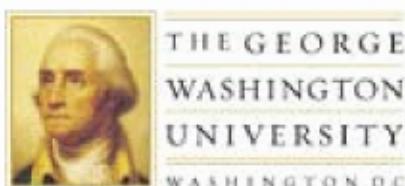


The Burger Court Opinion Writing Database

Zacchini v. Scripps-Howard Broadcasting Co.

433 U.S. 562 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



M
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1977

Re: 76-577 - Zacchini v. Scripps-Howard
Broadcasting Co.

Dear Byron:

I join. If the longhand note on the attached copy of page 7 interests you, I grant you the right to copy my entire "performance" sans royalties.

Regards,
WSB

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM.J. BRENNAN, JR.

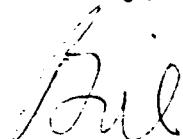
June 21, 1977

RE: No. 76-577 Zacchini v. Scripps-Howard Broadcasting

Dear Lewis:

Please join me in your dissent in the above.

Sincerely,



Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 1, 1977

76-577, Zacchini v. Scripps-Howard

Dear Byron,

I am glad to join your opinion for
the Court in this case.

Sincerely yours,

C. W.

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 5-31-77

Recirculated: _____

FIRST DRAFT

No. 76-577 — Zacchini v. Scripps-Howard
Broadcasting Co.

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner, Hugo Zacchini, is an entertainer. He performs a "human cannonball" act in which he is shot from a cannon into a net some 200 feet away. Each performance occupies some 15 seconds. In August and September, 1972, petitioner was engaged to perform his act on a regular basis at the Geauga County Fair in Burton, Ohio. He performed in a fenced area, surrounded by grandstands, at the fair grounds. Members of the public attending the fair were not charged a separate admission fee to observe his act.

On August 30, a free lance reporter for Scripps-Howard Broadcasting Company, the operator of a television broadcasting station and respondent in this case, attended the fair. He carried a small movie camera. Petitioner noticed the reporter and asked him not to film the performance. The reporter did not do so on that day; but on the instructions of the producer of respondent's daily newscast, he returned the following day and

pp 8, 9, 13

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6-7-77

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-577

Hugo Zacchini, Petitioner,
 v. On Writ of Certiorari to the
 Scripps-Howard Broadcasting Supreme Court of Ohio.
 Company.

[June —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner, Hugo Zacchini, is an entertainer. He performs a "human cannonball" act in which he is shot from a cannon into a net some 200 feet away. Each performance occupies some 15 seconds. In August and September, 1972, petitioner was engaged to perform his act on a regular basis at the Geauga County Fair in Burton, Ohio. He performed in a fenced area, surrounded by grandstands, at the fair grounds. Members of the public attending the fair were not charged a separate admission fee to observe his act.

On August 30, a freelance reporter for Scripps-Howard Broadcasting Company, the operator of a television broadcasting station and respondent in this case, attended the fair. He carried a small movie camera. Petitioner noticed the reporter and asked him not to film the performance. The reporter did not do so on that day; but on the instructions of the producer of respondent's daily newscast, he returned the following day and videotaped the entire act. This film clip, approximately 15 seconds in length, was shown on the 11 o'clock news program that night, together with favorable commentary.¹

¹ The script of the commentary accompanying the film clip read as follows:

"This . . . now . . . is the story of a *true spectator* sport . . . the sport

pp 3-5, 15-16

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

✓ ✓
From: Mr. Justice White

Circulated:

Recirculated: 6-23-77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-577

Hugo Zacchini, Petitioner,
v.
Scripps-Howard Broadcasting Company. } On Writ of Certiorari to the
Supreme Court of Ohio.

[June —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner, Hugo Zacchini, is an entertainer. He performs a "human cannonball" act in which he is shot from a cannon into a net some 200 feet away. Each performance occupies some 15 seconds. In August and September, 1972, petitioner was engaged to perform his act on a regular basis at the Geauga County Fair in Burton, Ohio. He performed in a fenced area, surrounded by grandstands, at the fair grounds. Members of the public attending the fair were not charged a separate admission fee to observe his act.

On August 30, a freelance reporter for Scripps-Howard Broadcasting Company, the operator of a television broadcasting station and respondent in this case, attended the fair. He carried a small movie camera. Petitioner noticed the reporter and asked him not to film the performance. The reporter did not do so on that day; but on the instructions of the producer of respondent's daily newscast, he returned the following day and videotaped the entire act. This film clip, approximately 15 seconds in length, was shown on the 11 o'clock news program that night, together with favorable commentary.¹

¹ The script of the commentary accompanying the film clip read as follows:

"This . . . now . . . is the story of a *true spectator* sport . . . the sport

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

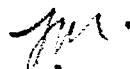
June 22, 1977

Re: No. 76-577, Zacchini v. Scripps-Howard

Dear Lewis:

Please join me.

Sincerely,


T. M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

OFFICE OF
CLERK OF THE COURT
BYRON R. BLACKMUN

June 6, 1977

Re: No. 76-577 - Zacchini v. Scripps-Howard
Broadcasting Co.

Dear Byron:

I am with you.

Sincerely,



Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 1, 1977

No. 76-577 Zacchini v. Scripps-Howard
Broadcasting Co.

Dear Byron:

In due time I will circulate a dissent.

Sincerely,



Mr. Justice White

Copies to the Conference

LFP/lab

4KP
Please return
4KP

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JUN 20 1977

Recirculated: _____

No. 76-577 ZACCHINI v. SCRIPPS-HOWARD

MR. JUSTICE POWELL, dissenting.

Disclaiming any attempt to do more than decide the narrow case before us, the Court reverses the decision of the Supreme Court of Ohio based on repeated incantation of a single formula: "a performer's entire act." The holding today is summed up in one sentence:

"Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."
Ante, at 12.

I doubt that this formula provides a standard clear enough even for resolution of this case.¹ In any event, I am not persuaded that the Court's opinion is appropriately sensitive to the First Amendment values at stake, and I therefore dissent.

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: JUN 23 1977

printed
 1st DRAFT

SUPREME COURT OF THE UNITED STATES

—
 No. 76-577
 —

Hugo Zacchini, Petitioner,
 v. On Writ of Certiorari to the
 Scripps-Howard Broadcasting Supreme Court of Ohio.
 Company.

[June —, 1977]

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Disclaiming any attempt to do more than decide the narrow case before us, the Court reverses the decision of the Supreme Court of Ohio based on repeated incantation of a single formula: "a performer's entire act." The holding today is summed up in one sentence:

"Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent." *Ante*, at 12.

I doubt that this formula provides a standard clear enough even for resolution of this case.¹ In any event, I am not

¹ Although the record is not explicit, it is unlikely that the "act" commenced abruptly with the explosion that launched petitioner on his way, ending with the landing in the net a few seconds later. One may assume that the actual firing was preceded by some fanfare, possibly stretching over several minutes, to heighten the audience's anticipation: introduction of the performer, description of the uniqueness and danger, last-minute checking of the apparatus, and entry into the cannon, all accompanied by suitably ominous commentary from the master of ceremonies. If this is found to be the case on remand, then respondent could not be said to have appropriated the "entire act" in its 15-second newsclip—the Court's opinion then would afford no guidance for resolution of the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1977

Re: No. 76-577 - Zacchini v. Scripps-Howard

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens
JUN 9 '77

Circulated: _____

Recirculated: _____

76-577 - Zacchini v. Scripps-Howard Broadcasting Co.

MR. JUSTICE STEVENS, dissenting.

The Ohio Supreme Court held that respondent's telecast of the "human cannonball" was a privileged invasion of petitioner's common law "right of publicity" because respondent's actual intent was neither (a) to appropriate the benefit of the publicity for a private use, nor (b) to injure petitioner. ^{*/}

As I read the State court's explanation of the limits on the concept of privilege, they define the substantive reach of a common law tort rather than anything I recognize as a limit on a federal constitutional right. The decision was unquestionably influenced by the Ohio court's proper sensitivity to First Amendment principles, and to this Court's cases construing the First Amendment; indeed, I must confess that the opinion can be read as resting entirely on federal constitutional grounds. Nevertheless, the basis of the State court's action is sufficiently doubtful that I would remand the case to that court for clarification of its holding before deciding the federal constitutional issue.

^{*/} Paragraph 3 of the court's syllabus reads as follows:

"A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual."

✓ Chief Justice
Justice Brennan
Justice Stewart
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 13 1977

Printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-577

Hugo Zacchini, Petitioner,
v.
Scripps-Howard Broadcasting Company. } On Writ of Certiorari to the
Supreme Court of Ohio.

[June —, 1977]

MR. JUSTICE STEVENS, dissenting.

The Ohio Supreme Court held that respondent's telecast of the "human cannonball" was a privileged invasion of petitioner's common law "right of publicity" because respondent's actual intent was neither (a) to appropriate the benefit of the publicity for a private use, nor (b) to injure petitioner.*

As I read the state court's explanation of the limits on the concept of privilege, they define the substantive reach of a common law tort rather than anything I recognize as

*Paragraph 3 of the court's syllabus reads as follows:

"A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual."

In its opinion, the court described the "proper standard" in language which I read as defining the boundaries of a common law tort:

"The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between the plaintiff and a third person to present the performance to the public, but that question is not presented here."