; Youngs Drug Prods. Corp. v. Bolger, 526 F. Supp. 823, 827 n.5 (D.D.C. 1981).

37. NIMMER, *supra* note 18 at 2-15.

38. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

39. Norwood v. Soldier of Fortune Magazine, 651 F. Supp. 1397, 1401 (W.D. Ark. 1987).

interest in publishing its advertisement no greater weight than Norwood's interest based on *Sullivan.*

Instead, the court appropriately suggested that the Magazine's advertisement was, at most, commercial speech.[40] The "gun for hire" language was simply an advertisement for employment, with no room for public debate of any kind. The advertisements consisted of facts detailing the advertisers' skills and promoted a commercial transaction. The idea conveyed in the "gun for hire" advertisement falls squarely within the boundaries of commercial speech. Based on this determination, the court relied on *Zacchini v. Scripps-Howard Broadcasting Co.*[41] (*"Zacchini"*), a commercial speech case, in making its decision. In *Zacchini,* a performer brought an action against the operator of a television broadcasting station when it telecast a videotape of the plaintiff's entire act. The video-taping was done after the plaintiff had asked the reporter not to do it. The *Zacchini* Court held that a plaintiff, believing that he suffered damage to his property, may bring a suit against the media to recover those damages. The *Norwood* court observed that *Zacchini* "left little doubt that different standards are to be applied in cases such as *New York Times Co., supra,* . . . and cases such as *Zacchini,* and, by inference, the one before this court . . . ."[42]

After properly identifying the speech involved and the applicable standard set forth in *Zacchini,* the court suggested that the right to be free from injuries resulting from "gun for hire" advertisements was greater than the speech interest. The *Norwood* court, like the *Sullivan* Court, did not acknowledge that the applicable rule is based upon balancing competing interests.[43] However, both courts implicitly referred to several competing policy considerations in making their decisions. The *Norwood* court alluded to a duty of reasonable care when exercising free speech and to the arbitrariness and harshness in enforcing free speech rights without regard to the rights of others.[44]

Underlying the *Norwood* court's decision appears to be a policy against publishers misusing their authority and publishing advertisements which may encroach on the safety of the public. Publishers are charged with disseminating legitimate information to the public at

40. *Id.* at 1398.

41. 433 U.S. 562 (1977).

42. *Norwood,* 651 F. Supp. at 1401.

43. Several cases following the *Sullivan* decision acknowledged that *Sullivan* was based on balancing. *See, e.g.,* Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974); Time v. Firestone, 424 U.S. 448, 456 (1976).

44. *Norwood,* 651 F. Supp. at 1400.

large.[45] Believing that "gun for hire" advertisements are not part of that legitimate pool of information, the *Norwood* court took a positive step by discouraging such advertisements. In juxtaposing the competing interests of protecting human life and placing "gun for hire" advertisements, it was clear that the Magazine's speech interest was marginal while the public interest against promoting such advertisements was compelling. Since the public interest outweighed the private interest of the Magazine, the *Norwood* court was unwilling to accord First Amendment protection to advertisements which are not vital to the democratic process.[46]

Moreover, the court gave little weight to the fact that the Magazine was a third party participant and that the conduct which directly caused Norwood's harm was the intervening criminal acts of defendants Savage and Jackson. Courts are split on the issue of whether a defendant can be held responsible for the intervening criminal acts of a third person.[47] The dispositive factor between liability and non-liability is elusive. It appears to be impossible to state a comprehensive rule to determine when a defendant will be liable for the intervening criminal act of a third person. Nevertheless, in Arkansas, the state in which this case arose, courts have held individuals liable for the foreseeable intervening criminal acts of others.[48] In accordance with this view, the *Norwood* court, had this case not been settled, would have sent this case to a jury to rule on the issues of disputed fact, particularly the issue of foreseeability. The ruling appears to reflect sound policy with regards to "gun for hire" advertisements.

The court's ruling may be criticized on the grounds that it will deter individuals from publishing speech, for which society has a need, and the right to hear, because of the fear of potential liability. Deterrence may result even though the publisher's fear is groundless. Publishers may engage in a self-imposed restriction of free speech.

Similarly, the ruling in *Norwood* threatens those who validly exercise their rights of free expression with the expense and inconvenience of

45. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

46. *See Norwood,* 651 F. Supp. at 1400-01.

47. *See* Watson v. Kentucky & Indiana Bridge & R. R. Co., 137 Ky. 619, 126 S.W. 146 (1910) (an individual is not bound to anticipate the criminal acts of others). *Contra* Franco v. Bunyard, 261 Ark. 144, 547 S.W.2d 91 (1977) (consequences of gun seller's conduct which led to criminal acts were deemed to be foreseeable); Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976) (psychotherapist may be liable for criminal act of patient whom he knew to be dangerous); Fernandez v. Miami Jai-Alai, Inc., 386 So. 2d 4 (Fla. App. 1980) (Jai-Alai, Inc. is under a duty to protect its patrons from assault); Hines v. Garrett, 131 Va. 125, 108 S.E. 690 (1921) (railroad company liable for rape of a young girl who was put off in a neighborhood notorious for criminals).

48. *See Franco,* 261 Ark. at 145.

criminal and civil prosecution. The fear that a magazine advertisement may give rise to substantial liability has disturbing implications, for the decision could lead to a dangerous degree of media self-censorship. In the future, whenever a publisher or potential advertiser is unsure whether a certain advertisement might lead to liability, he may decline to publish or advertise even if the subject is clearly newsworthy and lawful. Society is then the loser. For example, a publisher may not print a constitutionally protected advertisement regarding employment as a bodyguard, if the publisher believes it may lead to a criminal act. A publisher will tend to restrict a magazine's advertisements to those he has inspected and will thus impose a limitation on the public's access to protected as well as unprotected literature. Under the court's decision, all publishers would be placed under an obligation to make themselves aware of the contents of all advertisements placed in their magazines. It would be unreasonable to demand such a high standard of discernment.

The *Norwood* court was positive that "gun for hire" advertisements were not the kind of legitimate public debate the First Amendment was meant to foster. However, the court did not carefully consider the possible ramifications of its ruling. Although the court's decision, as applied to "gun for hire" advertisements, may be correct, its opinion is far reaching and may chill the First Amendment right to free speech. There is a disturbing possibility that the media will engage in a severe degree of self-censorship.

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