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Freedom of Speech and Press

plaintiff prove actual malice on the part of the defendant.[68] In deciding the defamation issue, the *Cruz* court cited *Galella v. Onassis*.[69] In *Galella*, the court held that the First Amendment does not establish a wall of immunity which protects news persons from any liability for their conduct while gathering news.[70]

Since under both New York and federal analysis the *Cruz* court did not find that freedom of speech would act as an absolute defense and since triable issues of fact existed, the defendants motion for summary judgment was denied.

WESTCHESTER COUNTY

Glendora v. Kofalt[71]
(decided July 28, 1994)

Plaintiff alleged that her state constitutional guarantees of freedom of speech[72] and freedom of expression[73] had been violated when the defendant, Cable Systems Corporation, refused to broadcast the plaintiff's program material.[74] The Supreme Court, Westchester County, dismissed plaintiff's claims and held that the defendant was not a state actor and the constitutional guarantees complained about would merely "'protect the individual against action by governmental authorities, not by

68. *Cruz*, N.Y. L.J., June 7, 1994, at 23.

69. 487 F.2d 986, 995 (2d Cir. 1973) (stating that social needs may warrant some intrusion of privacy, but the interference may be no greater than that necessary).

70. *Id.* (stating that crimes and torts committed in news gathering are not protected by the First Amendment).

71. 162 Misc. 2d 166, 616 N.Y.S.2d 138 (Sup. Ct. Westchester County 1994).

72. *Id.* at 168, 616 N.Y.S.2d at 140.

73. *Id.*

74. *Id.*

private persons.'"[75] Therefore the defendant's actions did not violate the plaintiff's constitutional rights.[76] The court did, however, grant the plaintiff's motion to compel broadcasting on other grounds.[77]

The controversy arose when the defendant agreed to broadcast the plaintiff's programming material. The material contained allegations of misconduct by a home improvement contractor in multiple installments.[78] After broadcasting "a number of

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75. *Id.* at 173, 616 N.Y.S.2d at 143 (citation omitted). *See* N.Y. CONST. art 1, § 8. This provision provides that: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

76. *Glendora*, 162 Misc. 2d at 173, 616 N.Y.S.2d at 143.

77. *Id.* The court upheld Executive Law § 829(3) and found that the defendants had violated this law by exercising editorial control over programming. The court denied the defendant's motion to dismiss on the grounds that state law, Executive Law § 829(3) was preempted. *Id.* at 170, 616 N.Y.S.2d at 141. The law at issue states, "No cable television company may prohibit or limit any program or class or type of program presented over a leased channel or any channel made available for public access or educational purposes." N.Y. EXEC. LAW § 829(3) (McKinney 1982).

The court noted that § 531(e) of the Cable Communications Policy Act of 1984 "forbids the cable operator from exercising editorial control over its PEG programming." *Glendora*, 162 Misc. 2d at 169, 616 N.Y.S.2d at 141. Because the New York statute "also forbids such editorial control," the court did not find that the statutes created a conflict. *Id.* In the absence of allegations that the program material was "obscene, sexually explicit, or that is solicits or promotes unlawful conduct[,]" the defendant's action, by refusing to broadcast the plaintiff's programming, constituted unlawful editorial control. *Id.* at 170, 616 N.Y.S.2d at 141.

The court, however, dismissed the plaintiff's negligence claim and stated that the defendant's action was clearly intentional and granted the defendant's motion to dismiss for failure to state a cause of action. *Id.* at 174, 616 N.Y.S.2d at 144. The plaintiff's defamation claim was dismissed because the facts did not show and the complaint did not allege that the defendants engaged in libel or slander. *Id.* The court similarly found that the facts did not support that there was any "mental injury caused by the defendant's conduct" and granted the defendants motion to dismiss the claims of negligent infliction of emotional disturbance, and intentional infliction of emotional distress. *Id.*

78. *Id* at 168, 616 N.Y.S.2d at 140.

installments,"[79] the defendants unilaterally refused to broadcast the remaining installments.[80] The plaintiff proceeded *pro se*, and sought damages under the New York State Constitution alleging that the defendant had violated her rights to freedom of speech and press.[81]

Even though the court found that the plaintiff's actions were collaterally estopped, it engaged in a brief analysis of the relevant issues, including freedom of speech. The court noted that, "[i]t is a firmly established principle of constitutional law that the state and federal constitutional guarantees of freedom of speech protect the individual against action by governmental authorities, not by private persons."[82] An inquiry was made as to whether cable casting could be considered a state activity, or whether the company was acting under the color of state law.[83]

The court held that although a cable company is viewed as a public utility, its activities do not fall under the color of state law.[84] In coming to its conclusion, the court relied on *Montalvo v. Consolidated Edison Co. of New York*,[85] a case in which the plaintiff unsuccessfully sought to establish that the action of a public utility constituted state activity.[86] The plaintiff in *Montalvo* argued that factors such as Consolidated Edison's "monopoly status within its franchise area, the high degree of

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79. *Id.*

80. *Id.*

81. *Id.* at 168-69, 616 N.Y.S.2d at 140-41.

82. *Id.* at 173, 616 N.Y.S.2d at 143.

83. *Id.* at 173, 616 N.Y.S.2d at 144.

84. *Id.* at 174, 616 N.Y.S.2d at 144.

85. 92 A.D.2d 389, 460 N.Y.S.2d 784 (1st Dep't 1983), *aff'd*, 61 N.Y.2d 810, 462 N.E.2d 149, 473 N.Y.S.2d 972 (1984). The plaintiff in *Montalvo* sought declaratory and injunctive relief in addition to compensatory and punitive damages for "personal and economic injuries allegedly suffered as a result of being deprived of utility service." *Id.* at 390-91, 460 N.Y.S.2d at 786. Justice Asch, dissenting in part, held that "it is not necessary to take even such a leap in legal logic to reach the conclusion that the action by Consolidated Edison in this case constitutes 'state action' and as a consequence is in violation of the Constitution." *Id.* at 400, 460 N.Y.S.2d at 791 (Asch, J., dissenting).

86. *Id.* at 389, 460 N.Y.S.2d at 785.

state regulation,"[87] and the fact that, "New York State has delegated to Con Ed the traditional state function of dispute resolution"[88] predicated state action.[89] The *Glendora* court rejected these factors as indicative of state action.[90] The court similarly rejected the assertion that public utilities operate under the color of state law. "Although a cable company is considered a public utility this does not imbue any of the defendants with the power or authority of the State."[91]

In determining whether state action occurred, the *Glendora* court examined the criteria utilized in *Shad Alliance v. Smith Haven Mall.*[92] The factors the court focused on included:

> [T]he source of authority for the private action; whether the State is so entwined with the regulation of the private conduct as to constitute State activity; whether there is meaningful State participation in the activity; and whether there has been a

87. *Id.* at 394, 460 N.Y.S.2d at 788.

88. *Id.* at 395, 460 N.Y.S.2d at 788.

89. *Id.* at 396, 460 N.Y.S.2d at 789.

90. *Id.*

91. *Glendora*, 162 Misc. 2d at 166, 616 N.Y.S.2d at 138.

92. 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985). The plaintiffs alleged that Smith Haven Mall's policy to prohibit "all leafleting and all types of political activities or gatherings" from its premises infringed their First Amendment rights. *Id.* at 488, N.E.2d at 1212, 498 N.Y.S.2d at 100. The court held that "because the actions of the owner do not constitute the state action necessary to trigger Federal constitutional protections," there was no infringement. *Id.* at 500, 488 N.E.2d at 1213, 498 N.Y.S.2d at 101. In his dissent, Chief Judge Wachtler cited PruneYard Shopping Ctr. v. Robbins, 447 U.S. 74 (1980), where the court held that "California's recognition of a State constitutional right to solicit signatures for petitions in shopping malls did not infringe upon either the Federal property, due process or First Amendment rights of mall owners." *Shad*, 66 N.Y.2d at 509, 488 N.E.2d at 1220, 498 N.Y.S.2d at 108. Judge Wachtler stated that access to shopping malls is essential to the preservation of free speech because they have replaced town squares, which provided "inexpensive channels of communication." *Id.* at 512, 488 N.E.2d at 1221, 498 N.Y.S.2d at 109. He argued that because shopping malls function in many communities as the only form of public gathering, access to them is necessary to protect "one of our most cherished liberties." *Id. See* John A. Ragosta, *Free Speech Access to Shopping Malls Under State Constitutions: Analysis and Rejection,* 37 SYRACUSE L. REV. 1 (1986).

> delegation of what has traditionally been a State function to a private person.[93]

In its analysis of these factors, the *Shad* court looked at the intent of the drafters of the free speech provision. The court held that it was clear that free speech had been "intended by its drafters to serve as a check on governmental, not private conduct."[94] The *Glendora* court also noted that the state's involvement in cable casting consists of "a set of statutory and regulatory laws specifying what the defendant cable cast operator is allowed to do."[95] This involvement was deemed insufficient to label the cable casting as governmental activity.[96]

A public utility had been, however, previously considered a state actor in a case where constitutional rights violations were alleged. In *Cahill v. Public Service Commission*,[97] the New York Court of Appeals determined that a utility's action in passing on the cost of charitable contributions when setting rates for its customers constituted impermissible government conduct.[98] The *Cahill* court determined that coercion resulting from the state's establishment of rates, which included an allowance for the contributions, combined with the fact that the utility was a

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93. *Shad*, 66 N.Y.2d at 505, 488 N.E.2d at 1217, 498 N.Y.S.2d at 105.

94. *Id.* at 500, 488 N.E.2d at 123, 498 N.Y.S.2d at 101.

95. *Glendora*, 162 Misc. 2d at 174, 616 N.Y.S.2d at 144.

96. *Id.*

97. 69 N.Y.2d 265, 506 N.E.2d 187, 513 N.Y.S.2d 656 (1986).

98. *Id.* The court relied heavily upon Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). The *Cahill* court explained that in *Abood*, the "plaintiffs, nonunion teachers, challenged the validity of a union shop clause in the collective bargaining agreement between their employer and the teachers' union because dues they were compelled to pay were being used by the union for legislative lobbying and for the support of political candidates." *Cahill*, 69 N.Y.2d at 270, 506 N.E.2d at 189, 513 N.Y.S.2d at 658. The *Abood* court held that the Constitution requires that such expenditures be financed with money of employees, "who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 271, 506 N.E.2d at 189, 513 N.Y.S.2d at 658 (citations omitted). The United States Supreme Court, however, rejected the *Abood* decision in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) and Blum v. Yaretsky, 457 U.S. 991 (1982). *Cahill*, 69 N.Y.2d at 272, 506 N.E.2d at 190, 513 N.Y.S.2d at 659.

monopoly which the customer had no choice but to utilize, constituted impermissible government action.[99]

The *Glendora* court addressed a federal constitutional issue when it determined that Executive Law section 829(3) was constitutional.[100] The court, deeming the statute content-neutral,[101] subjected it to the *O'Brien/Ward* balancing test.[102] This test asks whether the regulation "'furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'"[103] The regulation is not required to be "'the least restrictive or least intrusive means of doing so.'"[104] These requirements would be met if the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[105] The court found that the state's "intent to enhance and encourage public interest in cable television," and its connected "prohibition

99. *Cahill*, 69 N.Y.2d at 272, 506 N.E.2d at 189, 513 N.Y.S.2d at 659. In a dissenting opinion, it was stated that "the State's regulatory involvement in the cost pass-along . . . is an insufficient basis for finding that his rights have been impaired by the actions of a governmental entity." *Id.* at 274, 506 N.E.2d at 191, 513 N.Y.S.2d at 660-61 (Titone, J., dissenting).

100. *Glendora*, 162 Misc. 2d at 172, 616 N.Y.S.2d at 143.

101. *Id.*

102. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968). The court held that because the government has a "substantial interest in assuring the continuing availability of issued Selective Service certificates," the statute at issue is "an appropriately narrow means of protecting this interest," and "because the non communicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest," the defendant's conviction was justified. *Id.* at 382; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (holding that a city's "sound-amplification guideline is narrowly tailored to serve substantial and content-neutral governmental interests" and is therefore "valid under the First Amendment as a reasonable regulation of the place and manner of expression").

103. *Glendora*, 162 Misc. 2d at 170-71, 616 N.Y.S.2d at 141 (quoting *O'Brien*, 391 U.S. at 377).

104. *Id.* at 171, 616 N.Y.S.2d at 142 (quoting *Ward*, 491 U.S. at 798).

105. *Id. See* United States v. Albertini, 472 U.S. 675, 689 (1985) (holding that "the general exclusions of recipients of bar letters for a military open house does not violate the First Amendment").

of censorship . . . promotes a stated governmental interest in a way that places no limits of specifications on content of the programming."[106] Because the Executive Law survived the *O'Brien/Ward* balancing test, the law was upheld and the defendant's motion to dismiss was denied.[107]

The *Glendora* court's decision concerning public utilities is in alignment with the federal courts' treatment of similar cases. In *Jackson v. Metropolitan Edison Co.*,[108] the United States Supreme Court held that a privately owned and operated utility company, though subject to "extensive state regulation," was not acting under the color of state law.[109] The Court also engaged in an analysis to determine the extent of the relationship between the utility's activities and the state. The Court noted that "the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself."[110] The Court found that the utility was not operating under the color of state law after examining such factors as the utility's monopoly status,[111] its function of providing an essential public service,[112] and the degree to which the relationship between the utility and the state could be characterized as "symbiotic."[113]

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106. *Glendora*, 162 Misc. 2d at 171, 616 N.Y.S.2d at 142.

107. *Id.* at 173, 616 N.Y.S.2d at 143.

108. 419 U.S. 345 (1974).

109. *Id.* at 350. "The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Id.* The Court emphasized:

> Doctors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State's.

Id. at 354 (citations omitted).

110. *Id.* at 351.

111. *Id.*

112. *Id.* at 352.

113. *Id.* at 357.