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Right of Publicity

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Ninth Circuit Finds First Amendment Protects against Right of Publicity Claim Involving Film "The Hurt Locker"

The Ninth Circuit confirmed that right of publicity claims purporting to arise from expressive works, such as films, are content-based restrictions on speech that are presumptively unconstitutional, and generally should not survive strict constitutional scrutiny. On February 17, 2016, a panel of the Ninth Circuit issued a decision in *Sarver v. Chartier*, a right-of-publicity case arising from the Oscar-winning film "The Hurt Locker." The panel unanimously affirmed the district court's order dismissing the lawsuit on constitutional grounds. The panel also held that defendants in federal diversity cases are not restricted by the California Strategic Lawsuit Against Public Participation (SLAPP) statute's 60-day time limit for filing special motions to strike.

Background

Plaintiff Jeffrey Sarver served as an Army Explosive Ordnance Disposal technician in Iraq, where he led teams that identified and disposed of improvised explosive devices (IEDs). During his military service, Mr. Sarver was photographed and interviewed by embedded journalist Mark Boal, who wrote an extensive magazine article about his experience, which included descriptions of Mr. Sarver's life and experiences in Iraq. Mr. Boal subsequently wrote the screenplay for the critically acclaimed film "The Hurt Locker." Mr. Sarver sued the film's creators, claiming that the movie's main character was based on his own life story, in violation of his right of publicity; he also claimed that portions of the film defamed him and placed him in a false light.

Almost a year after Mr. Sarver filed his complaint, the defendant filmmakers filed special motions to strike under California's SLAPP statute, California Code of Civil Procedure § 425.16. Mr. Sarver argued that the motions were untimely under C.C.P. § 425.16(f)—which provides that a SLAPP motion must be filed within 60 days after service of the complaint, absent a finding of good cause for the delay—but the district court exercised its discretion to accept the motions despite the passage of time, on the grounds that the case was still in its early stages. [*Sarver v. the Hurt Locker LLC*, 2011 U.S. Dist. LEXIS 157503, *11 n.5 (C.D. Cal. Oct. 13, 2011).]

The district court then granted the defendants' SLAPP motions in their entirety, finding that the alleged use of Mr. Sarver's life story was constitutionally protected. Applying California's transformative-use test, the court held that any use of Mr. Sarver's identity was "transformative" as a matter of law, because "a significant amount of original expressive content was inserted in the [film] through the writing of the screenplay, and the production and direction of the movie." [*Sarver*, 2011 U.S. Dist. LEXIS 157503 at *21.] In particular, the court held that differences between Mr. Sarver's life and the main character, along with "dialogue between characters, the other fictional characters with whom [the main character] interacted, and the direction of the actor all added significant and distinctive expressive content," such that "the [main] character…, even if modeled after [Mr. Sarver], is 'so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness." [*Id*. (quoting *Comedy III Prods. Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 406 (2001)).]

The district court also dismissed Mr. Sarver's related claims for false light invasion of privacy, defamation, breach of contract, intentional infliction of emotional distress, fraud, and negligent misrepresentation.

Mr. Sarver appealed. More than two years after the case was argued and submitted, the Ninth Circuit affirmed the district court's decision dismissing the lawsuit.

Timing of SLAPP Motions in Federal Diversity Cases

After confirming that California law applies to the case, the Ninth Circuit panel held that the defendants' SLAPP motions were timely filed, notwithstanding the 60-day presumptive time limit set forth in California Code of Civil Procedure § 425.16(f). The defendants argued that the California timing provision does not apply in federal court, because it conflicts with federal summary judgment rules that allow a party to file a motion for summary judgment "at any time until 30 days after the close of all discovery." [Fed. R. Civ. Proc. 56.] The panel agreed, holding that "the timing controls imposed by section 425.16(f) directly collide with the more permissive timeline

Rule 56 provides for the filing of a motion for summary judgment." [*Sarver v. Chartier,* 2016 U.S. App. LEXIS 2664, *17 (9th Cir. 2016).] Consequently, the panel held that the 60-day limitation does not apply in federal court diversity actions, and the motions to strike were timely filed under Rule 56. [*Id.*] This ruling will permit defendants sued in federal diversity cases arising from speech or petitioning activity to have more time to evaluate and present their defenses before the deadline to file a SLAPP motion elapses.

Right of Publicity Claims Are Subject to Strict Scrutiny

In addressing the merits of the SLAPP motions, the panel first held that the lawsuit was subject to a special motion to strike because it arose from the filmmakers' speech on a matter of public concern: "Sarver's work while deployed in Iraq." [*Sarver*, 2016 U.S. App. LEXIS 2664 at *21-22.] Although Mr. Sarver argued that there was no public interest in his "private persona," the panel rejected this argument, finding that the alleged depiction of Mr. Sarver's personal characteristics "centered" on his work disabling IEDs in Iraq, which was a matter of public concern given the "significant attention devoted to the war and to the role of IEDs in it." [*Id*.] This ruling was consistent with prior case law that had rejected arguments by plaintiffs that sought to limit the application of the statute to circumstances where the plaintiff's personal identity was a matter of public interest. [*See, e.g., Doe v. Gangland Productions*, 730 F.3d 946, 955 (9th Cir. 2013); *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 807-808 (2002).]

On the second prong of the statute, the panel held that Mr. Sarver could not establish a probability of prevailing on his right of publicity claim. Although the district court had dismissed the right of publicity claim on the grounds that California's transformative-use test would preclude liability, the Ninth Circuit panel ruled that it did not need to resolve this affirmative defense, because it found that Mr. Sarver's claims could not withstand the requisite constitutional strict scrutiny . As the Court explained:

> If California's right of publicity law applies in this case, it is simply a content-based speech restriction. As such, it is presumptively unconstitutional, and cannot stand unless Sarver can show a compelling state interest in preventing the defendants' speech. Because Sarver cannot do so, applying California's right of publicity in this case would violate the First Amendment. [*Id.* at *30.]

In discussing its conclusion that Mr. Sarver could not show a compelling interest sufficient to overcome the defendants' First Amendment rights, the Court distinguished cases involving right of publicity claims arising from advertisements, noting that *"The Hurt Locker* is not speech proposing a commercial transaction…." [*Id*. at 29.]

The Court also distinguished the circumstances presented in *Zacchini v. Scripps-Howard Broadcasting Co.* [433 U.S. 562, 575-579 (1977)], in which the US Supreme Court—in its only decision involving right of publicity claims—held that the performer of a "human cannonball" act could bring a right of publicity action against a news outlet that broadcast the plaintiff's "entire act," thereby effectively preventing him from earning a living as a performer. [433 U.S. 575-579.] The Court noted that neither the magazine articles about Mr. Sarver, nor the film, "stole Sarver's 'entire act' or otherwise exploited the economic value of any performance or persona he had worked to develop." [*Sarver*, 2016 U.S. App. LEXIS 2664 at 29-30.] In fact, the Court noted, "Sarver did not 'make the investment required to produce a performance of interest to the public,'… or invest time and money to build up economic value in a marketable performance or identity," given that he "is a private person who lived his life and worked his job." [*Id.* at 29.]

In a statement that applies equally to highly paid celebrities and working Army technicians, the court indicated that the right of publicity should not prevent expressive works from depicting prominent individuals' lives and exploits, as long as the depiction does not misappropriate the value of an entire performance, because "[t]he state has no interest in giving [the plaintiff] an economic incentive to live his life as he otherwise would." [*Id*.]

The panel also distinguished other recent Ninth Circuit cases, noting, among other things, that those cases "addressed the First Amendment only through the lens of California's 'transformative use' doctrine," or through other defenses provided by California state law. [*Id*. at 26-27, fns. 6, 7.] The *Sarver* panel did not reach the question of how the transformative use test or any other particularized defenses to right of publicity claims would be adjudicated. [*See id.*]

The Court's decision supports applying the right of publicity in only the most narrow of circumstances: When a person's identity is used in a commercial advertisement, or when the value of a plaintiff's entire performance or persona is usurped. This

re-aligns right of publicity law to accord greater respect for First Amendment values. As the panel concluded, "*The Hurt Locker* is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays." [*Id*. at 30.] The decision therefore represents a significant step forward in reining in the use of right of publicity claims to target expressive works.

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