

### *Free Speech at Permitted Public Events*

The U.S. Ninth Circuit Court of Appeals recently issued an opinion in *Janelle Dietrich v. Mike Cardella*, \_\_ F3d \_\_ (9<sup>th</sup> Cir, December 1, 2008); 2008 U.S. App. LEXIS 24310, concerning the regulation of the right to free speech at private events held in public places via a special event permit process. The case brings into sharper focus the balance that must be struck between the public's First Amendment right to free speech and the concomitant right to not speak, in this case each right being exercised by opposing parties.

Defendant John Ascuaga's Nugget, a private business in Nevada, hosts an annual four-day Cook-Off in the City of Sparks. Defendant Nugget acquired a Special Event Permit, the application for which stated a necessity to close certain city streets and sidewalks. On the first day Plaintiff, as a volunteer for a local political organization, set up two booths for the registration of voters and collection of signatures on a recall petition. The booths were set up on a portion of the sidewalk covered in the permit and an employee of the Nugget, Defendant Michelle Malchow, asked them to leave and when unsuccessful, enlisted the help of Defendant Sparks Police Officer Mike Cardella, who under threat of arrest escorted Plaintiff's group to another location more than a block away. On the second day Plaintiff's group was allowed to return by Defendant Vice President of Nugget Larry Harvey, provided they did not impede traffic or pose a safety risk.

Plaintiff's group successfully conducted their business over the course of days two through four with only one further incident. Defendant Sparks Police Officer Potter issued Plaintiff a traffic citation on day three for failing to obey a traffic device when she drove her pickup truck past a barricade with a "road closed" sign in order to deliver signs and a table to the booth location. Plaintiff challenged the citation in municipal court and unsuccessfully appealed to the state district court when found guilty.

Plaintiff filed a claim in federal court under 42 U.S.C. § 1983 seeking monetary damages for two violations of her First Amendment rights: (1) for her booth's removal from the desired location on day one; and (2) for the traffic citation, alleging it was a retaliatory effort by the City in response to an article in a local paper on the evening of day two that detailed the relocation. The defendants fall into three categories: a private entity/persons, municipal entities, and individual police officers. The district court granted summary judgment as to all defendants finding there was no constitutional violation on either day and Plaintiff appealed.

Defendants make two arguments in response to the appeal. The Defendants all make the same first argument that no constitutional violation occurred. Their second arguments assume a constitutional violation and the arguments vary depending on which of the above categories the defendant falls into. The private parties argue that they were not acting "under the color of law". The municipal entities argue that they did not have a policy or custom of violating the First Amendment. The police officers argue that they are entitled to qualified immunity.

The First Amendment claim for forced removal on day one resulted in a reversal of the district court's conclusion that that no violation occurred. The Court of Appeals analyzed the intersection of the First Amendment rights of Plaintiff and Defendant Nugget. That analysis was

guided by *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) and *Gathright v. City of Portland*, 439 F.3d 573 (9th Cir.), cert. denied, 127 S. Ct. 76, 166 L. Ed. 2d 27 (2006). *Hurley* involved a Plaintiff who excluded the participation of the Defendant in a St. Patrick's Day Parade and prevailed in the court challenge of this decision based on the parade being, as described by the court, an expression whose message is an accumulation of its participants and that there was no effective way of disclaiming views not their own from being included in that accumulation. A contrasting case is *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980), in which a shopping mall owner was required by the court to allow for someone to solicit on the premises for signatures on a petition as the establishment was open to the public, the solicitation was unlikely to be associated with the mall's owner and further, that the owner could post signs nearby disavowing any connection should the owner choose to.

In *Gathright*, a private citizen engaging in behavior many found to be offensive at an event similar to the one in the instant case was removed by police upon being summoned by the event's organizers. The court found that the Plaintiff's First Amendment rights were violated as the offensive behavior could not have been mistaken by anyone as being part of the message of the event.

In the instant case the Court found that the Defendants' actions were not asserted as an effort in promoting the free flow of traffic or in maintaining an appropriate level of safety, nor were they an effort in protecting the permittee's rights, those being the only obvious reasons for municipal action that would be deemed appropriate. As in *Gathright*, there was little chance that Plaintiff's actions could be viewed by the public as being part of the Cook-Off and if there was a concern by the event organizers, the posting of signs, as was ordered in *PruneYard*, would extinguish that possibility.

Defendants' second, varying arguments were then addressed individually. Defendant Officer Cardella's argument of qualified immunity for relocating Plaintiff's booth was remanded to the district court as it was an issue they had failed to reach in the underlying case. Defendant Nugget and its employee Defendants were not found to be acting "under the color of state law" in that there was no evidence of any action on their part beyond the summoning of a police officer when Plaintiff failed to relocate after being asked to by an employee. Therefore, summary judgment was affirmed as to those Defendants. Municipal Defendants City of Sparks and Sparks Police were able to prove that there existed no municipal code, custom, policy, practice, procedure or the constructive elements of any of these such that a showing of a prohibition or restriction of First Amendment rights in specially permitted areas existed. Summary judgment was affirmed as to these Defendants as well.

The court also found there was no evidence of a causal relationship, a necessary component in a retaliation claim between the newspaper article on day two and the traffic citation on day three. Additionally, probable cause was found to exist for the citation as Plaintiff admits driving past the barricade. Since a lack of probable cause is a component that must be pled and proven to succeed in a retaliatory claim of this nature, summary judgment was affirmed as to all Defendants on this claim.