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FEATURED CASES:

Artistic Expression vs. Government Control: Eleventh Circuit Upholds City's Rights in First Amendment Battle

McGriff v. City of Miami Beach, No. 22-12863 (11th Cir. Oct. 10, 2023).

Eleventh Circuit affirmed City's authority in removing contentious artwork from public display, upholding it as government speech protected under the First Amendment. Ruling in favor of the City of Miami Beach, the court rejected the artists' claims, emphasizing the City's control and endorsement of the event's messaging. This case highlights the distinction between government expression and free speech in public art displays.

Background

This case arrived in the Eleventh Circuit on appeal by artists Jared McGriff, Octavia Yearwood, Rodney Jackson, and Naiomy Guerrero ("plaintiffs"). On initial review, the district court entered summary judgment in favor of the City of Miami Beach on plaintiffs' First Amendment claim brought against the City under 42 U.S.C. § 1983.

In 2019 the City organized an event, "ReFrame: Miami Beach," to be held over Memorial Day Weekend. The City intended the event to recognize its "troubling and regrettable history of race relations" while encouraging conversation around the advertised theme of "inclusion." In preparation for the event, the City contracted with artists to "create and curate" a series of artworks which would be displayed publicly as part of an installation entitled "*I See You, Too*."

In commissioning the art pieces for the inaugural ReFrame art exhibition, the City executed Professional Services Agreements ("the Agreements") with plaintiffs McGriff's and Yearwood's production companies. In relevant part, the Agreements provided for all installations to be approved by the "City Manager's designee" such that all contracted services are performed "to the reasonable satisfaction of the City Manager." Furthermore, any work product arising out of the Agreements is

designated property of the City "which shall not otherwise be made public… without the prior written consent of the City Manager." Finally, the City agreed to provide the exhibition venue space, as well as an appropriate location to perform the services.

Among the pieces delivered for this collection was a painting which memorialized a Hatian-American man named Raymond Herisse who was shot and killed by Miami Beach police officers over Memorial Day weekend in 2011. Upon reviewing this piece, the City Manager instructed the artists to remove the Herisse painting from the installation. The City Manager believed that the piece was "potentially divisive" and "definitely insulting to our police as depicted and narrated."

Plaintiffs' claims arise from the City's removal of the Herisse painting from the public "*I See You, Too*" collection. Specifically, plaintiffs argue that this action violated their rights to free speech under the First Amendment. At trial, the City argued their action was exempt from first Amendment scrutiny under the Government speech doctrine. The City moved for summary judgment and the district court granted the motion, declaring the City's action Government speech. The Eleventh Circuit affirmed.

The Government Speech Doctrine

Government speech is generally exempt from First Amendment scrutiny. Thus, the relevant doctrine in this case requires the court to distinguish between private and government speech. While no precise test exists, several factors may be weighed to determine whether expression is government speech or private speech given the totality of the circumstances.

On appeal, plaintiffs unsuccessfully argued that the district court erred by misinterpreting the government speech doctrine. Specifically, they argued that the lower court misinterpreted two factors in this doctrine, the scope of the control" factor and "history" factor. Additionally, plaintiffs asserted that the "City's actions were insufficient to show its endorsement" of the art installations' message. The Eleventh Circuit, relying heavily on the Supreme Court's decision in *Pleasant Grove v. Summum*, addresses each of these three factors and rejects each argument in turn. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

Scope of the control factor

Plaintiff's argued that the district court should have required the City to have "actively controlled" the message of the commissioned artwork. However, the Circuit Court rejected this argument. Rather, they concluded that, "[h]aving bought the artwork, the City's decision to display it, or not display it, was classic government speech."

Three facts are given in support of this assertion. First, it is undisputed that the City contracted to fund the artists' work and subsequently "take ownership over the art." Citing *Summum* and the Agreement, the Eleventh Circuit declared once the City took ownership of the commissioned works, including the controversial Herisse painting, "all rights previously possessed by the [production companies were] relinquished."

Furthermore, the Agreements clearly provided for the City to "control its exhibition, including by subjecting the art to the City Manager's approval" according to their reasonable satisfaction. Finally, the Circuit notes that the City exerted sufficient control over the message of ReFrame by terminating a contract with a different production company "after disagreeing with its programming decisions" prior to contracting with the Plaintiffs.

For these reasons, the Circuit Court ultimately determines that "the City's actions mirror—and arguably exceed—those taken in *Summum*" and thus satisfy the scope of control factor.

History

Plaintiffs argued that the history factor requires the "majority of the historical use" of a type of speech to have been by the government. Since "artistic expression" is only *sometimes* used to convey government speech, then it may not be subject to First Amendment protections.

The Circuit Court disagreed with this argument, finding that the plaintiffs' "framing of the medium of speech… seems far too broad." Even assuming, as Plaintiffs contend, that artistic expression has historically been used for private speech more than government speech, this does not negate the government's own long historical use of artistic expression to convey messages. Furthermore, the court analogized to several cases involving government speech through other non-traditional mediums including license plates, wartime propaganda campaigns, and even Facebook posts to ultimately conclude that this factor also weighs in the City's favor.

Endorsement

The court acknowledged this additional factor but notes that it "need not weigh in the City's favor… to conclude that the speech involved here was government speech." In rejecting the Plaintiffs' final argument, the court asked whether the public would "reasonably believe" that the government has endorsed the speech. Though plaintiffs contend otherwise, the Eleventh Circuit concluded that "the public would reasonably believe that the City endorsed the art produced for ReFrame" because of the City's actions in promoting the event, including advertising for the event and specifically the *I See You, Too* installation, the organization of an "opening night cocktail reception and media preview," and a publicized interview conducted by the Mayor with Yearwood, one of the installation's co-curators and a plaintiff in this case.

Conclusion

For these reasons, summary judgment is affirmed. In conclusion, the Eleventh Circuit explains that the City is "not obliged to display any particular artwork in the art exhibitions that they fund, organize, and promote." This case is exemplary of the types of First Amendment arguments available to localities who may be concerned about the risk of free speech claims arising from government action being construed as artistic expression.

McGriff v. City of Miami Beach

SHORT SUMMARIES:

9th Circuit – Excessive Force – Qualified Immunity- no duty to retreat under circumstances

Who would have guessed five or ten years ago that a panel of the 9th Circuit would be granting QI to police officers who shot and killed an unarmed man? Well, times change, and for those of us defending the police, some decisions seem more sensible. Officers are called to a domestic dispute and are told when they get there that father and mother are fighting and mother needs an ambulance. Police called for an ambulance, enter house and find father in a narrow hallway. Father, despite advice from the officers to the contrary, charges them. They shoot and the father dies. Panel: QI appropriate where, as here, father could have taken their weapons had they not acted and if they had retreated, mother could be in a more precarious situation.

Wade v. County of Lyon

8th Circuit – QI – Protests – Pepper Spray – First Amendment Retaliation

Just for the record, despite my significant pride in the US Revolution, the English tort system may have some value, where litigants must pay when they lose. Here a disabled internet reporter who joined with protestors outside a ball game in St. Louis to record the protest was pepper sprayed. She claims in retaliation to her First Amendment rights and the officers claim inadvertently. Inadvertently seems to win the day, as recordings from the event reflect that the officer could not hear the Plaintiff (who BTW, was apparently, protesting and acting outside the ambit if pure journalism). Seriously, folks, wouldn't it be nice if attorneys' fees and costs were actually awarded in 1983 actions that are meritless? No turkey for Thanksgiving, just malarky in this suit, Congratulations to City of St. Louis law department.

De Mian v. City of St. Louis