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PERSPECTIVE

Recent right of privacy developments

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The Reality of Privacy Liability in Reality TV

Kara Belen, a wellknown model, was filmed changing clothes in a fashion show's dressing area for an episode of reality television program "Shahs of Sunset." She signed no waiver or release, yet her nearly nude image was broadcast to a national audience without her consent. Furthermore, her runway walk was broadcast alongside the comment referring to her performance made by one of the show's cast members that "[t]his bitch knows how to walk." She filed an action against the producers and broadcasters of the show for "intrusion / right to privacy, tortious appropriation of name or likeness, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence." *Belen v. Ryan Seacrest Productions*, LLC, 65 Cal. App. 5th 1145 (2021). In response, the defendants filed a special motion to strike under provisions of California's anti-SLAPP statute. That motion was denied by the trial court in its entirety, prompting the defendants' appeal.

The Court of Appeal examined (1) whether the moving party met its burden to make "a threshold showing that the challenged cause of action arises from protected activity" and (2) whether the non-moving party met its burden "to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated."

Belen asserted that the defendants' activity is not protected because the distribution of the image of the intimate body parts of an identifiable person is a violation of Penal Code Section 647(j)(4), and, under *Flatley v. Mauro*, 39 Cal. 4th 299 (2006), a defendant's acts that are illegal as *a matter of law* are not protected activities and thus such a defendant cannot invoke the anti-SLAPP statute. However, *Flatley's* holding was limited to circumstances where either the defendant concedes to such illegality or the evidence conclusively establishes that illegality — neither of which were present in this case. So, the defendants' activity was protected.

As to the plaintiff's probability of prevailing on her claims, the defendant production companies argued that they were not liable because they were not involved in the "filming or production" of the "Shahs of Sunset" episode at issue. However, a "defendant's declaration denying that he or she engaged in the conduct alleged in the complaint does not foreclose the possibility that a fact finder could later find that he or she did in fact engage in that conduct. Foreclosing an anti-SLAPP motion based upon one version of the facts would irrationally and unfairly disregard this possibility." The evidence before the court included the episode itself, in which the defendants were identified. For this reason, the court found that "the evidence in the record sufficiently shows that all of the defendants named in Belen's complaint were involved in some degree in the production and/or distribution of the show/episode; no evidence produced by appellants defeat Belen's evidence (that all named defendants were involved to some degree) as a matter of law." Moreover, the court pointed out that neither of the production companies involved filed a demurrer or a motion for summary judgment, as they should have if they were indeed erroneously named as defendants, but instead answered the complaint.

The Court of Appeal affirmed the trial court's denial of the defendants' motion on all but one of her claims — negligent infliction of emotional distress — on the grounds that it is not an independent tort. The court found that Belen made a prima facie showing that the defendants breached their duties to disclose to her that she was being filmed and obtain her release for the use of her image.

To recover for negligent infliction of emotional distress, a plaintiff must show that the distress is "serious," i.e., "where a reasonable person would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Here, the court found that Belen sufficiently made such a showing because "[h]aving one's nearly fully naked body filmed and broadcast on television and the internet, without consent or knowledge, would cause any reasonable person, model or not, to suffer serious emotional distress."

Belen showed a probability of prevailing on her invasion of privacy claim by providing evidence that she was assigned to a relatively private dressing room, its door manned by a security guard, and that she held a reasonable expectation of privacy that was violated when she was filmed, without her consent, and her image was broadcast "show[ing] her almost fully naked, her breasts exposed (with small blurs covering the areola of her breasts), wearing only underwear." Though the defendants argued that there were signs in the dressing rooms warning of filming and that an announce-

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ment of filming was made, no evidence of either was provided in any footage shot that day. Belen pleaded that this invasion of her privacy caused her "severe emotional distress, sleepless nights, nausea, and require[ed] her to return to therapy."

As to her common law misappropriation of name or likeness claim, the court found that "the filming and use of Belen's face and nearly nude body constitute appropriation of Belen's likeness to appellants' advantage," giving rise, alongside evidence of the defendants' nonconsensual and injurious use of her image, to a finding that she established a probability of prevailing.

Though the defendants contended that their use of Belen's image in the context of the "Shahs of Sunset" episode was de minimis, Belen argued that the use of her nearly nude image wherein her breasts were shown but her areolas were blurred in editing, juxtaposed with a cast member's statement that there were "naked models running around" was extreme, outrageous, and reckless. Belen provided sufficient evidence of her severe or extreme emotional distress caused by the broadcast.

Reality TV take note: The mere blurring of the areolas of a non-consenting subject is an insufficient prophylactic to a claim for intentional infliction of emotional distress. More importantly, Belen would not have had a claim at all if the production team on the ground simply obtained all necessary releases and waivers.

Stop Screaming!: Limitations of the Right Privacy

Comedian Kathy Griffin and her boyfriend Randy Ralph Blick, Jr. were hauled into court by their neighbors, Sandra and Jeffrey Mezger for claims of, inter alia, violation of Penal Code Section 632 (eavesdropping on or recording of confidential communications) and invasion of privacy. *Mezger v. Bick*, 2021 DJDAR 6816 (Cal. Ct. App. July 1, 2021). The parties' respective homes are separated by a six-foot-tall concrete wall topped with two feet of wrought iron. Griffin and Blick installed security cameras on Griffin's property after they made noise complaints to the Los Angeles Police Department and the local homeowners association about the Mezgers, the Mezgers claimed that the home security cameras were installed "in order to spy on and record them."

Griffin and Blick moved for summary adjudication of the Mezgers' claims. Though the homeowners association had advised Griffin and Blick that they needed to "document" the Mezgers' conduct to support their noise complaints, Griffin testified that she installed a Nest security system on her property because "she is a public figure, and has received death threats and been stalked in the past." Griffin's property includes a staircase from her backyard up to her second- story bedroom. The court reviewed evidence that the camera outside Griffin's bedroom mostly captured the balcony outside the room, the staircase, and a portion of the Mezgers' backyard, including their pool. Though Blick has installed the camera outside the bedroom and knew it captured a portion of the Mezgers' backyard, he readjusted and focused the camera on the staircase landing.

The trial court examined a flash drive containing 15 recordings made by the Nest security system submitted by the Mezgers as evidence in support of their opposition to the motion for summary judgment. Only one file contained images of people in the Mezgers' yard, in which the figures could "barely be seen, if at all." The audio portions of the recordings are generally classified as "barely audible," "not clearly comprehensible," "consit[ing] of only loud music," and "consist[ing] of numerous people speaking loudly and most of the sound is not clearly audible as it has a lot of static and music playing." The court did not that some of the only audible voices are riddled with expletives and that the video portion of the evidence was focused on Griffin's property.

The trial court granted Griffin's and Blick's motions for summary judgment. The Mezgers filed an ex parte application requesting a vacatur of the order. However, the court ultimately found that despite the supplementary declarations provided by the Mezgers that the Nest security cameras included omnidirectional microphones that can capture more than what the human ear can hear and that industry standards and best practices require that outdoor security cameras do not capture adjoining property, "the additional evidence did not create a material dispute and defendants' conduct had an 'insubstantial impact on Plaintiffs' privacy interests.'" The Mezgers dismissed their remaining claims and appealed the trial court's order.

The Court of Appeal identified the linchpin of the proper inquiry before it as to the privacy and Penal Code claims at issue: "did plaintiffs create a material factual dispute whether defendants' cameras intruded on their right to privacy in a highly offensive or serious manner?" In affirming the lower court's order, the Court of Appeal concluded in the negative, holding that "there is no material dispute regarding the offensiveness or seriousness of the intrusion." In other words, the Mezgers did not hold a reasonable expectation of privacy as to the shouting emanating from their backyard, and anything else recorded was undecipherable. Furthermore, the court disposed of the Mezgers' claims that Griffin's security concerns were pretextual. "Any impact on plaintiffs' privacy interests was therefore insubstantial [and there-fore not actionable] as a matter of law."

At bottom, one cannot claim a private conversation when one is 0screaming expletives, even in their own backyard. Perhaps the Mezgers won in the end as the court refused to take judicial notice that Griffin had sold her house in the interim. ■