KAREN CARPENTER V. WESTWOOD ONE AND TOM LEYKIS: FREE SPEECH, DEFAMATION, AND THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS—DOES LOGIC RESCUE DECENCY?

JACK B. MCGEE*

ABSTRACT

The relationship between speech protected by the First Amendment and the torts of defamation and intentional infliction of emotional distress (IIED) is a complicated one. This is apparent in the recent Alaska Supreme Court case of Carpenter v. Westwood One*, which turned on an unusual set of facts involving a national radio talk show host. The Alaska Supreme Court drew a novel distinction between the kind of speech the First Amendment protects from defamation and IIED actions, and other speech that is not protected against such actions. The basis for the court's distinction lies in the difference between speech that makes assertions of fact and speech that does not. This Comment will discuss how the Alaska Supreme Court utilized established principles of logic to support this distinction and how it applied these principles in fashioning its decision.*

TABLE OF CONTENTS

INTRODUCTION 50
I. RELEVANT FACTS OF *CARPENTER V. WESTWOOD ONE* 51
II. LITIGATION HISTORY OF *CARPENTER V. WESTWOOD ONE* 53
III. ISSUES ON APPEAL 54

Copyright © 2010 by Jack B. McGee.

* B.S., J.D., M.S., University of Wisconsin. The author is an attorney in private practice in Juneau, Alaska, focusing on appellate litigation. He previously worked as an Assistant Attorney General for the State of Alaska in Juneau and has also taught constitutional law, philosophy, and logic at the University of Alaska Southeast. He briefed and argued the First Amendment issues in *Carpenter v. Westwood One* for appellant Karen Carpenter before the Alaska Supreme Court.

IV. THE ALASKA SUPREME COURT'S RULING ON CARPENTER'S DEFAMATION AND FALSE LIGHT ISSUES 55
A. Carpenter's Defamation Claim 55
B. Carpenter's False Light Invasion of Privacy Claim.....56
V. THE ALASKA SUPREME COURT'S RULING ON CARPENTER'S IIED JURY INSTRUCTION ISSUE.....56
A. Carpenter's Argument 56
B. The Alaska Supreme Court's Analysis of Carpenter's Argument.....59
1. *The Court's Distinction Between Leykis's Speech that Gave Rise to Carpenter's Defamation Claim and the Speech that Gave Rise to Carpenter's IIED Claim*.....59
2. *The Logical Basis for the Court's Distinction* 60
C. The Court's Analysis of the Effect of Instruction No. 17 on the Jury.....61
VI. THE COURT'S INSTRUCTIONS ON REMAND.....63
VII. JUSTICE CARPENETI'S CONCURRING OPINION 64
VIII. JUSTICE FABE'S DISSENTING OPINION.....65
IX. IIED CLAIMS IN ALASKA AFTER *CARPENTER* 67
CONCLUSION 67

INTRODUCTION

Justice Oliver Wendell Holmes wrote, "The life of the law has not been logic: it has been experience."[1] In Alaska, however, Justice Holmes' observation has not always been on the mark. The Alaska Supreme Court's decision in *Carpenter v. Westwood One*[2] is a striking example.

The *Carpenter* case is important in several respects. Chief among them is the court's distinction between speech assertions that give rise to defamation claims—assertions that are either true or false—and communicative speech that gives rise to claims of intentional infliction of emotional distress (IIED)—speech that does not make assertions that are true or false.[3] This Comment will focus on the court's distinction

1. OLIVER W. HOLMES, JR., THE COMMON LAW 1 (A.B.A. 2009) (1881).

2. 171 P.3d 41 (Alaska 2007). This case appears in the Pacific Reporter as "State v. Carpenter" and will be referred to throughout this Comment as "Carpenter v. Westwood One."

3. The *Carpenter* case also discusses the constitutionality of Section 09.17.020(j) of the Alaska Statutes, which requires fifty percent of a punitive damage award to go to the State. *Carpenter*, 171 P.3d at 67–68. The case is

between defamatory speech and communicative speech that gives rise to IIED claims, the logical principles on which the distinction rests, and how the distinction led the court to its conclusion that communicative speech that is neither true nor false is not speech that is protected by the First Amendment against an IIED claim.

I. RELEVANT FACTS OF *CARPENTER V. WESTWOOD ONE*

Tom Leykis hosted a four-hour national radio talk show, *The Tom Leykis Show*.[4] The program originated in California and was produced and distributed as a live radio show by Westwood One.[5] Between June 8 and July 24, 1998, Juneau AM radio station KJNO broadcast the show weekdays from two o'clock to six o'clock in the afternoon.[6]

The Tom Leykis Show commonly featured sex-related topics.[7] Karen Carpenter, a Juneau resident, first heard the show on July 20, 1998; its content concerned her.[8] Carpenter expressed her concerns to a member of the City and Borough of Juneau Assembly, as well as to some of KJNO's advertisers who ran ads during Leykis's show.[9] She also faxed a letter to KJNO stating that she found most of Leykis's show "very offensive" and unsuitable for children who might be listening.[10] Carpenter wrote that she would "do everything in [her] power to have the show taken off the air as soon as possible."[11] Someone at KJNO faxed a copy of Carpenter's letter, which showed her fax number, to *The Tom Leykis Show* in California.[12]

At about this same time, KJNO's station manager, Steve Rhyner, decided to take *The Tom Leykis Show* off the air because of complaints from advertisers.[13] The program aired its final broadcast in Juneau on July 24, 1998.[14]

---

noteworthy as well for its insightful examination of the tort of spoliation. *See id.* at 64–67.

4. *Id.* at 47.
5. *Id.*
6. *Id.*
7. *Id.* Examples of sexually themed topics discussed on the Tom *Leykis Show* include: bestiality, group sex, incest, and sex toys. Brief of Appellant Karen Carpenter at 5, Carpenter v. Westwood One, 171 P.3d 41 (Alaska 2007) (S-10700, S-10709, S-10739), 2003 WL 25319456.
8. *Carpenter*, 171 P.3d at 48.
9. *Id.*
10. *Id.* (internal quotation marks omitted).
11. *Id.* (internal quotation marks omitted).
12. *Id.*
13. *Id.*
14. *Id.*

Leykis made a number of comments about KJNO's cancellation of his show, Carpenter's letter, and Karen Carpenter during his July 24 broadcast.[15] He described people who objected to his show as a "band of old prunes and old blue-hairs, nut cases and . . . cretins."[16] He complained "I hate those—those old biddies who sit out there and have nothing better to do than to write in to radio stations,"[17] and said that, "Maybe if this woman had gotten laid in the last fifty years, who writes into the station and started making all these waves, maybe she wouldn't be complaining so much. I'm not kidding."[18] Leykis read Carpenter's letter on the air and commented:

> And it's signed, the woman who wrote the letter—it's signed: Karen Carpenter. Well Karen, I have a little something that you could use right now. [Buzzing sound intended to simulate the sound of a vibrator.]
> Sit on this, you old prune. Come on, get close to the radio. Get right on top of the speaker, baby. You moron. You jerk. You and your little band of nut cases out there, trying to decide what's going to be on the radio in Juneau, Alaska. You know, maybe you ought to go out and get laid once in a while, huh? [Buzzing sound.]
> You cretin. Are your nipples getting hard yet, baby? Feel the power. You can't stop this show. Oh, you can stop Juneau, Alaska. But you can't stop me. . . .
> You and your stupid—your stupid church and your stupid religion, and you and your stupid god damned bunch of marauders. You morons. Jerks.
> I'm enjoying this. I'm sporting wood right now, just thinking about it. . . .
> Oh, Karen Carpenter. Karen Carpenter wanted our show off the air. No, not that Karen Carpenter. But Karen, sit on it, baby. [Buzzing sound.]
> Oh, yeah. See, if you got more of this, you wouldn't be writing complaint letters to the station.[19]

Later in the show, a Juneau caller attempted to broadcast Carpenter's home telephone and fax numbers, which were listed in the local telephone directory under "K.L. Carpenter."[20] The caller expressed

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 48–49.
20. *Id.* at 49.

the hope that people would "send [Carpenter] faxes."[21] Carpenter's telephone number was partially bleeped out.[22] Around this time Leykis also encouraged his listeners to make Carpenter's telephone "ring off the hook."[23] Later, a Juneau fan called Leykis to praise his show.[24] Leykis responded: "Well, we hate to lose you, but like I say, stay tuned, 'cause we're going to get back on in Juneau. . . . And we're going to make that woman's life a living hell."[25] According to trial testimony, this "living hell" comment was used repeatedly throughout the broadcast."[26]

Carpenter herself heard the first part of Leykis's broadcast and learned of other parts from friends.[27] She testified "that she felt humiliated and sexually violated."[28] She also testified that she received a telephone message "that repeated part of what Leykis had said about her" and that she "received several threatening faxes at her home."[29] Sometime later, Carpenter was "diagnosed with post-traumatic stress syndrome and an anxiety disorder."[30]

II. LITIGATION HISTORY OF *CARPENTER V. WESTWOOD ONE*

Karen Carpenter filed suit in a Juneau superior court against Tom Leykis, Westwood One, KJNO, Alaska Broadcast Communications, Inc., and Steve Rhyner.[31] Carpenter alleged in her complaint that "Leykis's comments about her during his July 24, 1998 broadcast were defamatory, caused negligent and intentional infliction of emotional distress, and placed her in a false light."[32] She also alleged that Leykis and Westwood One spoliated evidence.[33]

Three of the defendants—Leykis, Westwood One and Alaska Broadcast Communications—"filed summary judgment motions on all of Carpenter's claims on the grounds that Leykis's comments were

21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 48–49.
27. *Id.*
28. *Id.*
29. *Id.* (internal quotation marks omitted).
30. *Id.*
31. *Id.*
32. *Id.* at 49.
33. *Id.* Carpenter's "false light" claim rests on her right to privacy, specifically the intrusion of her seclusion. *See* WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 117, 807, 812 (4th ed. 1971).

protected by the First Amendment and that Carpenter was a limited public figure on the issue of obscenity in mass media."[34]

Carpenter also filed a summary judgment motion "on her claims of intentional infliction of emotional distress (IIED), negligent infliction of emotional distress, invasion of privacy by way of false light publicity and intrusion upon seclusion, and spoliation of evidence."[35]

The trial court dismissed Carpenter's claims based on "defamation, negligent infliction of emotional distress, and false light invasion of privacy."[36] The superior court, however, refused to "grant summary judgment to either side on Carpenter's claims of IIED, intrusion upon seclusion and intentional spoliation of evidence."[37]

A trial was held on Carpenter's remaining claims. A jury "found that Westwood One had engaged in intentional spoliation of evidence and awarded Carpenter $5042 in compensatory damages and $150,000 in punitive damages."[38] The jury also "returned a verdict for Leykis and Westwood One on Carpenter's claims of IIED and intrusion on seclusion," and returned a verdict "for Leykis on [the] spoliation claim."[39]

In a post-trial motion, Carpenter challenged the constitutionality of Section 09.17.020(j) of the Alaska Statutes, which required fifty percent of a punitive damage award to be paid over to the State.[40] The trial court held that the statute was constitutional.[41]

III. ISSUES ON APPEAL

Karen Carpenter's two primary issues on appeal concerned: (1) the trial court's dismissal of her defamation and false light privacy claims; and (2) the validity of one of the jury instructions that related to her IIED claim.[42] Carpenter also appealed two evidentiary rulings, as well as the trial court's ruling on Section 09.17.020(j) of the Alaska Statutes.[43] Westwood One challenged the validity of the jury's decision on Carpenter's spoliation claim and the constitutionality of the jury's punitive damages award.[44]

34. *Carpenter*, 171 P.3d at 49–50 (internal quotation marks omitted).
35. *Id.* at 50.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*

This Comment will focus on the Alaska Supreme Court's reasoning and ultimate rulings on: (1) Carpenter's appeal of the trial court's dismissal of her defamation and false light claims; and (2) Carpenter's appeal regarding the validity of the jury instruction related to her IIED claim.[45]

IV. THE ALASKA SUPREME COURT'S RULING ON CARPENTER'S DEFAMATION AND FALSE LIGHT ISSUES

A. Carpenter's Defamation Claim

The superior court dismissed Carpenter's defamation claim, reasoning that "Leykis's statements about Ms. Carpenter . . . [were] opinionated insults protected by the First Amendment."[46] The trial court held that Leykis's statements were "hyperbole, used only for shock value, and d[id] not state or imply any factual basis."[47]

In her appeal, Carpenter argued that the fact-opinion distinction drawn by the United States Supreme Court in *Milkovich v. Lorain Journal Co.*[48] and *Sands v. Living Word Fellowship*[49] was not relevant to her case because Leykis's speech fell into three categories that are not protected by the First Amendment: (1) "indecent speech" under the Supreme Court's ruling in *FCC v. Pacifica Foundation*;[50] (2) "obscenity" under the three-pronged test set out in *Miller v. California*;[51] and (3) "fighting words" under *Chaplinsky v. New Hampshire*.[52]

The Alaska Supreme Court rejected all three of Carpenter's arguments. The court concluded that Leykis's statements were

45. Carpenter's appeal of evidentiary matters and her appeal of the trial court's ruling on the constitutionality of Section 09.17.020(j) of the Alaska Statutes will not be discussed here. Westwood One's issues on appeal also will not be considered in this Comment.

46. *Carpenter*, 171 P.3d at 51 (internal quotation marks omitted).

47. *Id.* (internal quotation marks omitted).

48. 497 U.S. 1 (1990). In *Milkovich*, the Court held that expressions of opinion on matters of public concern that are alleged to be defamatory are protected by the First Amendment from a defamation action. *See id.* at 20. If the "opinion reasonably implies false and defamatory facts about a public figure or official," the plaintiff "must show such statements were made with knowledge of their false implications or with reckless disregard of their truth."*Id.* But if "such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault." *Id.*

49. 34 P.3d 955 (Alaska 2001). *Sands* held that statements that "are not factual statements capable of being proven true or false . . . are not actionable as a basis in a defamation claim." *Id.* at 960.

50. 438 U.S. 726 (1978).

51. 413 U.S. 15 (1973).

52. 315 U.S. 568 (1942).

"opinionated insults" and "hyperbole, used only for shock value," and that the statements did not "imply any factual basis."[53] The court concluded that Leykis's speech was protected under *Milkovich* and *Sands*.[54]

B. Carpenter's False Light Invasion of Privacy Claim

The Alaska Supreme Court, relying on *Time, Inc. v. Hill*,[55] held that Carpenter's false light claim failed for the same reason that her defamation claim failed:

> A false light invasion of privacy claim arises when the defendant publicizes a matter that places the plaintiff before the public in a false light. In many cases, the publicity is defamatory, although a plaintiff need not show injury to reputation to prevail on a false light claim. An action for false light invasion of privacy differs from an action for defamation because a defamation claim redresses damage to reputation while a false light privacy claim redresses mental distress from exposure to public view. Like defamation liability, however, false light liability requires at least knowing or reckless disregard of the falsity of the assertion of fact. Because opinions cannot be proved false, they cannot give rise to false light liability. Carpenter's false light invasion of privacy claim relies on the same statements that formed the basis for her defamation claim. It therefore fails.[56]

V. THE ALASKA SUPREME COURT'S RULING ON CARPENTER'S IIED JURY INSTRUCTION ISSUE

A. Carpenter's Argument

The issue that Carpenter raised about jury instructions concerns the logical interplay among two jury instructions ("Jury Instruction Nos. 17 and 18"), one Special Interrogatory ("Special Interrogatory 1"), and the answer given to part of a Special Verdict Form ("Special Verdict Form"). Instruction No. 18 read as follows:

> Karen Carpenter claims that Tom Leykis or Westwood One or its employees or agents intentionally inflicted emotional

53. Carpenter v. Westwood One, 171 P.3d 41, 51 (Alaska 2007).
54. *Id*.
55. 385 U.S. 374 (1967).
56. *Carpenter*, 171 P.3d at 53 (citations omitted).

> distress on her by virtue of a radio broadcast on July 24, 1998. For Karen Carpenter to recover for this claim of intentional infliction of emotional distress, you must decide that it is more likely true than not true that Tom Leykis's or Westwood One or its employee's conduct was extreme and outrageous and that he/they intentionally or recklessly caused Karen Carpenter severe emotional distress.[57]

Instruction No. 17 was also given to the jury, and the instruction read in relevant part:

> The law protects most speech. By example, statements of opinion, even if insulting or distasteful are generally protected speech. It is only in limited circumstances that speech can be punished or be the basis of liability for damages. Therefore, you shall not consider words spoken to or about Karen Carpenter unless you find that the speech is not protected because of either of the following reasons: (1) Speech that is intended to provoke a hostile reaction under circumstances where a clear and present danger of immediate violence exists is not protected speech. . . .[58]

Special Interrogatory 1 read as follows: "Did Tom Leykis engage in speech related to Karen Carpenter that was intended to provoke a hostile reaction under circumstances where a clear and present danger of immediate violence existed?"[59]

The Special Verdict Form, in relevant part, asked whether the jury found by clear and convincing evidence that "the conduct of Tom Leykis and/or Westwood One (or its employees or agents) was outrageous and thus subject to an award of punitive damages[.]"[60]

Carpenter did not challenge Instruction No. 18. Rather, her challenge related to the logical relationship between Instruction No. 17 and Special Interrogatory 1, and the jury's answer to the Special Verdict Form. Carpenter did not argue that Instruction No. 17 was incorrect because it told the jury that it "could not consider as a basis for liability words spoken to or about Carpenter unless the speech was unprotected . . . ."[61] This is a truism. Rather, Carpenter argued that Instruction No. 17

57. *Id.* at 54–55.

58. *Id.* at 54. Instruction No. 17 also defined a second class of unprotected speech for the purpose of an IIED action as speech that involved the "[p]ublication of private factual information. . . ." *Id.* Carpenter did not rely on this second class of unprotected speech in her argument on appeal.

59. *Id.* at 55.

60. *Id.*

61. *Id.* at 54 (internal quotation marks omitted).

took a wrong turn when it defined "unprotected speech" for purposes of an IIED claim as "speech that is intended to provoke a hostile reaction under circumstances where a clear and present danger of immediate violence exists."[62]

Carpenter made two arguments. First, she argued that she was not a "public figure," and that therefore the holding in *Hustler Magazine, Inc. v. Falwell*[63] was not relevant to her IIED claim.[64] Second, she argued that, even if she were a public figure (or a limited public figure), Instruction No. 17's restriction of a viable IIED claim to "speech that is intended to provoke a hostile reaction under circumstances where a clear and present danger of immediate violence exists" was not consistent with the rule in *Falwell*[65] and had no relevance whatsoever in Carpenter's case, since her IIED claim was based on specific words uttered by Leykis.[66]

With the premise that Instruction No. 17 was erroneous, Carpenter argued that the error was prejudicial, given that: (1) the jury answered "Yes" to the Special Verdict Form with regard to the question whether it found by clear and convincing evidence that "the conduct of Tom Leykis . . . was outrageous";[67] and (2) that the jury answered "No" to Special Interrogatory 1 with regard to whether "Tom Leykis engage[d] in speech related to Karen Carpenter that was intended to provoke a hostile reaction under circumstances where a clear and present danger of immediate violence existed[.]"[68]

In other words, by instructing the jury that it could not consider Leykis's speech in evaluating Carpenter's IIED claim unless "a clear and present danger of immediate violence existed,"[69] the jury, after finding that Leykis's speech was not "intended to provoke a hostile reaction under circumstances where a clear and present danger of immediate

62. *Id.*
63. 485 U.S. 46 (1988).
64. *Carpenter*, 171 P.3d at 56.
65. The court in *Falwell* held that "[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *See Falwell*, 485 U.S. at 56.
66. *See* Brief of Appellant Karen Carpenter, *supra* note 7, at 37–47
67. *Carpenter*, 171 P.3d at 55.
68. *Id.*; *see also* Brief of Appellant Karen Carpenter, *supra* note 7, at 48–52.
69. *See Carpenter*, 171 P.3d at 53.

violence existed,"[70] could not logically find for Carpenter on her IIED claim even though it found that Leykis's conduct was "outrageous."[71]

B. The Alaska Supreme Court's Analysis of Carpenter's Argument

1. *The Court's Distinction Between Leykis's Speech that Gave Rise to Carpenter's Defamation Claim and the Speech that Gave Rise to Carpenter's IIED Claim*

The court began its analysis by noting that "an IIED claim that turns on the truth or falsity of speech is subject to the same limitations that protect speech from claims of defamation."[72] Since malice and falsity must be proved by a public figure who claims defamation, a public figure who claims IIED based on the same language that gave rise to his defamation claim must also prove malice and falsity. The court also assumed that if a plaintiff (public figure or not) claims defamation rising out of speech on a matter of public concern, malice also must be proved by the plaintiff who claims IIED arising out of the same speech.[73]

Carpenter argued that she was not a public figure and that the speech that gave rise to her IIED claim was not on a matter of public concern. In response, the court stated that the question of whether Carpenter was a public figure was irrelevant.[74] The court found that the question of whether Carpenter was a public figure "would be important to her IIED claim *if* that claim, like her defamation claim, turned on the truth or falsity of Leykis's words about Carpenter."[75] In other words, if Carpenter's IIED claim was based on the same speech that gave rise to her defamation claim, she would have to prove the falsity of the speech, and, if she were a public figure or a limited public figure, she would also have to "prove actual malice to prevail on her IIED claim."[76]

Here, the court made a critical distinction: Carpenter's IIED claim was "not based on the truth or falsity of Leykis's words . . . ."[77] From this distinction, the court concluded that it did "not need to decide whether Carpenter was a public figure" and "that the heightened protections due speech about public figures and matters of public concern [did] not altogether foreclose Carpenter's IIED claims."[78]

---

70. *Id.*
71. *Id.*
72. *Id.* at 55.
73. *Id.* (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52–53, 55–56 (1988)).
74. *Id.* at 56.
75. *Id.* (emphasis added).
76. *Id.*
77. *Id.*
78. *Id.*

If Carpenter's IIED claim was not based on Leykis's speech (or assertions) that were either true or false, then what was her claim based on? The court's answer was that her claim was based on "speech intended merely to harass or cause others to harass the target."[79] Specifically, Carpenter's IIED claim was based on Leykis's speech telling his listeners to "harass" her and "make her life a living hell."[80] Leykis's speech in this narrow regard did not consist of assertions of fact that could be proved true or false, but rather consisted of commands to his listeners. Thus, the court concluded that, "[u]nlike her defamation claim, Carpenter's IIED claim was not dependent on the truth or falsity of Leykis's words."[81] Consequently, to prevail on her IIED claim, Carpenter did not have to prove Leykis's speech was false or that it was uttered with malice.

As for the holding in *Falwell*, the court denied that it stands "for the proposition that every IIED claim based on an utterance invariably requires proof of a falsehood."[82]

2. The Logical Basis for the Court's Distinction

Logic is said to be "the study of the methods and principles used to distinguish good (correct) from bad (incorrect) reasoning."[83] Since reasoning is expressed in sentences, logicians draw a clear distinction between sentences that make (or imply) some assertion of fact and those that do not. The former are said to assert propositions; while the latter do not. Propositions, then, "are either true or false, and in this they differ from questions, commands, exclamations. . . . Only propositions can be either asserted or denied; questions may be asked and commands given and exclamations uttered, but none of them can be affirmed, denied, or judged to be either true or false."[84]

A sentence, however, is not a proposition. The following two sentences, while different, express (or assert) the same proposition:

> "Sarah Palin was the republican candidate for Vice-President of the United States."
>
> "The republican candidate for Vice-President of the United States was Sarah Palin."

79. *Id.* at 57.
80. *Id.*
81. *Id.*
82. *Id.* at 56 n.44. Later in its opinion, the court found that there was no special protection for "harassing speech" in federal law. *See id.* at 59–61.
83. IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 2 (9th ed. 1994).
84. *Id.* at 4.

Similarly, a sentence is always in a particular language. And while the expression, "it is snowing" can be expressed in many types of sentence formulations in any number of different languages, all the sentences have a single meaning; that is, they express the same proposition.[85] A proposition, then, is "[a] statement; what is typically asserted using a declarative sentence, and hence always true or false—although its truth or falsity may be unknown."[86]

If we apply this terminology to the *Carpenter* decision, the court found that Carpenter's IIED claim was not based on any proposition uttered by Leykis. Rather, it was based on commands uttered by Leykis that cannot be "judged to be either true or false." Since the essence of Carpenter's claim was that Leykis's "commands" were "outrageous" and caused her emotional distress, her IIED claim was not foreclosed by *Falwell.* This conclusion follows from the court's understanding that the holding of *Falwell* is concerned only with propositional speech that is "*about* a public figure" or propositional speech that is "*about* a matter of public concern."[87]

C. The Court's Analysis of the Effect of Instruction No. 17 on the Jury

The Alaska Supreme Court and all parties agreed that Instruction No. 18 was proper.[88] As for Instruction No. 17, the court found that, given its breadth, the jury likely applied the instruction to Carpenter's IIED claim.[89] Instruction No. 17 told the jury:

> It is only in limited circumstances that speech can be punished or be the basis of liability for damages. Therefore, you shall not consider words spoken to or about Karen Carpenter unless you find that the speech is not protected. . . . Speech that is intended to produce a hostile reaction under circumstances where a clear and present danger of immediate violence exists, is not protected speech.[90]

Before the jury could consider the merits of Carpenter's IIED claim, they first had to be convinced that Carpenter proved Leykis's speech was "intended to provoke a hostile reaction under circumstances where a clear and present danger of immediate violence exists . . . ." Since the

85. *Id.*
86. *Id.* at 710.
87. *Carpenter*, 171 P.3d at 56 (emphasis added).
88. *Id.* at 61.
89. *Id.*
90. *Id.* at 54.

jury, in its answer to Special Interrogatory 1, found that Leykis did not "engage in speech . . . intended to provoke a hostile reaction . . . ," it could not consider the merits of Carpenter's IIED claim.[91]

The court had a problem with Instruction No. 17 because, as a matter of law, Carpenter did not need to prove the element of a "hostile reaction . . . where a clear and present danger of immediate violence exists . . ." in order to prevail on her IIED claim.[92] The speech that formed the basis of Carpenter's IIED claim was not protected (because it was non-propositional speech); thus, it could "be found to be outrageous if a jury finds that the speaker intended to harass by provoking a widespread audience to react with hostility toward the target of humiliating and demeaning comments":[93]

> There is no reason why an IIED plaintiff under such circumstances must prove that there is in fact a clear and present danger of immediate violence; so long as Leykis acted with the requisite intent to harass, it is enough that a reasonable person could think that his comments were likely to prompt listeners to contact or communicate with Carpenter in a hostile fashion, thus accomplishing his objective. In short, the "hostile reaction" exception did not accurately describe Carpenter's IIED claim, and made it more difficult for her to prevail on that claim.[94]

The court also found that there was "no basis for thinking the verdict would have been the same if it had been clear to the jury that Carpenter's IIED claim only had to satisfy Instruction No. 18 and did not also have to satisfy Instruction No. 17 . . . ."[95] After all, in answering the Special Verdict form, "the jury found by clear and convincing evidence that Leykis's conduct was outrageous and thus subject to an award of punitive damages."[96]

The court came to its ultimate conclusion on the basis of the above reasoning:

> We therefore hold that Instruction No. 17 potentially prevented the jury from giving fair consideration to Carpenter's IIED claim. Remand for a new trial is necessary. The jury on remand

91. *Id.* at 55.
92. *Id.* at 61.
93. *Id.* at 62. The court also found that the "instruction's exception for publication of private factual information was equally inapplicable, and equally potentially prejudicial." *See id.*
94. *Id.*
95. *Id.*
96. *Id.* (internal quotation marks omitted).

> should consider whether Leykis's conduct, when viewed in its entirety: (1) was extreme and outrageous, (2) was intentional or reckless, and (3) caused [Carpenter] severe emotional distress.[97]

VI. THE COURT'S INSTRUCTIONS ON REMAND

In crafting its instructions on remand, the Alaska Supreme Court faced the question of the relevance of Leykis's "derogatory comments" to Carpenter's IIED claim. The court stressed that Leykis's derogatory comments about Carpenter, comments that asserted propositions, could not be "the sole basis for her IIED claim," in part because they were "entitled to some speech protections."[98] Leykis's derogatory comments "attacked the wisdom and need for cancellation by attacking [Carpenter] and her values."[99] And, since his comments "addressed a matter of public interest, under Alaska law, they are qualifiedly privileged."[100] Additionally, because Leykis's words were "arguably germane to the show's cancellation, a topic of public interest, they [could not] be considered outrageous conduct."[101]

Nonetheless, though Leykis's derogatory comments could not be considered as a basis for Carpenter's IIED claim, they "remain[ed] potentially relevant" to this claim:[102]

> [T]he jury on remand may consider how Leykis's derogatory comments bore on whether it was extreme and outrageous to encourage listeners to contact Carpenter or harass her. It might think his comments were intended to incite listeners to contact Carpenter or harass her. It might think his comments were intended to incite listeners to act on his arguable invitation to take harassing action against her and increased the foreseeability and likelihood that some would do so. In this, the comments bear on whether Leykis acted with the mental state required for an IIED claim. Finally, the words may also be relevant to the question whether Carpenter suffered severe emotional distress.[103]

---

97. *Id.* (citations and internal quotation marks omitted).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 63.
102. *Id.* In other words, the jury may well find that Leykis's derogatory comments created a context that warranted the conclusion that it was "extreme and outrageous" for Leykis to encourage his listeners to harass Carpenter.
103. *Id.*

VII. JUSTICE CARPENETI'S CONCURRING OPINION

Justice Carpeneti would have resolved the Instruction No. 17 issue on whether Carpenter was a "public figure." The test for answering the public figure question, he said, is the four-prong query that was set out in *Lerman v. Flynt Distributing Co.*:[104]

> A defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.[105]

Justice Carpeneti concluded that Carpenter did not meet the test's first, third and fourth elements:

> On these facts, I would conclude that Carpenter did not "invite[] public attention" to her views. I also conclude that the evidence did not establish that Carpenter "assumed a position of prominence" through her participation in the controversy. . . . Finally, there is no evidence that Carpenter had or exercised *any* access to the media, much less "regular and continuing access." The fact that Leykis read Carpenter's letter on the air during the July 24 broadcast does not change my conclusion, because "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."[106]

Since "the [S]tate's interest in protecting private individuals from the intentional infliction of emotional distress outweighs the First Amendment interest in speech on private matters concerning private individuals," Justice Carpeneti concluded that *Hustler Magazine, Inc. v. Falwell* should not be extended "to IIED claims brought by private individuals such as Carpenter":[107]

> The state has a "strong and legitimate" interest in protecting private individuals from unprovoked verbal attacks. Private figures like Carpenter are both less equipped to defend

104. 745 F.2d 123 (2d. Cir. 1984).
105. *Carpenter*, 171 P.3d at 71 (Carpeneti, J., concurring) (citing *Lerman*, 745 F.2d at 136–37).
106. *Id.* at 73 (citing Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979)) (citations omitted).
107. *Id.* at 74.

> themselves against attack and more worthy of protection than are public figures who run the risk of closer public scrutiny, but "enjoy significantly greater access to the channels of effective communication." Although Carpenter voluntarily participated in the controversy over the show's cancellation, the limited and discrete nature of her participation did not warrant the degree of exposure she received. Application of defamation standards to the IIED claims of private figures exposes to retaliation any private individual exercising her own free speech rights to complain about media program content. In such circumstances, no one could ever safely complain about the media without risking public attack. It would chill listeners' desires to voice their opinions. This result is inconsistent with the value placed on listener input by the FCC regulations as well as the values represented by the First Amendment.[108]

VIII. JUSTICE FABE'S DISSENTING OPINION

Justice Fabe raised two principal objections in her dissent. First, she argued that Leykis's "call to arms," which the majority said invited listeners "to harass Carpenter," was nothing more "than the sort of hyperbole and rhetoric that is typical of debate about public figures and matters of public concern in this day and age."[109] The only thing Leykis encouraged his listeners to do "was to persuade Carpenter, a public figure, to change her mind by demonstrating that she held the minority view and by suggesting alternate routes to address her concerns."[110]

The dissent's second objection concerned the majority's holding that Carpenter's IIED claim was "not based on any statement of fact, false or otherwise."[111] This holding, the dissent argued, was "wholly inconsistent" with the Supreme Court's decision in *Hustler Magazine, Inc. v. Falwell*.[112]

Falwell, the dissent argued, cannot be read as limiting its constitutional protections to only those statements that are true or false:

> *Falwell* is clearly intended to protect opinion statements about public figures and matters of public concern. And the very definition of an opinion is that its accuracy cannot be established. By attempting to distinguish this case on the grounds that Leykis's statement can be neither true nor false,

108. *Id.* (citations omitted).
109. *Id.* at 75 (Fabe, J., dissenting).
110. *Id.* at 76.
111. *Id.* at 77.
112. *Id.*

> the court exposes all opinion statements directed at public figures to IIED liability. This is not only clearly contrary to *Falwell* but substantially eviscerates the protections it extended.[113]

The dissent appears to equate a statement whose "accuracy cannot be determined" with a statement that "can be neither true nor false." And so the strength of the dissent's second objection rests on the premise that "opinions" cannot be true or false. So, if no opinion can be true or false (i.e., "its accuracy cannot be determined"), then the dissent is quite correct that the majority "exposes all opinion statements directed at public figures to IIED liability."

The truth of the premise "that no opinion can be true or false" is doubtful. The Supreme Court stated in *Milkovich v. Lorain Journal Co.* that "expressions of opinions may often imply an assertion of objective fact":

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."[114]

Opinions, then, can be true or false. If I say, "I think that going to war in Iraq was not in the best interests of the United States," I am really saying two things: (1) that going to war in Iraq was not in the best interests of the United States; and (2) that I *believe* that going to war in Iraq was not in the best interests of the United States. In essence, I am asserting two propositions, both of which may be true or false.[115]

Since opinions can be true or false, the dissent's argument that the majority misread *Falwell* and exposed "all opinion statements directed at public figures to IIED liability" loses much of its force.

---

113. *Id.* at 78.

114. Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–19 (1990).

115. *See id.* at 20 n.7 ("For instance, the statement 'I think Jones lied' may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is of course the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice when that is required for recovery.").

IX. IIED CLAIMS IN ALASKA AFTER *CARPENTER*

An IIED claim can be based on conduct or, as in *Carpenter*, based on speech. If a plaintiff is a public figure (or limited public figure) and her IIED claim is based on speech that makes assertions that have a truth value (that is, propositions that are either true or false), then, under *Falwell*, the plaintiff must prove that the assertions are false *and* that they were made with malice. *Carpenter* is clear on this.[116]

Carpenter is also clear that a plaintiff must, if her IIED claim is based on speech that makes *assertions* about a matter of public concern, prove "actual malice" in addition to the falsity of the speech.[117] But if a plaintiff, regardless of whether she is a public figure, bases her claim on *non-assertive* speech that "relates to a matter of public interest," the speech "loses its protection and can give rise to an IIED claim if, in addition to meeting the other requirements for an IIED claim, it is uttered with an intent merely to harass and with no intent to persuade, inform, or communicate." [118]

Finally, if a plaintiff is *not* a public figure and her IIED claim is based on speech that is *not* about a matter of public concern, but which nonetheless makes assertions that are either true or false, it is an open question whether she must meet the requirements of *Falwell,* or whether she only has to prove the common law elements of an IIED tort. Based on Justice Carpeneti's reasoning in his concurring opinion, a strong case can be made that a plaintiff must only prove the elements of an IIED tort.

To summarize, the essential holding of *Carpenter* is this: if a plaintiff, whether or not she is a public figure, bases an IIED claim on speech that makes no assertions and expresses no propositions, then she need only prove the common law elements of the tort of IIED.

CONCLUSION

Justice Fabe was correct when she argued that the purpose of the "freedom of speech" clause in the First Amendment is to protect debate and discussion of public issues: "The purpose of protecting speech is to

116. *Carpenter*, 171 P.3d at 55.

117. *Id.* Under federal law, if a plaintiff in this circumstance is "a private figure," *Milkovich* says that she need only "show that the false connotations were made with some level of fault." *Milkovich*, 497 U.S. at 20.

118. *Carpenter*, 171 P.3d at 59. The majority assumes, quite reasonably, that this kind of unprotected speech does not make assertions that are either true or false. *See id.* at 55.

avoid unnecessarily chilling public debate and dialogue."[119] Thus, a serious objection to the Alaska Supreme Court's decision in the *Carpenter* case is that it will chill debate about matters of public concern and inhibit "robust political dialogue."[120]

In considering the merits of the objection, it is helpful to remember that the matter of public concern in *Carpenter* was whether, given the typical content of *The Tom Leykis Show*, it was appropriate for the show to be broadcast in Juneau, Alaska. This was the political issue raised by Karen Carpenter.

If the majority decision had been based on the dissent's reasoning, the practical effect would have been to inhibit an ordinary person like Karen Carpenter from exercising her right to speak freely. As the subjects and themes of national talk radio become increasingly controversial, an individual who objects to the content of a particular show will be reluctant to voice her concern. And she may even be inhibited to the extent that she foregoes such ordinary expressions of opinion as writing a letter to the editor or to the local radio station. After all, she would run the risk of having a national talk show host, a person who has the power to directly communicate to millions of devoted listeners, make "crass, mean and utterly repugnant"[121] remarks about her over the air, humiliate her, and then, using "outrageous"[122] language, encourage his listeners to contact her "in a hostile fashion."[123]

The *Carpenter* case presents a First Amendment dilemma. No matter how it was decided, either Tom Leykis's or Karen Carpenter's speech would have been "chilled" in some way. But there is a great difference here. Though he lost, Leykis can still voice his opinion that his show should remain on the air, and he can still encourage his listeners to support his efforts to stay on the air. If, however, the decision had gone the other way, this is not true for individuals like Karen Carpenter. Their speech objecting to shows like Leykis's would be severely inhibited.

Plato posed a question more than 2300 years ago: can Justice be defined as "the interest of the stronger"?[124] Had the Alaska Supreme Court ruled in favor of Leykis, justice would indeed have been understood as the interest of the stronger. Leykis, with all of the power of his microphone and his legions of loyal listeners, would have, in effect, been granted the power to stifle the free speech of those with very

119. *Id.* at 80 (Fabe, J., dissenting).
120. *Id.* at 75.
121. *Id.* at 79.
122. *Id.* at 80.
123. *Id.* at 81.
124. PLATO, THE REPUBLIC 19 (Benjamin Jowett trans., The Modern Library 1982).

little status and very little power. But justice cannot be understood as the interest of the stronger; the Alaska Supreme Court's decision in *Carpenter* reinforces this truth.