No. 09-35153

In the United States Court of Appeals for the Ninth Circuit

POWELL'S BOOKS, INC., et al.,
Plaintiffs-Appellants,
v.
JOHN KROGER, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon
(Hon. Michael W. Mosman) Case No. CV-08-501-MO

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

Bookseller/Media Plaintiffs respectfully submit this Reply to respond to Defendants' Opposition (Dkt Entry 74)("Deft. Opp.") to their fee application (Dkt Entry 73)("Pl. App.") and that of ACLU Plaintiffs (Dkt Entry 68 in 09-35154).[1]

Having vigorously fought this case through two hearings (first on a preliminary injunction; then on a permanent injunction) in the District Court (Defendants prevailed), Plaintiffs' appeal to this Court (Plaintiffs prevailed),

[1] Capitalized terms are as defined in Bookseller/Media Plaintiffs' Application for Attorneys' Fees and Expenses. Bookseller/Media Plaintiffs are Powell's Books, Inc.; Old Multnomah Book Store, Ltd.; Dark Horse Comics, Inc.; Colette's: Good Food + Hungry Minds, LLC; Bluejay, Inc.; St. John's Booksellers, LLC; American Booksellers Foundation for Free Expression; Association of American Publishers, Inc.; Freedom to Read Foundation, Inc.; Comic Book Legal Defense Fund. ACLU Plaintiffs are ACLU of Oregon, Cascade AIDS Project, Planned Parenthood of the Columbia Willamette, and Candace Morgan.

Defendants' request for certification to the Oregon Supreme Court (denied), and Defendants' request for rehearing or rehearing *en banc* before this Court (also denied), Defendants now argue that this was a simple, modest litigation, presenting a narrow issue that should have required little effort for Plaintiffs to prevail.

That is not so. Defendants presented a broad range of inventive defenses, some of which had not been litigated in any other court—state or federal—and the District Court adopted a legal standard to sustain the Oregon Statutes which had not been used by any other court. Defendants' counsel should not now profess surprise that it took time and effort to overcome their vigorous, creative defenses.

1. The Legal Issues In This Case—Framed Largely By the Arguments Raised by Defendants—Were Broader and More Complex Than Defendants Now Contend

Defendants assert:

> The dispositive question presented by this case throughout the proceedings has been the meaning of the challenged statutes, Or. Rev. Stat. §§ 167.054 and 057, which is a question of Oregon law.

(Deft. Opp., p. 7). But Defendants raised a range of issues far broader and more complex than Defendants now contend were involved, including these:

- Defendants argued that Plaintiffs lacked standing to bring this case, and argued that the claims were not justiciable.[2]

[2] Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, June 2, 2008, pp. 11-13 (Dkt Entry 29 in 08-cv-501) ("Deft. Memo on Prel. Inj."); *(cont'd)*

- Defendants argued that the Oregon Statutes need not incorporate the three-part "*Miller/Ginsberg*" test adopted by the United States Supreme Court,[3] as long as the substance of the statute "compl[ies]" with that test.[4]
- Defendants argued that precedents holding other state statutes unconstitutional were of little relevance, because the Oregon Constitution has a "stricter standard" than the First Amendment. [5]
- Defendants argued that Plaintiffs' claim that the Statutes are "unconstitutionally vague fails because the very terms that Plaintiffs assert are unconstitutionally vague appear in other obscenity statutes and have already been construed by the Oregon courts."[6]
- Defendants argued that the United States Supreme Court "has already recognized Oregon's distinct approach to regulating obscenity."[7]

In ruling in Defendants' favor, the District Court found that the Statutes do

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Memorandum in Opposition to Plaintiffs' Motion for Permanent Injunction, Aug. 29, 2008, p. 10 (Dkt Entry 44 in 08-cv-501) ("Deft. Memo on Perm. Inj.");

[3] *Miller v. California*, 413 U.S. 15 (1973); *Ginsberg v. New York*, 390 U.S. 629 (1968).

[4] Deft. Memo on Prel. Inj., p. 16; Deft. Memo on Perm. Inj., p. 14; Appellees' Brief, Sept. 25 2009, pp. 50-51 (Dkt Entry 7075462 in 09-35153)("Appellees' Br.").

[5] Deft. Memo on Prel. Inj., p. 18; Deft. Memo on Perm. Inj., p. 15; Appellees' Br., pp. 52-53.

[6] Deft. Memo on Prel. Inj., p. 27; Deft. Memo on Perm. Inj., p. 15; Appellees' Br., pp. 58-59.

[7] Appellees' Br., pp. 54-56.

not contain the *Miller/Ginsberg* standards, but that the reach of the Statutes "as they would be applied by prosecutors, judges and juries" is "functionally" equivalent thereto. *Powell's Books, Inc. v. Myers*, 599 F.Supp.2d 1226, 1239-1240 (D.Or. 2008). The District Court's "functional equivalent" test had never been adopted by any other court—state or federal.

This was not a narrow, one issue case.

2. Plaintiffs' Counsel Appropriately Staffed this Case

Nor is there any basis for Defendants' argument that there was a duplication of effort among counsel. This case was appropriately staffed.

In the District Court, SNR Denton US LLP (then known as Sonnenschein) (Michael A. Bamberger, lead counsel) and Stoel Rives LLP (P.K. Runkles-Pearson, lead counsel) appeared jointly on behalf of all Plaintiffs. Mr. Bamberger and Ms. Runkles-Pearson together brought exactly the right knowledge, experience, and skills to properly litigate this case. Mr. Bamberger is one of the country's leading First Amendment lawyers, having litigated First Amendment cases for more than 30 years, and is the leading expert on "harmful to minors" statutes. Ms. Runkles-Pearson served as a law clerk to Oregon Supreme Court Justice Thomas A. Balmer from 2004 to 2006, and has practiced law for seven years. Plaintiffs were well served by this combination of complementary skills.

The District Court's Opinion separately addressed the positions of

Bookseller/Media Plaintiffs (booksellers, publishers, and media companies) and of ACLU Plaintiffs (the ACLU, health care providers, and health care advocates). For example, on the issue of whether Section 054 was overbroad, the District Court held that different Plaintiffs could escape liability for different reasons:

> [P]laintiffs [booksellers] need not be concerned about liability for selling book[s] whose contents are unknown to them * * * . Planned Parenthood and Cascade AIDS Project escape liability both because the materials they hand out are not primarily intended to sexually arouse the reader and because they are generally furnishing the works for sex education purposes on behalf of treatment providers.

599 F.Supp.2d at 1243. Because the District Court's analysis caused Plaintiffs' interests to diverge, separate Notices of Appeal and separate briefs were filed by Bookseller/Media Plaintiffs (represented by SNR Denton) and by ACLU Plaintiffs (represented by Stoel Rives). This was, of course, far more efficient than bringing in new counsel to represent one (or both) of the two groups of Plaintiffs.

Counsel coordinated their work to avoid duplicative briefing. Thus, *e.g.*, ACLU Plaintiffs' brief addressed Oregon rules of statutory construction and reviewed in detail the First Amendment-protected activities of ACLU Plaintiffs (including the Cascade AIDS Project and Planned Parenthood's providing materials that "explain sexual behavior in terms appropriate to minors and preteens").[8] In contrast, Bookseller/Media Plaintiffs addressed the *Miller/Ginsberg*

[8] Appellants' Opening Brief, July 17, 2009, pp. 14-20 (Dkt Entry 20-1 in 09-35154).

standards in greater detail, and addressed the particular concerns of booksellers:

> There is too great a risk that an improper purpose could all too easily—albeit improperly—be inferred from the sale or other furnishing of works which include portions deemed sexually arousing. Were a 17-year old college student to ask a bookseller for a sexy or erotic book or video to read [or view] on a dateless Saturday night, or were a 17-year old husband or wife to seek such material for an evening with his or her spouse, making a recommendation could subject the bookseller under Section 057 to a felony conviction and up to 5 years in jail.

Plaintiffs-Appellants' Brief, July 22, 2009, p. 35 (Dkt Entry 22 in 09-35153).

By avoiding duplicative briefing, Stoel Rives and SNR Denton each stayed substantially below the word limit. The two opening briefs for Plaintiffs aggregated 18,964 words; Defendants' consolidated brief was 15,084 words.

3. This Court's Opinion Embraced Arguments Made by Both Bookseller/Media Plaintiffs and ACLU Plaintiffs

Defendants also argue "it was the ACLU's arguments—not Powell's—which this Court adopted in its opinion." (Deft. Opp., p. 8). This Court's Opinion did embrace arguments made in ACLU Plaintiffs' brief; that brief was excellent. But this Court's Opinion also embraced arguments that were made principally in Bookseller/Media Plaintiffs' brief, or in both briefs. Two examples suffice:

Prurient Interest. Under *Miller/Ginsberg*, material cannot be restricted unless, among other things, it appeals to the prurient interest of minors. In their brief in this Court, Bookseller/Media Plaintiffs argued that:

> The Oregon Statutes make material subject to restriction even if the material does not appeal to the prurient interest of minors. The vast majority of "sexual conduct" (sexual intercourse, masturbation, touching

> of breasts or buttocks, etc.) is not "shameful or morbid" in any way. *Brockett,* 472 U.S. at 499. Section 054 restricts material that depicts sex and sexually related acts, and Section 057 restricts material that depicts or describes the same sex or sexually related acts.

Plaintiffs-Appellants' Brief, July 22, 2009, p. 25 (Dkt Entry 22 in 09-35153). This Court held:

> The statutes also do not limit themselves to material that predominantly appeals to prurient interest. Such material is understood to trigger responses "over and beyond" normal sexual arousal. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498-99 (1985). Section 054 defines sexually explicit material to consist of visual images of sexual intercourse as well as more specific subcategories. This definition is broad enough to reach a substantial amount of material that does not appeal to the prurient interest of a child under thirteen, but merely appeals to regular sexual interest.

Powell's Books, Inc. v. Kroger, 622 F.3d 1202, 1214 (9th Cir. 2010).

"And" Means "And." Bookseller/Media Plaintiffs argued that the Statutes violated *Miller/Ginsberg* by not requiring that works be considered as a whole:

> the word "and" linking the two clauses of the exception means that a work will not be taken as a whole unless the sexually explicit part of the work also serves some purpose other than titillation. Thus, under the Statutes, if one item in the work is deemed to have the purpose of titillation, the work does not have to be taken as a whole. That is a clear violation of the *Miller/Ginsberg* standard, and brings nonobscene, constitutionally protected works within the ambit of the Statutes.

Plaintiffs-Appellants' Brief, July 22, 2009, p. 25 (Dkt Entry 22 in 09-35153).

ACLU Plaintiffs similarly argued:

> Nothing in the legislative history—or in *Maynard*—supports the district court's decision to interpret the Exemption, which has two distinct disjunctive requirements, as having only a single requirement. As

> written, a defendant must meet both parts of the Exemption in order to escape liability. As interpreted, a defendant must meet only one part.

Appellants' Opening Brief, July 17, 2009, pp. 19-20 (Dkt Entry 20-1 in 09-35154).

This Court held:

> The state bases its "hardcore pornography" argument on a disjunctive reading of the exemption. In the state's view, a work may provide the basis for prosecution unless its explicit portions form "merely an incidental part of an otherwise nonoffending whole" or "serve some purpose other than titillation." * * *
>
> The problem, however, is that the statute does not say "or"—it says " and." The two conditions for exemption from prosecution are plainly written in the conjunctive: a defendant must satisfy both conditions in order to avoid prosecution. Thus, a work might still give rise to liability if its sexually explicit portions solely intend to titillate but are only an incidental part of the work as a whole (*e.g.*, arguably, some of the sex scenes in *Berserk*).

622 F.3d at 1210-1211. All Plaintiffs and their counsel can rightfully claim credit for prevailing in this case.

4. The Hours Expended and Rates Requested Are Reasonable

Defendants' challenge to the hours expended and rates requested is based on an unrealistic view of this case. Bookseller/Media Plaintiffs' application contains a detailed review of the proceedings in this case, which we will not recount here. Suffice it to state that the proceedings in the District Court included the submission of comprehensive briefs and declarations on a motion for a preliminary injunction, a hearing at which that motion was denied and the Court scheduled a hearing on a motion for a permanent injunction, further briefing and the submission of further declarations on the motion for a permanent injunction, and a hearing on the motion

for a permanent injunction. Proceedings in this Court included not only the submission of briefs and oral argument, but Defendants' post-argument motion for certification of questions to the Oregon Supreme Court.

The proceedings in this case were comparable to those in *Southeast Booksellers' Association v. McMaster*, No. 2:02-3747-23 (D.S.C.)—which held a South Carolina "harmful to minors" statute unconstitutional—in which the court awarded $405,485.61 in fees (Pl. App., Ex. F)—more than the aggregate fees sought here by all counsel.

Defendants also distort the hours claimed in Plaintiffs' fee applications. For example, Defendants state that Bookseller/Media Plaintiffs "claim 161 hours spent just in preparing the initial complaint." (Deft. Opp., p. 11). In fact, that 161 hours also encompassed filing a motion for a preliminary injunction, with a memorandum of law and 15 declarations. (Pl. App., pp. 8-9). Defendants similarly assert that Bookseller/Media Plaintiffs sought compensation for 157 hours for time devoted to the appeal. (Deft. Opp., p. 12). In fact, Bookseller/Media Plaintiffs sought compensation for 113 hours for the appeal, and an additional 17.3 hours for Defendants' post-argument motion for certification to the Oregon Supreme Court. (Pl. App., pp. 11-13). (Additional time was devoted to the fee application.)

Nor is there any basis for Defendants' opposition to the rates requested by Bookseller/Media Plaintiffs' counsel. Defendants acknowledge that Mr.

Bamberger "has extensive experience in litigating First Amendment cases" outside of Oregon, but argue that Oregon rates should apply because "the fundamental issue presented by this case was the proper application of Oregon law." (Deft. Opp., p. 7). But, as reviewed above, the fundamental issues in this case went far beyond the construction of the Oregon Statutes, and included sophisticated First Amendment issues which required Mr. Bamberger's special expertise and that of his colleagues.

CONCLUSION

The time spent by both Bookseller/Media Plaintiffs' counsel, and by ACLU Plaintiffs' counsel, was reasonable, their rates are reasonable and the expenses incurred are reasonable. Bookseller/Media Plaintiffs' and ACLU Plaintiffs' applications for attorneys' fees and expenses pursuant to 42 U.S.C. § 1988 should be granted in the amounts requested.

Dated: January 10, 2011

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