

The Court's Gone Wild! - Keeping Abreast Of Developments In Florida's Publicity And Privacy Laws



By David R. Ellis, Esq.

Recently, a federal district court judge in Orlando issued a decision interpreting various aspects of Florida's statutory and common laws relating to the right of publicity, unauthorized publication of likeness, invasion of privacy for commercial misappropriation of likeness, and false light invasion. The case, which involved an adult video called "Girls Gone Wild," resulted in a victory for the producer of the video and the purveyor of the images in question.

In the case, *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002), the plaintiff, seventeen at the time, was approached by a video photographer in Panama City, Florida, and asked to expose herself before his video camera in exchange for beaded necklaces. The plaintiff was with a companion who said she was familiar with the practice of exposing herself for beads, and that she had been photographed at Mardi Gras and her photograph had been published in a men's magazine. The two girls then exposed their breasts to the video camera in return for the beads they had requested.

Subsequently, the defendants produced and distributed clips of the plaintiff exposing her breasts in "Girls Gone Wild," a video that depicts a variety of young women exposing their private parts in public places. The defendants also marketed the video through television commercials containing two and three second censored clips of the plaintiff exposing herself. The video that the plaintiff appeared in was marketed with another video called "Sexy Sorority Sweethearts" that contained much more explicit sexual material than the "Girls Gone Wild" video.

According to the plaintiff, she was surprised to learn of the commercials and video with her image because she was under the impression that the cameraman was intending to make a film for his own personal use and not for a commercial purpose. She said she relied on his representations and would not have exposed herself if she had known that the tape was to become part of a commercial video.

The plaintiff sued in Florida state court for unauthorized publication in violation of Fla. Stat. §540.08, common law invasion of privacy for commercial misappropriation of likeness, and false light invasion of

privacy. The defendants removed the case to federal court based on diversity of citizenship.

Section 540.08, entitled "Unauthorized publication of name or likeness," provides in pertinent part:

No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by ... such person ...

In the event the consent required ... is not obtained, the person whose name, portrait, photograph, or other likeness is so used ... may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

In her decision, U.S. District Judge Anne Conway held that Section 540.08 was not violated because the plaintiff's image and likeness were not used to directly promote a product or service. The court said that the video was an expressive work created solely for entertainment purposes and that while plaintiff's image and likeness were used to sell copies of the video, her image and likeness were not associated with a product or service unrelated to that work. The plaintiff was never shown endorsing or promoting a product, but rather, her image was part of an expressive work in which she voluntarily participated. Consequently, the use of her image or likeness in the video and in the marketing of the video could not give rise to liability under the statute.

In addition, the court ruled that the plaintiff consented to the use of her image and likeness. Section 540.08 provides that in order to be liable for commercial misappropriation, there must be an unauthorized publication. The plaintiff argued that, as a minor, she was not legally capable of consenting to the defendants' publication of her image and likeness.

The judge said that Florida law has never recognized that a minor is incapable of consenting to the publication of her image or likeness where no compensation is

involved. So, even though she was only seventeen at the time, she could consent to the filming and distribution of her image and likeness.

The plaintiff next argued that even if she were legally able to give consent to the video recording of her image, her consent did not extend to the defendants' widespread publication of her image. The plaintiff said that the cameraman represented that he was intending to film young women for his own personal use and that no one else would see any videotape of the plaintiff.

After viewing the video, the judge found that even if the cameraman made such representations, the plaintiff's consent was not limited to the viewing of her image and likeness to only those persons present at the time of filming. First, the interactions between the plaintiff and the cameraman were not private in nature. The plaintiff exposed herself on a public street while several pedestrians were in the general vicinity. Second, the plaintiff did not know the cameraman to whom she exposed herself. The judge found it unreasonable to expect that a total stranger would limit the viewing of a video of young women publicly exposing themselves to only those persons present at the time of the filming.

Finally, and perhaps most damaging to the plaintiff's arguments, was the fact that before she removed any of her clothes, the plaintiff's companion stated that two years before she had been photographed at Mardi Gras, and that her photograph had been published in a men's magazine. This statement should have alerted the plaintiff, and if she were concerned about the extent of the publication of her image, she should have restricted the use of the video before exposing herself.

The judge also denied the plaintiff's claim for common law invasion of privacy for commercial misappropriation of her likeness since the elements of that claim were the same as those for unauthorized publication of name or likeness in violation of Section 540.08.

As to her claim for false light invasion of privacy, the judge noted that the two essential elements for recovery under false

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light invasion of privacy are: (1) the false light must be highly offensive to a reasonable person; and (2) the defendant must have acted either knowingly or in reckless disregard as to the falsity of the publicized material and the false light in which it would be placed. *Harris v. Dist. Bd. Of Trustees of Polk Cmty. Coll.*, 9 F. Supp. 2d 1319, 1329 (M.D. Fla. 1998).

As to the first element, although the use of the plaintiff's image and likeness in a video containing women exposing themselves may be highly offensive, the plaintiff's inclusion in the "Girls Gone Wild" video and its marketing campaign with "Sexy Sorority Sweethearts" did not place the plaintiff in a false light. Rather, the plaintiff was depicted truthfully and accurately as doing exactly what she did, exposing her breasts on a street in Panama City in exchange for a beaded necklace.

Considering the nature of her actions, the publication of her image in a video containing other women engaging in similar acts was neither unreasonable nor inaccurate. Instead, the juxtaposition of the plaintiff with other women exposing themselves could not give rise to the tort of false light invasion of privacy because the depiction of the plaintiff here was reasonable, accurate, and truthful. Also, there was no suggestion, implication, or innuendo connecting plaintiff with the more offensive and sexually explicit scenes of "Sexy Sorority Sweethearts." Thus, the plaintiff's false light privacy claim, like her other publicity and privacy claims in the suit, were denied, and the defendants' conduct was upheld.

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