Halloween Sign Challenge Suffers Setback

On September 24, 2019, NARSOL filed a suit in the United States District Court for the Middle District of Georgia challenging the Butts County Sheriff’s Office’s practice of placing warning signs at the residences of registered persons before Halloween. The court granted a request for a preliminary injunction which prevented the Butts County Sheriff’s Office from erecting signs on the property of the plaintiffs during the 2019 Halloween Holiday. With Halloween 2020 rapidly approaching, NARSOL’s legal team moved for Summary Judgment(decision without a trial) to permanently enjoin the Sheriff’s Office from placing signs in front of their homes, or, in the alternative, a new preliminary injunction barring sign placement during 2020 Halloween. Unfortunately, the court denied our motion for summary judgment and resolved the case against us, denying the relief we had sought. In addition, most of the assertions raised in the complaint were dismissed with prejudice meaning they cannot be raised again.

**Background**

Registrant Corey McClendon lives with his 6-year-old daughter and his parents, who own the home where they all reside. Shortly before Halloween 2018, two Butts County Sheriff’s deputies appeared at McClendon’s door to inform him that the Sheriff’s Office would be placing a sign in front of the McClendon home. The sign conveyed a “community safety message” from the Sheriff’s Office “warning” that there could be no trick-or-treating at the McClendon home. Four other plaintiffs, name, name, name, and name, had similar stories.

As amended, their complaint asserted three claims:

* That the state compelled speech from the plaintiffs in violation of the First Amendment to the United States Constitution.
* That the state trespassed in violation of state law.
* That the state committed an unlawful taking of the Plaintiffs’ property in violation of the Fifth Amendment.

 **Explanation of Summary Judgment**

 “Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a). The moving party bears the burden of establishing that no genuine issues of material fact exist. All facts and all inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. The Court's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue of fact a proper question for the factfinder. The Court does not weigh the evidence or determine the truth of the matter. Nor does the Court search the record “to establish that it is bereft of a genuine issue of material fact.” *Street v. J.C. Bradford & Co*., 886 F.2d 1472, 1479- 80 (6th Cir. 1989). Thus, “the inquiry performed is the threshold inquiry of determining whether there is a need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson, 477 U.S*. at 250.

The standards upon which a court evaluates motions for summary judgment do not change when, as here, both parties seek to resolve the case through the vehicle of cross-motions for summary judgment. “The fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts*.” Taft Broad. Co. v. United States,* 929 F.2d 240, 248 (6th Cir. 1999) (citations omitted). Instead, “the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.” *Id*. For more details, see our article on Does v. Rausch in the October/November Digest.

**What is Trespass?**

The Plaintiffs brought two claims alleging the signs intrude on their property rights. It is undisputed that neither McClendon nor Reed owned the property where each resided at the times the signs were placed. The Defendants argue that as a result, neither McClendon nor Reed had “standing to assert any claim that turns on a real property interest.” The Defendants contended that a third party who is not a property owner cannot maintain a trespass action, and the Court agreed. *Coffin v.Barbaree*, 214 Ga. 149, 151, 103 S.E.2d 557 (1958) (“To maintain an action for trespass or injury to realty, it is essential that the plaintiff show either that he was the true owner or was in possession at the time of the trespass.”) The Plaintiffs accused the Defendants of “an inaccurate recitation of the law as addressed” and cited contrary ‘authority.’ That authority consisted of three cases. The court stated, “None remotely supported their argument.” Order at 9.

Quoting from the Order the court stated, “Under Georgia law, “[t]respass is a wrongful interference with the right to the exclusive use and benefit of a property right.” *Bishop Eddie Long Ministries, Inc. v. Dillard,* 272 Ga. App. 894, 901, 613 S.E.2d 673, 682 (2005) (citing OCGA § 51-9-1). The Plaintiffs argue, perplexingly, that “[t]he facts underlying Petitioners’ trespass claims are wholly undisputed by either party[.]” Doc. 50-1 at 29. Among those purportedly undisputed facts, they say, is that “Respondents were entering private property which was closed to the public[.]” Id. at 30. But that critical issue is, in fact, hotly disputed: the Defendants claim they placed the signs in the rights-of-way. Doc. 51-1 ¶ 4. But as critical as that issue is, the parties have all been unable to find evidence establishing the location and extent of the rights-of-way, if any, on the Plaintiffs’ properties. Nor have they been able to find legal authority that resolves the relative rights of the general public, the abutting landowner, and the Sheriff’s Office in the rights-of-way. *Order* at 11-12.

The court stated, “There is no clearly established law that every temporary physical invasion of property constitutes a taking. Further, if even the parties’ counsel have not yet found law establishing the location of the rights-of-way and the relative rights of the parties in the rights-of-way, certainly a reasonable officer would not have known the placement of the signs interfered with the Plaintiffs’ property interests. And again, the officers have adduced undisputed evidence that they at least attempted to place the signs in what they believed was the right-of-way. They are entitled to qualified immunity on the takings claim.” *Order* at 18-19.

**Compelled Speech**

The First Amendment “forbids abridgement of the freedom of speech,” and “freedom of speech includes both the right to speak freely and the right to refrain from speaking at all.” Now, the record is more developed, and there is evidence that the Sheriff’s Office does not now have a policy of prohibiting or the intention to prohibit competing speech. The Plaintiffs dispute this, citing the Sheriff’s testimony at the preliminary injunction hearing before last Halloween. They cite no further evidence showing such a policy or intention. On the issue of injunctive relief, the initial question, then, is whether the record provides evidence that the Sheriff’s Office intends to bar the plaintiffs from placing competing messages. It does not. Whatever the Sheriff’s Office planned to do in 2019, it is clear now it will not attempt to impinge the Plaintiffs’ First Amendment rights. The Plaintiffs are free to offer speech competing with the Sheriff’s Office’s views and to disassociate themselves from those views. *Order* at 21-22.

**Is There Hope?**

Yes, because the court was not able to resolve all issues, particularly the issue of whether the signs were on public right-of-way or private property. Quoting from the order, “The Court first makes clear what it is not concluding. The Sheriff’s Office believes it has the right to post the signs in front of the Plaintiffs’ homes as long as the signs are in yet to be defined rights-of-way and that it can prosecute anyone who moves the signs. The Court doesn’t reach that issue, but as noted, the Defendants have scant authority to support either proposition. And the Court certainly doesn’t conclude, given the facts here, that putting the signs in the Plaintiffs’ yards makes sense. Rather, the Court only concludes that, for the most part, the relief the Plaintiffs seek is not available.” *Order* at 28.