1997-98

NATIONAL HEALTH LAW
MOOT COURT COMPETITION

Transcript of Record
Docket No. 97-1511

SUPREME COURT OF THE UNITED STATES

October Term, 1997

CITY OF LUNGEN

Petitioner,

v.

NICORHETT ADVERTISING, INC,

Respondent.

SPONSORS:

Southern Illinois University School of Law

Southern Illinois University School of Medicine,
Department of Medical Humanities

American College of Legal Medicine

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PULMONA

Nicorhett Advertising, Inc.,	**)**	
Plaintiff	**)**	
	)	
v.	**)**	**Civil No. 95-C-1765**
	)	
City of Lungen,	**)**	
Defendant	**)**	

MEMORANDUM OPINION AND ORDER

Lawrence J. Tarr, District Judge

Plaintiff, Nicorhett Advertising, Inc. ("NICO"), challenges the constitutionality of the City of Lungen's Ordinance 415 (See Appendix A) which was promulgated in accord with 21 Pulmona Revised Statutes 2914.00-06 (See Appendix B). Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the parties have filed cross motions for summary judgment.

FACTS

NICO is a Pulmona corporation engaged in the business of displaying commercial and public service messages on outdoor signs in the city of Lungen. NICO leases property from private owners for signs that NICO erects and makes available to advertisers who wish to display messages in the city.

NICO also is engaged in the business of creating and marketing commercial and public service message signs for retail stores that wish to advertise products in both the store windows and inside the retail stores. NICO's customers include companies that advertise cigarettes. The parties have stipulated that NICO creates, displays, and markets commercial messages that are truthful, non-misleading, and concern lawful activity.

Ordinance 415 was duly adopted by the City Council of Lungen and took effect on January 1, 1996. The ordinance places restrictions on the location and manner in which tobacco products may be advertised. Plaintiff challenges the ordinance, claiming that the ordinance is both preempted by the Federal Cigarette Labeling and Advertising Act of 1969 and inconsistent with the First Amendment to the United States Constitution.

ANALYSIS

A. Federal Preemption

Plaintiff first argues that Ordinance 415 is preempted by federal legislation as provided by Article VI of the United States Constitution which provides that the laws of the United States "shall be the supreme Law of the Land;... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

The Federal Cigarette Labeling and Advertising Act of 1965 was passed to ensure that the public would be "adequately informed" about the health risks associated with smoking by requiring cigarette packages to carry specific health warnings. 15 U.S.C. § 1331. The Act was later amended by the Public Health Cigarette Smoking Act of 1969 to extend the requirements to cigarette advertisements. The pre-emption language of the statute also was modified. 15 U.S.C. § 1334. Congress acted to "protect commerce and the national economy" by preserving cigarette manufacturers' ability to advertise their products free from "diverse, nonuniform and confusing" state and local regulations based on smoking and health. 15 U.S.C. § 1331(2). The language of § 1334(b) is designed to avoid confusion for the public and to give effect to national uniformity. This section provides that "no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising and promotion of cigarettes the package of which is labeled in conformity with the provisions of this chapter."

Plaintiff cites *Cipollone v. Liggett Group, Inc.,* 112 S.Ct. 2608 (1992) for support for pre-emption. Based on the language of the statute the Court in *Cipollone* held that the central preemption inquiry is "whether the legal duty that is the predicate of the common law damages action constitutes a 'requirement or prohibition based on smoking and health...imposed under State law with respect to....advertising or promotion'... ." *Id.* at 2621.

Plaintiff claims that Ordinance 415 is based on smoking and health, and, therefore, is preempted by the FCLAA. Plaintiff arrives at this conclusion based on two reasons. First, it argues that the language of the ordinance contains several references to the fact that smoking is injurious to children's health. Plaintiff also argues that 21 PRS § 2914 is based on smoking and health because prior to 1994, § 2914 was entitled "An Act to Prohibit Offenses Against Public Health and Safety." The plaintiff argues that simply because a statute is retitled does not mean the statute no longer is concerned with smoking and health. Thus, because § 2914 is based on smoking and health, an ordinance meant to further § 2914 also is based on smoking and health.

This court does not accept these arguments. The prior title of § 2914 is irrelevant to our analysis. The clear purpose of Ordinance 415 is to further effectuate § 2914, a valid State law. Ordinance 415 is clearly aimed at the illegal sale of cigarettes to

minors. Its purpose is to effectuate § 2914 and, therefore, Ordinance 415 is not based on smoking and health giving that clause a fair but narrow reading.

The holding in the instant case is in line with the holding of the Supreme Court in *Cipollone*. In *Cipollone*, the Court held that Cipollone's claims of intentional fraud and misrepresentation were not pre-empted because they were not " 'based on smoking and health' but rather on a more general obligation -- the duty not to deceive." *Cipollone* 112 S.Ct. at 2624. In the instant case the ordinance is not based on smoking and health. Rather it is designed to effectuate state law which prohibits the illegal sale and consumption of cigarettes to minors, as well as to uphold the autonomy of children and the authority of parents.

For these reasons this court holds that the plaintiff has not demonstrated that the Federal Cigarette Labeling and Advertisement Act of 1969 preempts Ordinance 415.

B. First Amendment Free Speech

Having determined that the federal statute does not preempt the Lungen ordinance, the court now turns to whether Ordinance 415 violates Plaintiff's First Amendment rights. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law... abridging the freedom of speech, or of the press."

Plaintiff contends that the free speech interest protected by the First Amendment includes both the context and placement of signs advertising tobacco products as prohibited by Ordinance 415. Thus, Plaintiff claims that Ordinance 415 is not a permissible regulation of commercial speech under the First Amendment. In support of that claim, Plaintiff cites *44 Liquormart, Inc. v. Rhode Island,* 116 S. Ct. 1495 (1996), which held that a regulation of commercial speech will be upheld only if it will in fact materially advance the state's goals and is narrowly tailored to do so.

In order to determine whether this ordinance is a permissible restriction on commercial speech under the First Amendment, this court uses the four part test of *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980).

1. Lawful Activity and Not Misleading

The parties have stipulated to this first prong in that the advertising is a lawful activity and not misleading.

2. Substantial Governmental Interest

Plaintiff argues that the City has not demonstrated a substantial governmental interest in restricting their advertising as required under the second prong of the test of *Central Hudson.* This court does not agree.

The City demonstrates a substantial government interest in its promulgation of Ordinance 415 because the asserted interest of the City, as stated in the Preamble is to promote compliance with the state law prohibition against the sale of cigarettes to minors, 21 PRS § 2914. Such compliance also furthers the obvious public policy underlying this prohibition, which is to prevent the purchase and thus the consumption, of cigarettes by minors. This is certainly a sufficiently substantial interest for the purposes of the *Central Hudson* test. Defendant's position is that there is also its interest in protecting the autonomy of children and the authority of parents as stated in the Purpose section of Ordinance 415. This court finds that Ordinance 415 is explicitly aimed at promoting compliance with the Lungen statute that provides it is unlawful for a vendor to sell cigarettes to a minor and its other stated purposes, all of which are substantial.

3. Directly Advance State's Interest

Plaintiff argues that Ordinance 415 does not advance the state's interest in a direct or material way. Under the provisions of Ordinance 415, the City Council found that "Tobacco advertising induces children to initiate illegal tobacco use." Ordinance 415, § II.A. Further, this court accepts the judicially recognized proposition that advertising increases consumption. *Central Hudson.* In so doing, this court rejects Plaintiff's claim that summary judgment is not appropriate on this issue.

Plaintiff asserts that *Edenfield v. Fane*, 507 U.S. 761 (1993) (holding that a Florida ordinance prohibiting certified public accountants from in-person solicitation was an unconstitutional restraint on free speech), requires an altered level of scrutiny for examining a restraint on commercial speech. According to Plaintiff, the court should no longer apply an intermediate level of scrutiny, but the City must "demonstrate that the harms it restricts are real and that its restrictions will in fact alleviate them to a material degree." *Anheuser-Busch, Inc. and Penn Advertising of Baltimore, Inc., Plaintiffs, v. Mayor and City Council of Baltimore City,(Penn I)*, 855 F.Supp. at 815 (quoting *Edenfield*, 507 U.S. at 771).

The City maintains that the Court's *Edenfield* ruling does not modify the "intermediate level" of scrutiny that had been applicable to challenges to restraints on commercial speech prior to *Edenfield* and that the same deference should be afforded the legislature that had been prior to *Edenfield*.

An example of this judicial deference is found in the deference the Supreme Court has given a legislature's judgment that a link exists between billboards and traffic safety in repeated litigation over the placement of billboards. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), for example, the Court upheld San Diego's ban on off-site billboard advertising under the *Central Hudson* test. Although the record failed to establish a connection between billboards and traffic safety, the Court nonetheless upheld the restriction, stating that "[w]e likewise hesitate to disagree with the

accumulated, common sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Id.* at 509.

This court holds that it remains appropriate in the wake of *Edenfield* to defer to the City Council and to accept the judicially recognized proposition that advertising increases consumption. Thus, Ordinance 415 does directly advance the City's asserted substantial interests and passes the third prong of the *Central Hudson* test.

4. Narrowly Tailored to Serve the State's Substantial Interest

Ordinance 415 is narrowly tailored to serve the City's asserted substantial interest. In *Board of Trustees v. Fox,* 492 U.S. 469 (1989), the Supreme Court explained that the *Central Hudson* test requires only a reasonable fit between the challenged regulation and the interest it is meant to serve. *Fox* thus requires a "'fit' between the legislature's ends ... a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, ... a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decision makers to judge what manner of regulation may best be employed." *Id.* at 480.

Plaintiff argues that Ordinance 415 is underinclusive because it prohibits only a small percentage of total advertisements for the product, leaving many other media, such as newspapers and magazines unrestricted. Plaintiff cites *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), in support of this contention. Unlike *Discovery Network*, in the instant case, there are legitimate justifications related to the City's substantial interest for distinguishing between billboards or signs and the other types of mediums which the ordinance does not affect.

Plaintiff also argues that Ordinance 415 is overboard. Plaintiff points to the "tombstone notice" provisions of the ordinance, IV.E & F., and to the further prohibition of such notices at establishments within 750 feet of a school, playground, or public park, § IV.G. The court notes the parties stipulation that under these provisions there are some establishments within Lungen that will be able to post tombstone notice and others that will not. However, we reject Plaintiff's argument that this impermissibly prohibits some establishments from providing legitimate pricing and availability information to adults or infringes on the right of adults to obtain such information.

Plaintiff's reliance on *44 Liquormart* is misplaced. *Liquormart* is inapposite to the case at bar. *Liquormart* dealt with the state prohibiting all advertising throughout Rhode Island, "in any manner whatsoever," of the price of alcoholic beverages except for price tags or signs displayed with the beverages and not visible from the street.

This case is different. Lungen's ordinance clearly targets minors who cannot legally use tobacco products. Lungen does not ban all outdoor and inside retail store

advertising but restricts such advertising. The City of Lungen is not attempting a total ban on the product or information about it but a ban on certain kinds of advertising in certain places about products which are illegal for minors to purchase and consume. This court is unwilling to read *44 Liquormart* as prohibiting such restrictions.

This Court, therefore, holds that the City's chosen means are narrowly tailored to advance the City's asserted interest of decreasing the exposure of minors to stimuli that would encourage them to purchase cigarettes, thereby decreasing the number of illegal transactions and discouraging the purchase and consumption of cigarettes by minors.

CONCLUSION

Plaintiff’s motion for summary judgment is denied. Defendant’s motion for summary judgment is granted. The court therefore directs the Clerk of the Court to enter judgment and that Plaintiff take nothing.

SO ORDERED.

DATE: JUNE 20, 1996

____

Honorable Lawrence J.Tarr

ENTERED: JUNE 20, 1996

APPENDIX A

LUNGEN, PULMONA, ORDINANCE 415 (JANUARY 1, 1996)

I. PREAMBLE

The promulgation of 21 PRS § 2914 along with abundant federal and state statistics prove there is an increased prevalence of underage smoking and that smoking is injurious to the health and welfare of children. Ordinance 415 will serve as a means to increase the effectiveness of 21 PRS § 2914.

II. FINDINGS

The City Council of Lungen makes the following findings in support of Ordinance 415.

A. Tobacco advertising induces children to initiate illegal tobacco use.

1. The average age of smoking initiation is 14. Addiction to smoking is almost exclusively acquired between the ages of 12 and 19.

2. About 3,000 teenagers begin smoking every day.

3. Teenagers are 3 times more sensitive to tobacco advertising than adults. A 20-year comparison of cigarette brand sales and advertising campaigns found that teenagers are 3 times more likely than adults to buy the most heavily advertised brands of cigarettes.

4. RJR initiated the *Old Joe Camel* ad campaign in 1988. In the next 3 years the Camel brand's share among teenage smokers rose from 0.5% to 32.8% and teenage purchasers became 25% of Camel's market.

5. Countries that have banned or restricted tobacco promotion have experienced greater decreases in teenage smoking than countries that have not done so.

B. Tobacco use is injurious to the user's health and welfare.

1. Over 8,000 people die each year in the State of Pulmona from illnesses attributable to tobacco.

2. More people die in Pulmona each year from tobacco use than from auto accidents, suicides, drugs, homicides, and fires combined.

3. Lung cancer is the most prevalent form of cancer in the State of Pulmona. Cigarette smoking causes more than 81% of the state's lung cancer deaths.

III. PURPOSE OF ORDINANCE 415

The purposes served by Ordinance 415 include the following:

A. To promote the observance of and respect for 21 PRS § 2914 which makes it unlawful to sell, give, or furnish tobacco in any form to any minor under age 18.

B. To protect children by shielding them from advertising messages that impose an adult choice upon them and that encourage the purchase of a product that is illegal to be sold to them.

C. To enhance the authority of parents to direct the upbringing of their children by curtailing tobacco advertising that is forced upon children when they leave their homes.

IV. PROHIBITION AGAINST CERTAIN ADVERTISING OF TOBACCO PRODUCTS; EXCEPTIONS; FINE

A. Except as stated below, outdoor advertising of tobacco and tobacco products is prohibited within the jurisdiction of the City of Lungen.

B. For the purposes of this prohibition, "outdoor advertising" means advertising that can be seen from the street.

C. Advertising in sports stadiums or other enclosed outdoor spaces is not within this ban if it cannot be seen from outside the enclosure.

D. Advertising within buildings or other enclosures shall be considered outdoor advertising if it can be seen from outside the building or enclosure through windows, doors, or other apertures or if it can be seen on television.

E. Except as provided below, licensed retailers of tobacco and tobacco products may post a notice providing only price and availability information outside their premises in a tombstone format.

F. For the purposes of this prohibition, a tombstone format means a format in which truthful, factual information, conveyed only by the use of words and numbers, appears in clear, plain black type on a white field without adornment and unaccompanied by color, opinion, artwork, or logos.

G. No tombstone notice shall be placed within seven hundred fifty (750) feet of a school, playground, or public park.

H. Advertising that is within premises licensed to sell tobacco and tobacco products but not visible from the street may be in any format and present any information or images not otherwise prohibited by law.

I. Any person who violates any provision of this ordinance shall be guilty of a misdemeanor and upon conviction, shall be fined not less than $200 nor more than $500. Every person shall be deemed guilty of a separate offense for every day such violation shall occur.

V. EFFECTIVE DATE

Ordinance 415 shall take effect on January 1, 1996.

APPENDIX B

Prohibition of Cigarette Sales to Minors Act
Pulmona Revised Statutes § 2914.00

[1996 PULMONA REVISED STATUTES
CITE AS 21 PRS § 2914.00]

§ 2914.00 Preamble

The legislature of the state of Pulmona finds and declares that reducing and eventually eliminating the illegal purchase and consumption of tobacco products by minors is critical. Accordingly, the state of Pulmona must fully comply with federal regulations, that restrict tobacco sales to minors and require states to vigorously enforce their laws prohibiting the sale and distribution of tobacco products to persons under 18 years of age.

§ 2914.01 Tobacco; sale to minors; penalty

It shall be unlawful to sell, give, or furnish, in any way, any tobacco in any form whatever, including chewing tobacco or snuff, or any cigarettes or cigarette paper to any minor under eighteen years of age. It shall be unlawful for a minor under eighteen years of age to purchase any tobacco products.

§ 2914.03 Penalty

Whoever shall sell, give or furnish in anyway any tobacco in any form whatever, including chewing tobacco or snuff, or any cigarettes or cigarette paper to any minor under eighteen years of age shall be guilty of a Class III misdemeanor for each offense.

§ 2914.04 Political Subdivisions

To effectuate the purpose of this statute political subdivisions may enact more stringent ordinances or rules.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

No. 96-1428

Nicorhett Advertising, Inc.,

Plaintiff--Appellant

v.

City of Lungen,

Defendant--Appellee

Appeal from the United States District Court
for the Middle District of Pulmona
Civil No. 95-C-1765 -- **Lawrence J. Tarr**, District Judge

Argued December 10, 1996 -- Decided February 20, 1997

Before, MORRIS, Chief Judge, MILSTEIN and SHALLECK, Circuit Judges.

MORRIS, Chief Judge. This action comes before the court on appeal from the district court's grant of summary judgment against plaintiff in its challenge to the City of Lungen's Ordinance 415. The district court's judgment is reversed.

I. FACTS

The district court's opinion adequately sets forth the facts of this case. We merely summarize them here as necessary for our analysis. The appellant, Nicorhett Advertising, Inc., ("NICO"), challenged the constitutionality of the City of Lungen's Ordinance 415, claiming that the prohibition on advertising violates the appellant's First Amendment free speech rights. Further, the court held that this ordinance was not subject to preemption under the Federal Cigarette Labeling and Advertising Act of 1969 (FCLAA). Summary judgment was granted in favor of appellee and denied to appellant.

II. ANALYSIS

A. PREEMPTION

The Federal Cigarette Labeling and Advertising Act of 1969 does preempt the Lungen ordinance. In *Cipollone V. Ligett Group, Inc*. 112 S. Ct. 2608 (1992) the Court held that whether state law is preempted is determined primarily by looking to the language of the statute itself. A reading of the ordinance shows that it imposes requirements and prohibitions based on smoking and health with respect to the content and location of advertising and promotion of cigarettes. See Ordinance 415, §§ I & II.

Thus, Ordinance 415 is preempted. In this regard, this case is distinguishable from *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore* 63 F.3d 1318 (4th Cir. 1995).

B. First Amendment Free Speech Issue

The district court's misunderstanding of intermediate First Amendment scrutiny tainted its application of the third and fourth prongs of the *Central Hudson* test. Justice Stevens in *44 Liquormart* explained that under the third prong, courts must determine whether the state has shown "not merely that its regulation will advance its interest but also that it must do it 'to a material degree.'" 116 S. Ct. At 1509, quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Thus, in absence of record evidence establishing that point, he concluded that upholding the Rhode Island regulation "would require [the Court] to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the state interest." *Id* at 1509, quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). This court cannot find, based on this record, that Ordinance 415 materially advances the state's goal of decreasing the sale and consumption of cigarettes to minors.

Additionally, the ordinance is an overly broad restriction on constitutionally-protected commercial speech directed to the general public for whom the purchase of tobacco products, if over the age of 18, is a lawful activity. Indeed, under the terms of the ordinance, in some locations adults will not even be able to obtain pricing and availability information concerning what are clearly legal products.

The ordinance cannot be upheld simply because its goal is the protection of children. In *Bolger v. Youngs Drug Products Corp*., 463 U.S. 60 (1983), the Court held that a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives was in violation of the First Amendment. In so ruling, the Court rejected the argument that the protection of children and the needs for parental authority were sufficient justifications for the statute's limitations. "[T]he government may not 'reduce the adult population to reading only what is fit for children.'" *Id.* at 73 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

The ordinance does not meet the narrow tailoring requirement under the fourth prong of *Central Hudson* because the government must bear the burden of showing that "its restriction on speech [is] no more extensive than necessary." 116 S.Ct. at 1510.

Finally, although appellant will be limited by the terms of the ordinance, the public generally, including children, will still be exposed to significant tobacco product advertising and promotional activities through advertising in other media (e.g. magazines and newspapers) and by advertising in adjacent jurisdictions.

III. CONCLUSION

We hold that Ordinance 415 is preempted by the Act and violates the First Amendment right to free commercial speech.

The judgment of the district court is reversed and the case is remanded to the district court with instructions to enter summary judgment for appellant.

No. 97-1511
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

CITY OF LUNGEN,

Petitioner

v.

NICORHETT ADVERTISING, INC.

Respondent

ORDER GRANTING CERTIORARI

Upon consideration of the Petition for Certiorari the Court hereby GRANTS the petition on the following issues:

1. Whether Ordinance 415 is preempted by the Federal Cigarette labeling and Advertising Act of 1969.

2. Whether Ordinance 415 is constitutional under the First Amendment to the United States Constitution.

IT IS SO ORDERED.

Date: June 26, 1997