

RECENT CASES

National Enquirer may have invaded the privacy of Eddie Murphy's minor son, and the boy's mother, when it published an article that disclosed details of financial arrangements made by Murphy for the boy's support and the location of a home he purchased for them, California appellate court rules; California and United States Supreme Courts decline to hear Enquirer's appeal

The National Enquirer is no stranger to controversy . . . or the courts. Its style of journalism frequently pushes the envelope when it comes to the reputation and privacy of its subjects. And in the process, the Enquirer tests and sometimes makes the law in these important areas. Now it has done so again, this time with an article

about Christian M. - a "love child . . . born . . . out of wedlock" to actor-comedian Eddie Murphy and the boy's mother Tamara Hood. The article disclosed the details of financial arrangements said to have been made by Murphy with Ms. Hood for their son's support, as well as the location of a home he had purchased for them.

As far as the Enquirer was concerned, Eddie Murphy is a public figure and its article reported newsworthy facts. As far as Ms. Hood and their son are concerned, the article tortiously invaded their privacy. The clash of these opposing views made for an almost perfect test case concerning the law's protection for the privacy of those associated with celebrities (without being celebrities themselves) and concerning the law's protection of the public's right to know . . . and thus the Enquirer's right to tell.

Ms. Hood and her son asserted their position in a lawsuit filed in California state court. The Enquirer (and its co-defendants) filed a demurrer (a motion to dismiss for failure to state a valid cause of action); and the trial court granted the motion and dismissed. On appeal, however, the California Court of Appeal has reversed and has sent the case back to the trial court for further proceedings. The Court of Appeal ruled that Ms. Hood and her son have stated a valid invasion of privacy claim. The court's ruling is lengthy, well-written and extremely thorough. Indeed, it is a mini-treatise on the law of privacy in California. For some reason, however, the court marked its decision "Not To Be Published." This means that under California law it may not be cited as authority in subsequent cases. Nevertheless, because it is so thorough, it is an important decision for those in the entertainment industry; and therefore it is published in full text immediately below.

The California Supreme Court denied the Enquirer's petition for review; and the United States Supreme Court denied its petition for certiorari. The case is now back before the California trial court (the Superior Court) in Los Angeles.

Hood v. The National Enquirer, Inc., Cal.App., 2d Dist., Div. 5, B082611 (1995)

Hood v. The National Enquirer, Inc.

In the Court of Appeal of the State of California
Second Appellate District, Division Five
B082611 (Super. Ct. No. BC088691)

NOT TO BE PUBLISHED

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Kalustian, Judge. Affirmed in part; reversed in part.

Law Offices of Gary L. Bostwick and Gary L. Bostwick, Paul L. Hoffman, and Diane Greene Gordon; Allred, Maroko & Goldberg and Nathan Goldberg, for Plaintiffs and Appellants.

Williams & Connolly and Paul Martin Wolff, Gerson A. Zweifach, Paul K. Dueffert, Thomas G. Hentoff; Irell & Manella and Bruce A. Wessel, Rick Silverman; Law Offices of Jeffrey E. Karpel and Jeffrey E. Karpel, Michael O. Libraty, for Defendants and Respondents.

I. Introduction

This is an action for privacy invasion and misappropriation brought by two plaintiffs Christian M., the

minor son of actor and comedian Eddie Murphy, and Tamara Hood, the child's mother. The defendants are: The National Enquirer, Inc. (Enquirer); its publisher, Barbara Marks; and the co-authors of an article about plaintiffs, Doug Mays and Martin Dryan. A fourth defendant, Barbara Moss, allegedly photographed plaintiffs and "subsequently published" the photograph. Each defendant was alleged to have acted as the agent, servant, and employee of her or his codefendants.¹ Five causes of action were separately stated: commercial appropriation (Civ. Code, sec. 3344) (first); appropriation of name or likeness (second); public disclosure of private facts (third); intrusion upon solitude and into private affairs (fourth); and violation of plaintiffs' constitutional right of privacy (fifth). A judgment of dismissal with prejudice was entered after defendants' demurrers were sustained without leave to amend. We reverse the judgment of dismissal. We conclude it was

error to sustain the demurrers to the third and fifth causes of action. We affirm the orders sustaining without leave to amend the demurrers to the first, second, and fourth causes of action.

II. The Complaint

The complaint alleged as follows. The Enquirer published an article revealing plaintiffs' relationship to Mr. Murphy. The article identified plaintiffs by name. It was accompanied by a photograph of plaintiffs in which they were readily identifiable. The photograph of plaintiffs was appropriated by defendants without any authorization or consent. The misappropriation was accomplished for defendants' pecuniary gain and profit. Photographs of plaintiffs' home and Ms. Hood's car were also published. In addition, the article: "identif[ied] the community in which the residence was located"; and

"specifically describ[ed] the residence, . . . the date of purchase and the name on the title" The article contained specific statements which invaded plaintiffs' privacy.² The article said Christian was a "love child" and "was born to [Ms.] Hood out of wedlock." Until the publication of the article, these facts were not known to the general public and plaintiffs desired to keep them private. The disclosure was offensive to a reasonable person of ordinary sensibilities in that it revealed conduct a large segment of society may consider immoral. The disclosure also exposed plaintiffs to "unreasonable risk as targets of kidnappers, extortionists, or persons interested in harassment."

As alleged in the complaint, defendants also used Christian's photograph and likeness in a television advertisement for the Enquirer. The advertisement was broadcast throughout the United States. The television advertisement contained a photograph of Christian

which had been "doctored so that [Christian's face was] set upon a different body" and "[t]he figure [was] partially animated and moving a portion of his body in the commercial."

III. Discussion

A. Standard of Review

Our Supreme Court has set forth the standard of review on appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend: "The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed `if any one of the several grounds

of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.]" (Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 966-967.) The judgment of dismissal in the present case was entered after plaintiffs' counsel conceded all relevant facts had been stated and the complaint could not be amended. Therefore, it is presumed the complaint stated as strong a case as was possible. (Vaughn v. Hugo Neu Proler International (1990) 223 Cal.App.3d 1612, 1616; Otworth v. Southern Pac. Transportation Co. (1985) 166 Cal.App.3d 452, 457.)

B. Public Disclosure of Private Facts

A cause of action for invasion of privacy has been recognized in California since 1931. (Melvin v. Reid

(1931) 112 Cal.App. 285, 291.) Four distinct common law torts fall under the privacy rubric: (1) intrusion into private matters; (2) public disclosure of private facts; (3) false light; and (4) commercial appropriation. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24.) The elements of a cause of action for the second privacy invasion tort of public disclosure of private facts are: (1) public disclosure; (2) of a private fact; (3) which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities; and (4) which is not of legitimate public concern.³ (*Forsher v. Bugliosi*, supra, 26 Cal.3d at pp. 808-810; *Diaz v. Oakland Tribune, Inc.*, supra, 139 Cal.App.3d at p. 126; Rest.2d Torts, sec. 652D, p. 383; 77 C.J.S., Right of Privacy and Publicity, sec. 24, pp. 518-519.) The first element of the cause of action, public disclosure, is not at issue here.

1. private facts

The second element of the cause of action requires a showing that publicity has been given to matters concerning the private life of the individual. (Rest.2d Torts, sec. 652D, com. b, p. 385.) "Private facts" have been described as the "intimate details of one's private life" (Wasser v. San Diego Union (1987) 191 Cal.App.3d 1455, 1460.) They are facts which have not been left open to the public eye; or previously made public; and which are not matters of public record. (Rest.2d Torts, sec. 652D, com. b, pp. 385-386.) The Restatement Second of Torts gives several examples: "Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a [person's] life in [her or] his home, and some of [her or] his past history that [she

or] he would rather forget." (Rest.2d Torts, sec. 652D, com. b, p. 386.)

We find on the record before us that the details of plaintiffs' financial affairs were indisputably private facts. The information: was not left open to the public eye; had not previously made public; nor was it a matter of public record. (Rest.2d Torts, sec. 652D, com. b, pp. 385-386.) In its brief on appeal, the Enquirer has not contended otherwise. Further, courts in California and other jurisdictions have recognized, in a variety of contexts, that an individual's financial affairs are normally a private matter. See, e.g., *Adams v. Murakami* (1991) 54 Cal.3d 105, 130 (dis. op. of Mosk, J.) [discussing discovery of financial matters in connection with a punitive damages claim]; *Doyle v. State Bar* (1982) 32 Cal.3d 12, 19 [client's financial records in attorney's custody]; *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656 [bank records]; *City of Carmel-by-the-*

Sea v. Young (1970) 2 Cal.3d 259, 268 [public official financial disclosure law]; Terry York Imports, Inc. v. Department of Motor Vehicles (1987) 197 Cal .App.3d 307, 318 [automobile dealership records including payroll records and customer credit applications and reports]; Painting and Drywall Work Preservation Fund v. HUD (D.C. Cir. 1991) 936 F.2d 1300, 1303, and Hopkins v. U.S. Dept. of Housing & Urban Dev. (2d Cir. 1991) 929 F.2d 81, 87 [release of information about private employees' wages under the Freedom of Information Act]; Robyn v. Phillips Petroleum Co. (Colo. 1991) 774 F.Supp. 587, 592 [intrusion into private financial matters can form basis for invasion of privacy claim]; Palmisano v. Toth (R.I. 1993) 624 A.2d 314, 318-319 [punitive damages]; Tollefson v. Price (Ore. 1967) 430 P.2d 990, 992 [publication regarding debt purportedly owed was an invasion of privacy].) Therefore, we need not address whether other facts published in the

Enquirer article were "private facts." (*Aubry v. Tri-City Hospital Dist.*, supra, 2 Cal.4th at p. 967.)

2. highly offensive and objectionable to a reasonable person with ordinary sensibilities

The third element of the cause of action requires a showing the disclosure at issue would be highly offensive and objectionable to a reasonable person of ordinary sensibilities. (*Forsher v. Bugliosi*, supra, 26 Cal.3d at p. 809; *Diaz v. Oakland Tribune. Inc.*, supra, 139 Cal.App.3d at p. 126; Rest.2d Torts, sec. 652D, p. 383; 77 C.J.S., Right of Privacy and Publicity, sec. 24, pp. 518-519.) According to the Restatement Second of Torts, "It is only when the publicity given . . . is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises." (Rest.2d Torts, sec. 652D, com. c, p. 387.) Defendants contend no highly offensive facts were

published. However, the published facts included details of plaintiffs' private financial affairs. Under the circumstances of this case, we cannot say as a matter of law that a reasonable person of ordinary sensibilities would not be highly offended by the publication of such facts.

3. legitimate public concern or "newsworthiness"⁴

With respect to the fourth element, newsworthiness, at a trial, the burden is on a plaintiff to prove the publication was not constitutionally protected as newsworthy. (*Diaz v. Oakland Tribune, Inc.*, supra, 139 Cal.App.3d at pp. 129, 130.) When reasonable minds could differ as to newsworthiness, the issue is one for the trier of fact. (*Times-Mirror Co. v. Superior Court* (1988) 198 Cal.App.3d 1420, 1429; *Diaz v. Oakland Tribune, Inc.*, 139 Cal.App.3d at pp. 129-130.) On the other hand, when the facts permit only one conclusion,

newsworthiness may be decided as a matter of law. *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 39; *Pasadena Star-News v. Superior Court* (1988) 203 Cal .App.3d 131, 134.) In the present case, the trial court sustained the demurrers without leave to amend because it found the article was newsworthy.

What is newsworthy is not always clear. As the California Supreme Court recognized in *Briscoe v. Reader's Digest Association, Inc.* (1971) 4 Cal.3d 529, 540, footnote 14: "Judicial attempts at defining what constitutes `news' are fraught with oversimplification. Thus news has been defined as the `report of recent occurrences' [citation] or as all factual reports with `that indefinable quality of interest, which attracts public attention.' [Citation.]" Yet the California Supreme Court in *Briscoe* described the scope of the newsworthiness privilege as extending "to almost all reporting of recent events, even though it involves the publication of a

purely private individual's name or likeness."(Id. at p. 535.) Further, the Briscoe court concluded: "The publisher need not intend to educate the public. `The line between . . . informing and . . . entertaining is too elusive. . . . Everyone is familiar with instances of propaganda through fiction. What is one [person's] amusement, teaches another's doctrine. . . .' [Citation.]" (Id. at p. 535, fn. 6.)

In determining whether a publication is newsworthy, the California Supreme Court has identified the following factors which are to be balanced: "[T]he social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety. [Citation; fn. omitted.]" (Kapellas v. Kofman, supra, 1 Cal.3d at p. 36.) The California Supreme Court has held: "If the information reported has previously become part of the `public domain' or the intrusion

[sic] into an individual's private life is only slight, publication will be privileged even though the social utility of the publication may be minimal. [Citations.] On the other hand, when the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned, especially if the individual willingly entered into the public sphere." (Ibid.; fn. omitted.) In addition, the Restatement 2d of Torts states, "Some reasonable proportion is also to be maintained between the event or activity that makes the individual [newsworthy] and the private facts to which publicity is given." (Rest.2d Torts, sec. 652D, com. h, p. 391.)

Plaintiffs contend a triable controversy exists as to whether the Enquirer article was newsworthy because they are not celebrities or public figures. The complaint alleged plaintiffs' desired to keep the published facts private. Therefore, at the demurrer stage, it must be

assumed plaintiffs did not willingly enter into the public sphere. (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at pp. 966-967.) However, the law recognizes that individuals are sometimes unwittingly thrust into the public sphere because of: their connection to events which engender great public interest (e.g., *Johnson v. Harcourt, Brace, Jovanovich. Inc.* (1974) 43 Cal .App.3d 880, 892 [janitor found and returned \$240,000 in cash]); their close relationship to a candidate for public office (e.g., *Kapellas v. Kofman*, *supra*, 1 Cal.3d at pp. 37-38 [children of candidate for city council]); or their close association with a public figure (e.g., *Maheu V. CBS, Inc.* (1988) 201 Cal .App. 3d 662, 675 [aide to Howard Hughes]), or a celebrity. (E.g., *Carlisle v. Fawcett Publications. Inc.* (1962) 201 Cal.App.2d 733, 747, cited with approval in *Kapellas v. Kofman*, *supra*, 1 Cal.3d at p. 37, fn. 24 [former husband of actress Janet Leigh].) The Court of Appeal stated in *Carlisle*:

"[P]eople closely related to such public figures in their activities must also to some extent lose their right to the privacy that one unconnected with the famous or notorious would have. If it be objected that the mere relationship with some public figure should not subject a person to a qualified loss of [her or] his privacy, the identical observation could be made logically as to the man held up on the street, the householder who is burglarized, or the victim of an accident; all may be equally unwilling to be publicized. [Citations.]" (*Carlisle v. Fawcett Publications, Inc.*, *supra*, 201 Cal.App.2d at p. 747; *emphasis added.*) In *Kapellas v. Kofman*, *supra*, 1 Cal.3d at pages 37-38, footnote 25, a case involving the criminal conduct of the children of a city council candidate, the Supreme Court observed: "Family members, or others closely associated with newsworthy individuals, have been precluded from maintaining actions for invasion of privacy under circumstances in which the societal

interest in disclosure was much less compelling than in the instant case. (See, e.g., *Carlisle v. Fawcett Publications, Inc.*, supra, 201 Cal.App.2d 733 (action by former husband of girl who later became famous movie actress barred); *Estate of Hemingway v. Random House, Inc.* (1966) . . . [268 N. Y. S.2d 531] (Sup.Ct.) (suit by Ernest Hemingway's widow dismissed); *Aquinov. Bulletin Co.* (1959) . . . [154 A.2d 422] (suit by parents of girl who was newsworthy because of rapid marriage and divorce barred).)"5

The Restatement Second of Torts also recognizes the principle that individuals may involuntarily become newsworthy. The Restatement Second of Torts notes: "There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become 'news.' Those who commit crime or are accused of it may not

only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest concerning whom the public is entitled to be informed. The same is true as to those who are the victims of crime or are so unfortunate as to be present when it is committed, as well as those who are the victims of catastrophes or accidents or are involved in judicial proceedings or other events that attract public attention. These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them. As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely

private." (Rest.2d Torts, sec. 652D, com. f, pp. 389-390; emphasis added.)

Plaintiffs argue: the social value of the facts disclosed was minimal; Ms. Hood's status as an unwed mother, "her past romantic involvements," and Christian's illegitimacy, were "of no legitimate public concern"; and "exposing plaintiffs' neighborhood, home and wealth" was of "no social value." Plaintiffs also argue the depth of the intrusion into their private affairs was great in that defendants published unnecessary identifying information. Plaintiffs alleged, and we must accept as true (*Aubry v. Tri-City Hospital Dist.*, supra, 2 Cal.4th at p. 967), that by publishing: their names; photographs of their residence, themselves, their car; a description of their house; a description of the community in which they lived; and the fact they were financially well-off; defendants "exposed both plaintiffs to unreasonable risk as targets of kidnappers, extortionists, or

persons interested in harassment." Further, the complaint alleged, "[Ms.] Hood in fact experienced such harassment proximately caused by the disclosure by defendants."

We recognize that the private lives of celebrities and those closely associated with them are matters of interest to large segments of the population. Therefore, they are generally newsworthy. (E.g., *Time Inc. v. Sand Creek Partners, L.P.* (1993) 825 F. Supp. 210, 212 [photograph of Lyle Lovett and Julia Roberts on their wedding day]; *Eastwood v. Superior Court* (1983) 149 Cal .App.3d 409, 423 [Clint Eastwood's purported romantic involvements with two female celebrities].) However, the courts have repeatedly held that even when an event is generally newsworthy, the publication of certain facts may not be such (*Gill v. Curtis Publishing Co.* (1952) 38 Cal. 2d 273, 279 [judgment on the pleadings improperly granted where publication of plaintiffs' photograph in

connection with an article was unnecessary]; *Times-Mirror v. Superior Court*, supra, 198 Cal.App.3d at p. 1423 [question for trier of fact whether publication of name of witness to unsolved crime was newsworthy]; *Melvin v. Reid*, supra, 112 Cal.App. at p. 292 [demurrer improperly sustained where true name of reformed prostitute published]; *Capra v. Thoroughbred Racing Ass'n.* (9th Cir. 1986) 787 F.2d 463, 464-465 [triable issue of fact whether disclosure of identities and location of witnesses in federal witness protection program was newsworthy]. The Restatement Second of Torts states that some reasonable proportion must be maintained between the newsworthy event and the facts published about the individual. (Rest.2d Torts, S 652D, com. h, p. 391.)

In the present case, defendants published, in addition to other information, numerous details, of plaintiffs' private financial affairs. (See footnote 2, above.)

Plaintiffs were private citizens who never sought to publicize their relationship to Mr. Murphy. They had a right "to be let alone." (*Melvin v. Reid*, *supra*, 112 Cal.App. at p. 289; accord, *Carlisle v. Fawcett Publications, Inc.*, *supra*, 201 Cal.App.2d at p. 745, citing Prosser, *Privacy*, 48 Cal.L.Rev. 383, 389.) They had a privacy interest in precluding dissemination of personal information about them. (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at p. 35; *White v. Davis* (1975) 13 Cal.3d 757, 774-775.) Furthermore, plaintiffs had a constitutionally protected privacy interest in their personal financial affairs. (*Doyle v. State Bar*, *supra*, 32 Cal.3d at p. 19; *Valley Bank of Nevada v. Superior Court*, *supra*, 15 Cal.3d at p. 656.) We cannot say as a matter of law that the qualified loss of privacy resulting from plaintiffs' association with Mr. Murphy, a celebrity, rendered their personal financial affairs newsworthy. Given the assumed facts, we cannot say as a matter of law that the

details of a celebrity's financial support of his child and Ms. Hood's are newsworthy. While the fact of that support may be newsworthy, the financial details may not. A trier of fact could conclude that how much money Mr. Murphy gave plaintiffs, the price of their home, the amount of Ms. Hood's monthly support, and the size of Christian's trust fund, were private facts, the publication of which was unnecessary to the story told and not newsworthy. Given the depth of the intrusion into plaintiffs' private financial matters and their attempts to keep their personal affairs private despite their relationship to Mr. Murphy, reasonable minds could differ as to newsworthiness. Therefore, the demurrers to plaintiffs' cause of action for public disclosure of private facts should not have been sustained.⁶

We must reverse the judgment of dismissal when the complaint states a cause of action under any possible legal theory. (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2

Cal.4th at p. 967.) Having concluded the newsworthiness of plaintiffs' private financial affairs is a question which cannot be resolved as a matter of law on a demurrer, we need not decide whether plaintiffs have stated a cause of action for public disclosure of private facts as to other of the published information. We express no opinion whether identifying plaintiffs, and revealing Christian's illegitimacy, was newsworthy as a matter of law under all the circumstances of this case. We also do not decide whether there was an invasion of Ms. Hood's privacy as to sexual matters. (See *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 842-843 [sexual harassment plaintiff had not waived right of "sexual privacy" by claiming emotional distress damages].)

We agree with defendants that lawfully obtained information contained in "public records" generally may be published except when a narrowly tailored interest of the highest order is present. (See *The Florida Star v.*

B.J.F. (1989) 491 U.S. 524, 531, 541 [no civil liability under state statute where name of rape victim obtained from police report released to the press]; *Smith v. Daily Mail Publishing Co.* (1979) 443 U.S. 97, 103 [no liability under state statute where name of alleged juvenile assailant obtained from police band radio frequency, witnesses, the police, and a local prosecutor]; *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 491 [no actionable invasion of privacy (public disclosure of private facts) where name of rape-murder victim obtained from judicial records open to public inspection].⁷ We need not address the issue of matters purportedly obtained from alleged public records. Because the present case comes before us at the pleading stage, there is no evidence how or when the Enquirer secured the so-called public records. There is an evidentiary void before us in that regard.

C. Intrusion Upon Solitude or Into Private Affairs

In *Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1482, the Court of Appeal set forth the elements of a cause of action for intrusion upon solitude or into private affairs as follows: "The case at bench involves the first category of privacy rights, the right to be secure from intrusion. Restatement Second of Torts, section 652B declares that, '[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.' (Italics added.)" (Accord, *Hill v. National Collegiate Athletic Assn.*, supra, 7 Cal.4th at p. 24; *Forsher v. Bugliosi*, supra, 26 Cal.3d at p. 808.) Publication or actual trespass are not necessary elements of the tort. (*Miller v. National Broadcasting Co.*, supra,

187 Cal.App.3d at p. 1484.) The Restatement Second of Torts offers some examples of the type of intrusion which gives rise to the tort: "The invasion may be by physical intrusion into a place in which the plaintiff has secluded [herself or] himself, as when the defendant forces [her or] his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering [her or] his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into [her or] his upstairs windows with binoculars or tapping [her or] his telephone wires. It may be by some other form of investigation or examination into [her or] his private concerns, as by opening [her or] his private and personal mail, searching [her or] his safe or [her or] his wallet, examining [her or] his private bank account, or compelling [her or] him by a forged court order to permit an inspection of [her or] his personal

documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of photograph information outlined." (Rest.2d, Torts, sec. 652B, com. b, pp. 378-379.) Decisional authority also illustrates the type of intrusion required: e.g., *Miller v. National Broadcasting Co.*, supra, 187 Cal.App.3d at page 1484 [television camera crew followed paramedics into home and filmed efforts to save heart attack victim]; *Vescovo v. New Way Enterprises, Ltd.* (1976) 60 Cal. App.3d 582, 587-588 [physical intrusion by unsavory characters on solitude in plaintiff's home]; *Noble Sears, Roebuck & Co.* (1973) 33 Cal.App. 3d 654, 659-660 [private investigator secured information from hospitalized plaintiff by deception]; and *Dietemann v. Time, Inc.* (9th Cir. 1971) 449 F.2d 245, 248 [secretly photographing and electronically recording and transmitting conversations in plaintiff's home].

No intrusion of the type discussed above was alleged in the present case. Plaintiffs argue two intrusions were alleged:"[f]irst, . . . that defendant Barbara Moss . . . took an unauthorized photograph of plaintiffs[;] and second, that defendants subsequently published an unnewsworthy article containing the intrusive photograph and other photographs of plaintiffs' home and car." (Emphasis added.) However, there was no allegation that the photograph of plaintiffs, even if unauthorized, was taken in an intrusive manner. The taking of a photograph in a pose voluntarily assumed in a public place does not constitute an invasion of privacy. (*Gill v. Hearst Publishing Co.* (1953) 40 Cal.2d 224, 230 [public market place]; accord, e.g., *Muratore v. M/S Scotia Prince* (Me. 1987) 656 F.Supp. 471, 483, *aff'd. in part, vac. in part* (1st Cir. 1988) 845 F.2d 347 [public areas of cruise ship]; *Fogel v. Forbes, Inc.* (E.D. Pa. 1980) 500 F.Supp. 1081, 1087 [Miami International Airport].) There was

no allegation the unauthorized photograph of plaintiffs was taken surreptitiously or in a private place. (Ibid.; compare, e.g. , *Dietemann v. Time, Inc.*, supra, 449 F.2d at p. 248 [individual secretly photographed in home]; *Rafferty v. Hartford Courant Co.* (Conn.Super. 1980) 416 A.2d 1215, 1220-1221 [newspaper reporter and photographer attended private party uninvited]; *Barber v. Time, Inc.* (Mo. 1942) 159 S.W. 2d 291, 295-296 [surreptitious photograph taken in patient's hospital room].) There was no allegation the photograph itself portrayed plaintiffs in an offensive manner. (*Gill v. Hearst Publishing Co.*, supra, 40 Cal.2d at p. 231.) Furthermore, the subsequent publication of the photograph does not in itself constitute an intrusion. In *Gill v. Hearst Publishing Co.*, supra, 40 Cal.2d at page 231, the California Supreme Court held: "Plaintiffs have failed to cite, and independent research has failed to reveal, any case where the publication of a mere photograph under

the circumstances here prevailing - a picture (1) taken in a pose voluntarily assumed in a public place and (2) portraying nothing to shock the ordinary sense of decency or propriety - has been held an actionable invasion of the right of privacy. To so hold would mean that plaintiffs `under all conceivable circumstances had an absolute legal right to [prevent publication of] any photograph of them taken without their consent. If every person has such a right, no [periodical] could lawfully publish a photograph of a parade or a street scene. We are not prepared to sustain the assertion of such a right.' [Citations.]" (Accord, *Aisenson v. American Broadcasting Co.* (1990) 220 Cal. App.3d 146, 162-163.) Therefore, plaintiffs did not allege an invasion of privacy by intrusion upon their solitude or into their private affairs and the trial court properly sustained the demurrer to that cause of action.

In their brief on appeal, plaintiffs set forth additional facts concerning the taking of the photograph by a defendant, Ms. Moss, which facts were not included in the complaint. For the first time on appeal, defendants assert: Ms. Moss was a relative of a friend of Ms. Hood; Ms. Moss took the photograph at a private dinner; and she subsequently sold the photograph to the Enquirer. Plaintiffs cite *Pearson v. Dodd* (D.C.Cir. 1969) 410 F.2d 701, 703-708, for the proposition that in so doing Ms. Moss committed the tort of intrusion into private matters. That case is inapposite. The undisputed facts in *Pearson* were that: on several occasions two former employees, with the help of two current staff members of former Senator Thomas Dodd of Connecticut, entered his office without his knowledge or permission; removed documents from his files; copied the papers; replaced the originals; and turned the copies over to Jack Anderson, a newspaper columnist. Mr. Anderson and

another columnist, Drew Pearson, published articles containing information gleaned from the documents. (Id. at p. 703.) The columnists received the copies of the documents knowing that they had been removed without authorization. (Id. at p. 705.) The question whether Senator Dodd's present and former employees had committed the tort of intrusion was not before the court. The court assumed, without deciding, "that [Senator Dodd's] employees and former employees did commit such an improper intrusion when they removed confidential files with the intent to show them to unauthorized outsiders." (Id. at pp. 704-705, fn. omitted.) The circumstances alleged in the present case are not arguably directly analogous to those in Pearson.

The facts asserted in plaintiffs' brief on appeal do not rise to the level of an intrusion. The facts asserted are that Ms. Moss took an unauthorized photograph of plaintiffs at a private dinner and then sold it to the

Enquirer. Assuming the photograph was taken at a private dinner, we do not know whether Ms. Moss was an invited guest or an uninvited intruder at that dinner. There are no allegations as to whether plaintiffs posed for their picture or were unaware their photograph was being taken. We do not know whether they asked Ms. Moss not to take their photograph. Further, there is no claim Ms. Moss took the photograph with the intention of selling it to a third party. These pertinent and essential facts were not alleged.

Finally, even if the facts presented for the first time on appeal could have been inserted in an amended pleading, they may not be relied upon now as a basis for contending that the demurrer should not have been sustained. Plaintiffs conceded they had stated the facts as strongly as possible. They acquiesced in the court's order that the demurrers be sustained without leave to amend. On appeal, they have not argued leave to amend

should have been granted. It is a black letter rule of California law that when a plaintiff elects not to amend, despite having been given the opportunity to do so, no additional facts may be considered for the purposes of determining whether the judgment of dismissal must be affirmed. In *Casella v. City of Morgan Hill* (1991) 230 Cal.App.3d 43, 48, the Court of Appeal stated: "Where the trial court sustains a demurrer with leave to amend but the plaintiff elects not to amend, there is a presumption that the plaintiff has stated as strong a case as he or she can. In such instances, in determining whether the trial court has abused its discretion, the appellate court must resolve all ambiguities and uncertainties raised by the demurrer against plaintiff, "if the complaint is objectionable on any ground raised by the demurrer, the judgment of dismissal must be affirmed. [Citations.]" [Citation.]" This is a well established rule of appellate review. (*Vaughn v. Hugo Neu Proler International*,

supra, 223 Cal.App.3d at p. 1616; Terminals Equipment Co. v. City and County of San Francisco (1990) 221 Cal. App.3d 234, 241-242; Shick v. Lerner (1987) 193 Cal.App.3d 1321, 1327; Lyon v. Western Title Ins. Co. (1986) 178 Cal. App. 3d 1191, 1204; Otworth v. Southern Pac. Transportation Co., supra, 166 Cal.App.3d at p. 457; Sarro v. Retail Store Employees Union (1984) 155 Cal.App.3d 206, 211; Logan v. Southern Cal. Rapid Transit Dist. (1982) 136 Cal.App.3d 116, 127; Hooper v. Deukmejian (1981) 122 Cal.App.3d 987, 994.) Accordingly, that additional facts could have been alleged is irrelevant in terms of appellate review in this case. Plaintiffs chose not to seek leave to amend. Further, because the demurrer was properly sustained to the intrusion upon solitude or into private affairs cause of action, the dismissal of that cause of action must be affirmed on appeal.

D. Invasion of the Constitutional Right of Privacy

Article I, section 1 of the California Constitution states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." The last phrase, "and privacy," was added to the California Constitution in 1972 by voter initiative. The initiative created a right of action against private as well as government entities. (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at p. 20.)

In *Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at pages 39-40, an action for injunctive relief, our Supreme Court held the elements of a cause of action for invasion of the state constitutional right of privacy are as follows: "Based on our review of the

Privacy Initiative, we hold that a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. [Para.] Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. [Citations.] Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact. If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law."

As we have noted, there are three elements of a constitutional privacy invasion claim. Elaborating on the

first element of the constitutionally based cause of action discussed in *Hill*, our Supreme Court related the following: "The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest. Whatever their common denominator, privacy interests are best assessed separately and in context. Just as the right to privacy is not absolute, privacy interests do not encompass all conceivable assertions of individual rights. Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at p. 35.) As to the second element of the constitutional cause of

action, the court held whether a reasonable expectation of privacy exists depends on: the circumstances of the particular case; the customs, practices, and physical settings surrounding particular activities; and the existence of broad based and widely accepted community norms and customs. (Id. at pp. 36-37.) With respect to the third element of the constitutional privacy right discussed in Hill, our Supreme Court explained: "No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy. `Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which [she or] he is a part.' (Rest. 2d Torts, supra, sec. 652D, com. c.) Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social

norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." (Id. at p. 37.) All of the three elements of a constitutional right of privacy claim must be present in order for there to be a valid cause of action. (Id. at pp. 39-40.)

In Hill, our Supreme Court set forth several of the pertinent defenses to a state constitutional privacy claim. Our Supreme Court held: "A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interest by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests. Of course, a defendant may also plead

and prove other available defenses, e.g., consent, unclean hands, etc., that may be appropriate in view of the nature of the claim and the relief requested." (Hill v. National Collegiate Athletic Assn., supra, 7 Cal.4th at p. 40.) Additionally, our Supreme Court described the legal and factual nature of such defenses as follows: "The existence of a sufficient countervailing interest or an alternative course of conduct present threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. Again, in cases where material facts are undisputed, adjudication as a matter of law may be appropriate." (Ibid.)

In Hill, the California Supreme Court considered whether the National Collegiate Athletic Association's (NCAA) drug testing program violated the state constitutional right to privacy. The court held as a matter of law that legally protected privacy interests were at

stake. For example, there was an interest in freedom from observation in performing bodily functions (urination) recognized by social norms as private; an "autonomy privacy" interest. Further, the Hill court determined there was an interest in limiting disclosure of information about the internal medical state of a person's body; an "informational privacy" interest. (Hill v. National Collegiate Athletic Assn., *supra*, 7 Cal.4th at pp. 40-41.) With respect to the autonomy interest, the court found that the athletes' reasonable expectation of privacy was diminished. This was because participation in intercollegiate athletics involved close regulation and scrutiny of physical fitness and condition. Also, the NCAA's drug testing program was fully disclosed to the athletes who were given an opportunity to consent or refuse before testing. (Id. at pp. 41-42.) The court found that despite the athlete's diminished expectations of privacy, the invasion was potentially serious because the NCAA used

a particularly intrusive procedure to monitor urination. (Id. at p. 43.) The NCAA asserted the intrusion was justified to safeguard the integrity of intercollegiate athletics and to protect the health and safety of the students who participated in athletic events. (Id. at pp. 43-44.) The court concluded the NCAA's motives and objectives were "reasonably calculated to further its legitimate interest in maintaining the integrity of intercollegiate athletic competition." (Id. at p. 44.) The court also held the drug testing program was beneficial to the athletes and those benefits offset the limited impact on privacy interests. (Id. at p. 45.) After similarly considering the informational privacy interest, the court concluded the NCAA testing program did not violate the state constitutional right to privacy. (Id. at p. 57.)

Our Supreme Court again considered the state constitutional right to privacy several months later in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30,

42-44 (cert. den. December 12, 1994). The plaintiff alleged a treating physician, Dr. Yamaguchi, had violated her constitutional right to privacy by discussing her medical condition with the malpractice insurer for a colleague, Dr. Geis, she had sued for malpractice. The Court of Appeal had reversed a trial court order dismissing the invasion of privacy claim. Applying its recent decision in *Hill*, our Supreme Court held the plaintiff could not state a cause of action for invasion of privacy. No constitutional claim under article I, section 1 of the California Constitution could be stated the court reasoned, because the plaintiff had no reasonable expectation of privacy as to her medical condition under the circumstances. (*Id.* at p. 43.) As noted previously, in *Hill*, our Supreme Court identified a reasonable expectation of privacy as the second essential element of a state constitutional claim under article I, section 1. (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at p.

36.)In *Heller*, our Supreme Court determined that the absence of a reasonable expectation of privacy was premised on the following factors: (1) the plaintiff had placed her physical condition in issue in the malpractice litigation, thereby substantially lowering her privacy expectation (*Heller v. Norcal Mutual Ins. Co.*, supra, 8 Cal.4th at p. 43); (2) she should have been aware her medical condition would be an issue in the malpractice litigation (*Id.* at p. 44, fn. 5); and (3) given the litigation, her medical condition would have been inevitably discovered because Dr. Yamaguchi was to testify as an opinion witness in the malpractice lawsuit. (*Id.* at p. 44.)

We must consider whether plaintiffs have stated a cause of action for invasion of their constitutional right of privacy as that cause of action is defined in *Hill* and *Heller*. First, plaintiffs' legally protected privacy interests are implicated. The present case involves the first class of the two legally recognized privacy interests

identified in Hill; viz. an interest in precluding the dissemination of confidential information or "informational privacy." (Hill v. National Collegiate Athletic Assn., supra, 7 Cal.4th at p. 35.) Specifically, plaintiffs had a constitutionally protected privacy interest in their personal financial affairs. (Doyle v. State Bar, supra, 32 Cal.3d at p. 19; Valley Bank of Nevada v. Superior Court, supra, 15 Cal.3d at p. 656.) Hence, the first element of the cause of action has been sufficiently plead. (Hill v. National Collegiate Athletic Assn., supra, 7 Cal.4th at pp. 39-40.)

The second element of the cause of action is a reasonable expectation of privacy under the circumstances considering community norms, customs, and practices. (Hill v. National Collegiate Athletic Assn., supra, 7 Cal.4th at pp. 36-37, 39-40.) That element presents a mixed question of fact and law. (Ibid.) As previously discussed in section III.B. of this opinion,

plaintiffs' expectation of privacy may have been diminished to some extent by reason of their close association with a celebrity. That association, however, did not extinguish both plaintiffs' expectation of privacy. (*Carlisle v. Fawcett Publications, Inc.*, supra, 201 Cal.App.2d at p. 747.) As discussed in section III.B. of this opinion, above, we cannot say as a matter of law that plaintiffs' association with Mr. Murphy, contacts they sought to keep private, rendered any expectation of privacy as to their affairs, most notably personal financial matters, unreasonable. Considering community norms, customs, and practices, a trier of fact could conclude that under the circumstances of this case plaintiffs had a reasonable expectation of privacy as to at least some of the information published. (*Hill v. National Collegiate Athletic Assn.*, supra, 7 Cal.4th at pp. 36-37.) Therefore, we conclude that the second element of the cause of action has been sufficiently plead.

The third element of the cause of action is a serious invasion of privacy resulting from a defendant's conduct. (*Hill v. National Collegiate Athletic Assn.*, supra, 7 Cal.4th at pp. 39-40.) That element also presents a mixed question of fact and law. (*Id.* at p. 40.) Our Supreme Court described this third element as follows: "Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." (*Id.* at p. 37.) Plaintiffs alleged the combined disclosures of their identities, the location of their home, and their financial condition, exposed them to an "unreasonable risk as targets of kidnappers, extortionists, or persons interested in harassment." It was also alleged Ms. Hood had in fact experienced such harassment. Moreover, numerous

details of plaintiffs' private financial affairs were published. Given these facts, we cannot say as a matter of law that no serious invasion of privacy resulted from defendants' conduct.

Finally, plaintiffs' privacy interests must be balanced against the Enquirer's constitutionally protected interest in publicizing newsworthy information. Considering the Enquirer's countervailing interest as a threshold question of law (*Hill v. National Collegiate Athletic Assn.*, supra, 7 Cal.4th at p. 40), we do not find as a matter of law that it is of sufficient strength to override plaintiffs' privacy interest as to all of the information published. To the extent the publication of certain information, most notably plaintiffs' personal financial affairs, was unnecessary to the story the tabloid sought to tell, a trier of fact could conclude the Enquirer's countervailing interest did not override plaintiff's constitutional right to privacy. In conclusion, plaintiffs have adequately stated

a cause of action for violation of their state constitutional right to privacy. Therefore, it was error to sustain defendants' demurrers to that cause of action without leave to amend.

E. Civil Code Section 3344 (Misappropriation)

Plaintiffs have asserted a statutory misappropriation cause of action as to Christian only. The complaint alleges the Enquirer knowingly used Christian's photograph and likeness, without his consent, in an advertisement broadcast nationwide for the purpose of promoting sales of the publication. It is further alleged: "Defendants' conduct involved the appropriation of a photograph of Christian, and Christian is readily identifiable in the photograph . . . Christian's face is clearly visible and distinguishable. The photograph appears to be doctored so that the face of Christian is set upon a different

body. The figure is partially animated and moving a portion of his body in the commercial."8

Civil Code section 3344 was enacted in 1971. (Stats. 1971, ch. 1595, sec. 1, p. 3426.) Civil Code section 3344, subdivision (a) provides in relevant part that "Any person who knowingly uses another's name, . . . photograph, or likeness, in any manner, . . . for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of [her or] his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits

from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. . . ." Civil Code section 3344, subdivision (d) provides: "For purposes of this section, a use of a name, . . . photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)." (Emphasis added.)

The "news account exemption" set forth in Civil Code section 3344, subdivision (d) has been construed in several cases. In *Eastwood v. Superior Court*, supra, 149 Cal.App.3d at pages 413-415, the Enquirer had published an article about Clint Eastwood's purported romantic involvements with two other celebrities. Mr. Eastwood alleged his name and photograph were used without his consent on the cover of the publication and in a telecast advertisement both of which uses were

calculated to promote sales of the Enquirer. (Id. at p. 415.) The Enquirer argued photograph in the telecast and on the cover were subject to the news account exemption. (Id. at p. 421.) Division Seven of this appellate district disagreed. The court held that because the article was allegedly entirely false, it did not fall within the news account exemption. The court held Mr. Eastwood could show that the use of his name and photograph in connection with a "news account, allegedly false but presented as true" was "a subterfuge or coverup for commercial exploitation." (Id. at p. 420.) Our colleagues in Division Seven concluded the uses were not subject to the news account exemption because, "[T]he deliberate fictionalization of Eastwood's personality constitutes commercial exploitation, and becomes actionable when it is presented to the reader as if true with the requisite scienter. [Citations; fn. omitted.]" (Id. at p. 426.)

Eastwood was distinguished in *Maheu v. CBS, Inc.*, supra, 201 Cal.App.3d at pages 676-677, a case decided by Division Four of the Court of Appeal for this appellate district, in an opinion by then Associate Justice Ronald George. *Maheu* arose out of the publication of *Citizen Hughes*, a book about Howard Hughes. Robert Maheu, the plaintiff, was a former aide to Howard Hughes. (Id. at p. 667.) The plaintiff alleged the defendants had misappropriated his name, likeness, and personality by writing, publishing, and commercially distributing *Citizen Hughes*. (Id. at p. 676.) In discussing the plaintiff's cause of action for public disclosure of private facts, the court held Mr. Maheu was a public figure and that the facts published had social value, therefore "newsworthiness was clearly established." (Id. at p. 675.) In considering the plaintiff's statutory misappropriation claim, the court noted that the *Eastwood* case had involved an article which was allegedly entirely

false. (Id. at p. 677.) The court concluded: "Since [the plaintiff] does not dispute the truthfulness of the matters published, the material is protected as a news account under section 3344, subdivision (d)." (Ibid.)

Dora v. Frontline Video, Inc. (1993) 15 Cal .App.4th 536, 540-546, involved a documentary produced in 1987 about famous surfers. The plaintiff had been a "legendary figure in surfing" in the 1950's. (Id. at p. 540.) He objected to the producers' use of his name, photograph, likeness, and voice in the documentary. (Ibid.) Division Two of this appellate district held the documentary fell within the exemption for "public affairs" contained in Civil Code section 3344, subdivision (d), which provides consent is unnecessary when use is in connection with "any news, public affairs, or sports broadcast or account, . . ." The court defined the term "public affairs" in Civil Code section 3344, subdivision (d) as follows: "We . . . presume that the term

`public affairs' was intended to mean something less important than news. [Citation.]" (Id at p. 545.) The court concluded: "Public affairs must be related to real-life occurrences. As has been established in the cases involving common law privacy and appropriation, the public is interested in and constitutionally entitled to know about things, people, and events that affect it. For that reason, we cannot limit the term `public affairs' to topics that might be covered on public television or public radio. To do so would be to jeopardize society's right to know, because publishers and broadcasters could be sued for use of name and likeness in documentaries on subjects that do not relate to politics or public policy, and may not even be important, but are of interest." (Id. at pp. 545-546.) The court also held the newsworthiness factors relevant to a claim for public disclosure of private facts were not relevant to a statutory cause of action for appropriation of name and likeness. (Id. at p. 543.)

The Ninth Circuit Court of Appeals has also considered this issue. In *New Kids on the Block v. New America Pub., Inc.* (9th Cir. 1992) 971 F.2d 302, 309-310, two newspapers advertised 900-number phone-in polls to determine which of the individual members of the musical group New Kids on the Block was the most popular. The plaintiffs contended the use of their group's name amounted to a misappropriation under Civil Code section 3344. The Ninth Circuit Court of Appeals held the newspapers had a complete defense to the claim because they used the musical group's name "in connection with" news accounts. (*Id.* at p. 310.) The newspapers ran articles about the New Kids on the Block concurrently with or subsequent to the 900-number polls. In addition, both papers had "an established track record" of running polls and then reporting the results in a later news story. (*Ibid.*)

In the present case, plaintiffs allege Christian's doctored photograph was used to advertise an article in the Enquirer in order to boost sales of the tabloid. Here, as in *Maheu v. CBS, Inc.*, supra, 201 Cal.App.3d at pages 676-677, they do not allege the article was false in any respect. Therefore, this case is unlike *Eastwood v. Superior Court*, supra, 149 Cal.App.3d at pages 421-426. Whether all of the facts published were newsworthy is not at issue in considering this cause of action. (*Dora v. Frontline Video, Inc.*, supra, 15 Cal.App.4th at p. 543.) Moreover, celebrities' private lives are news matters. (e.g., *Time Inc. v. Sand Creek Partners*, supra, 825 F.Supp. at p. 212 [photograph of Lyle Lovett and Julia Roberts on their wedding day]; *Eastwood v. Superior Court*, supra, 149 Cal.App.3d at p. 423 [Mr. Eastwood's romantic involvements with female celebrities].) Therefore, the alleged appropriation falls within the

news account exemption of Civil Code section 3344, subdivision (d).

We reject plaintiffs' contention the television commercial featuring the doctored photograph of Christian "constitutes an entirely new commercial appropriation." Plaintiffs argue that the news account exemption applies only to the "re-use" in advertising the story of the exact photograph published with the news account. In the present case, they assert, the Enquirer "created a new commercial appropriation" when they doctored Christian's photograph and "used it directly to sell their product." Plaintiffs cite *Fairfield v. American Photocopy etc. Co.* (1955) 138 Cal .App. 2d 82, 86-88, *Williams v. Weisser* (1969) 273 Cal.App.2d 726, 741-742, and *Stilson v. Reader's Digest Assn., Inc.* (1972) 28 Cal.App.3d 270, 275. However, none of those cases involved an appropriation of a photograph in connection with a news account. Further, none involved a claim under Civil

Code section 3344 or an analogous statute.⁹ Moreover, we have found no legal authority for the precise proposition advanced here.

F. Common Law Appropriation

Plaintiffs allege defendants appropriated their names, likenesses, and photographs, as well as photographs of their home and their car. They allege the appropriations were without their consent and caused injury to them. A common law claim for appropriation of name, picture, or identity has the following elements: (1) appropriation of the plaintiffs name, picture or identity; (2) for the defendant's own purposes or benefit, commercial or otherwise; (3) without the plaintiff's consent; (4) where the plaintiff's privacy interests outweigh any public interest in the publication; and (5) the appropriation caused the plaintiff harm, injury, damage, or

loss. (*Eastwood v. Superior Court*, supra, 149 Cal.App.3d at p. 417; BAJI No. 7.23 (8th ed. 1994) p. 316.)¹⁰ Lack of newsworthiness is not an element of the tort. (Comment, BAJI No. 7.23 (8th ed. 1994) p. 317.) However, the news account exemption codified in Civil Code section 3344, subdivision (d), is a defense to the common law as well as the statutory cause of action. (*Eastwood v. Superior Court*, supra, 149 Cal.App.3d at p. 421; *New Kids on the Block v. News America Pub., Inc.*, supra, 971 F.2d at pp. 309-310; Comment, BAJI No. 7.23 (8th ed. 1994) p. 318.) Because the publications at issue here were in connection with a news account, they are not actionable as appropriations under the common law. (*Ibid.*) Therefore, the trial court properly sustained the demurrer to this cause of action without leave to amend.

IV. Disposition

The judgment of dismissal is reversed in part. The orders sustaining the demurrers of defendants, National Enquirer, Inc., Barbara Marks, Doug Mays, Martin Dryan, and Barbara Moss to the third cause of action (public disclosure of private facts) and the fifth cause of action (constitutional right to privacy) without leave to amend are reversed. The dismissal order as to the third and fifth causes of action are reversed. The court is directed to enter an order overruling the demurrers to the third and fifth causes of action. The orders sustaining the demurrers to the first (Civil Code section 3344), second (common law appropriation) and fourth (intrusion into private matters) causes of action without leave to amend are affirmed. Plaintiffs, Tamara Hood and Christian M., are to separately recover their costs on appeal, jointly and severally, from defendants, the National Enquirer, Inc.,

Barbara Marks, Doug Mays, Martin Dryan, and Barbara Moss.

NOT TO BE PUBLISHED

TURNER, P.J.

We concur:

ARMSTRONG, J.

GODOY PEREZ, J.

[Footnotes]

1. Plaintiffs argue Ms. Moss "may not hide behind any privilege arguably enjoyed by the media defendants." They cite in their brief numerous facts relating to Ms. Moss which were not alleged in the complaint. Given the allegation that the defendants acted as the

agents, servants, and employees of each other, plaintiffs need not at this stage of the proceedings attempt to differentiate the analysis as to Ms. Moss. Insofar as the other defendants are liable on a privacy invasion theory, Ms. Moss would be subject to potential tort liability because it is alleged they are her agents. (Mary M. v. City of Los Angeles (1991) 54 Cal .3d 202, 208-209; Civ. Code, sec. 2338; Rest.2d Agency, secs. 212-213, pp. 454-463.)

2. The statements set forth in an appendix to the complaint were as follows: "And he made the boy a millionaire!"; "And when Tamara found a four-bedroom, three-bath home in Woodland Hills, Calif., it was purchased on March 13, 1992, in Christian's name. The 2,583 square-foot home has a three-car garage, a concrete driveway, a slate tile roof as well as yards in the front and back."; "Eddie also told her to start looking for a house and he would buy it for her and Christian.";

"Eddie gives her a generous allowance every month and she's living like a queen. She did over \$60,000 of remodeling in her house and bought a new Range Rover that costs about \$40,000."; "Eddie started paying her \$2,000-a-month support and he paid for the birth of Christian."; "He also set up a million-dollar trust fund for Christian and bought the boy and Tamara a \$376,000 house, ..."; "He did it by setting up a special trust for Christian, said a source."; "He paid for the birth and has supported his love child and the boy's mom for the last two years."; and "She believed Eddie was just being nice to her so she wouldn't make a big deal about his new son to the press." The photograph of the house and car was captioned, "Eddie paid for \$376,000 home and Tamara's \$40,000 Range Rover, insiders say."

The Enquirer article itself was not attached as an exhibit to the complaint. Furthermore, a statement in the article to the effect Mr. Murphy offered to pay Ms.

Hood a substantial sum of money if she would abort the child was not alleged in the complaint as an invasion of privacy. Therefore, we will not consider the contents of the article not alleged in the complaint.

3. The fourth element is sometimes discussed as an affirmative defense, i.e., that the published facts were newsworthy and therefore no action will lie, rather than as an element of the cause of action. (See, e.g., *Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 808-810; 77 C.J.S., Right of Privacy and Publicity, sec. 29, pp. 525-527.) However, at trial, the burden is on the plaintiff to prove the publication was not constitutionally protected as newsworthy. (*Diaz v. Oakland Tribune, Inc.* (1983) 139 Cal. App.3d 118, 129, 130.) Therefore, it is more accurately described as an element of the cause of action.

4. The United States Supreme Court has recognized that whether the published facts are "of legitimate concern to the public" is a standard used in determining

a common law public disclosure claim. (*Connick v. Myers* (1983) 461 U.S. 138, 143, fn. 5, citing Rest.2d Torts, sec. 652D.)

5. The degree to which Ms. Hood's privacy interests were diminished would be greater than those of Christian. This is because Ms. Hood voluntarily entered into a relationship with Mr. Murphy and gave birth to his son. No voluntary conduct on Christian's part led to his relationship to Mr. Murphy. However, under the newsworthiness factors discussed above, and given the facts of this case, the extent to which Ms. Hood willingly entered into the public sphere is a matter for the trier of fact to consider.

6. In a letter brief filed following oral argument in this case, the Enquirer argued that publishing information about an individual's private financial affairs does not give rise to an actionable invasion of privacy when the information published is newsworthy. We agree. The

issue here is whether, given all the circumstances of this case, plaintiffs' private financial affairs were newsworthy. The Enquirer's argument to the contrary notwithstanding, we question whether the details of plaintiffs' private financial affairs had "a `logical,' [citation], or a `substantial' `nexus with a newsworthy topic,'" The Enquirer contends, "[D]etails such as the level of child support Eddie Murphy was paying, and the price of the house he bought for his son, were a part of the story of his concealing this son from his fiancée." We think a trier of fact could conclude differently.

7. In a different context, the United States Supreme Court recently held, "An individual's [privacy] interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." (Department of Defense v. FLRA (1994) 510 U.S. --, 127 L.Ed.2d 325, 337.) The case involved a

union's access under the Freedom of Information Act (FOIA) to employee home address lists. The court held disclosure of the home addresses would constitute a "clearly unwarranted invasion of personal privacy" within the meaning of a FOIA exception to disclosure (5 U.S.C. sec 552(b) (6)). (Id. at p.--, 127 L.Ed.2d at p. 338.)

8. Plaintiffs have lodged a videotape of the Enquirer commercial with this court. However, the videotape was not made a part of the complaint in this action. Nor was it considered by the trial court in ruling on the demurrers. Moreover, contrary to plaintiffs' assertion at oral argument, the videotape is not a fact or proposition that is "not reasonably subject to dispute and [is] capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, sec. 452, subd. (h).) Therefore, we have not considered it.

9. In *Fairfield v. American Photocopy etc. Co.*, supra, 138 Cal.App.2d at page 87, a photocopier manufacturer falsely advertised that the plaintiff, an attorney, was a satisfied user of its machine. The court held the plaintiff had a viable claim for invasion of privacy because the widely circulated advertisement "amounted to a pretended endorsement or recommendation of defendant's product" and "was an unauthorized and unwarranted appropriation of plaintiff's personality as a lawyer for pecuniary gain and profit." (Ibid.) Similarly, in *Williams v. Weisser*, supra, 273 Cal.App.2d at pages 741-742, the plaintiff was an assistant professor of anthropology at the University of California at Los Angeles (UCLA). The defendant was a publisher of notes of lectures given by UCLA professors. The defendant published notes of plaintiff's lectures. Also, the defendant used the plaintiff's name in selling the publications. The court held the case was indistinguishable from *Fairfield*

v. American Photocopy etc. Co., supra, 138 Cal.App.2d at page 87. (Williams v. Weisser, supra, 273 Cal.App.2d at p. 742.) The issue in Stilson v. Reader's Digest Assn., Inc., supra, 28 Cal.App.3d at page 275, was whether the trial court had properly barred a class action claim. The plaintiff members of the proposed class were individuals whose names had been used without their consent in letters soliciting participation in two Reader's Digest sweepstakes which letters were designed "ultimately" to secure subscriptions. (Id. at p. 272.) The court cited Fairfield v. American Photocopy etc., supra, 138 Cal.App.2d at page 87, for the proposition the unauthorized use of a person's name for commercial exploitation was actionable. (Williams v. Weisser, supra, 273 Cal.App.2d at p. 742.) The court held, however, that the proposed class action involving millions of unnamed plaintiffs "would foist upon our judicial system an intolerable burden, . . ." (Id. at p. 274.)

10. The fourth element, balancing the plaintiff's privacy interests against the public interest in the publication, is not mentioned in Eastwood, but is included in BAJI No. 7.23 as derived from Gill v. Curtis Publishing Co., supra, 38 Cal.2d at pages 278-279.

[ELR 17:9:3]

Clothing designer's invasion of privacy claims against publisher and T-shirt manufacturer are dismissed, but right of publicity claim requires further proceedings, in case based on unauthorized use of photo of designer wearing jeans that displayed her "bottom" through fishnet-covered cut outs

Cynthia Cheatham designs "unique" clothing which she displays and sells at biker events. Sometimes she displays her creations by wearing them herself; and

when she does, she sometimes displays portions of her own anatomy as well. This is so, because at least one of her blue jean designs featured fishnet-covered holes strategically cut from the jeans to reveal what a judge later described as her "bottom." Apparently, the view was attractive, or at least interesting, because some time after she wore these jeans at a bikers festival in Ohio, a photograph of her "backside" was published by In the Wind magazine as part of a photo essay about the festival. And some time after that, a T-shirt manufacturer reproduced the photo on its products and sold "several hundred or more" of them. In both instances, the photo of Cheatham was used without her consent. When she learned of these uses, she responded with an invasion of privacy lawsuit against the magazine's publisher and the T-shirt manufacturer.

Cheatham's lawsuit was filed in federal District Court in Kentucky, but asserted claims under Kentucky

state law. Thus, in ruling on the defendants' motion to dismiss, Judge John Heyburn applied privacy principles set forth in the Restatement (Second) of Torts which the Kentucky Supreme Court has adopted as the law of that state. The Restatement provides that privacy may be invaded in four ways: by intrusion, by appropriation, by disclosure of private facts, and by false light. Judge Heyburn had little difficulty deciding that Cheatham could not prevail on three of these four theories.

Cheatham could not show intrusion, because she had worn her cut-out jeans at large public events in front of large crowds. For the same reason, she could not successfully claim that the defendants' had disclosed "private" facts about her life. Nor could she assert that the photo in question placed her in a "false light," because it showed her "exactly as she appeared at the bikers' event."

On the other hand, Judge Heyburn found there was somewhat more merit in her appropriation claim. Kentucky law concerning invasion of privacy by appropriation is what many other states refer to as the right of publicity. With respect to this claim, the judge ruled that the magazine had not violated Cheatham's right of publicity by publishing her photo as part of its photo essay about the biker festival, because the photo was newsworthy and "is entitled to First Amendment protection." Use of the photo on the T-shirt was another matter however, for which the T-shirt manufacturer might be liable, and for which the magazine publisher might be liable too if it licensed the T-shirt manufacturer to use the photo. Even as to this use, however, Cheatham's right to recover was not clear enough for Judge Cheatham to grant her motion for summary judgment establishing liability. Rather, he ruled that she would be entitled to recover only if "her image is distinctive enough that her friends

and customers recognized [it] on the T-shirt." Judge Heyburn said he had "grave doubts" that she would be able to show this, because the photo showed "only her backside from her waist to her thighs." Nonetheless, the judge acknowledged that if Cheatham could show that her friends and customers could recognize her from such a photo, the defendants' use of the photo "may be an unlawful appropriation for which [she] could receive damages."

Cheatham v. Paisano Publications, Inc., 891 F.Supp. 381, 1995 U.S. Dist. LEXIS 9757 (W.D.Ky. 1995) [ELR 17:9:16]

Trial required to determine likelihood of confusion between names of radio talk shows "The Rush Limbaugh Show" and "After the Rush," but court rules that "After the Rush" does not violate Rush Limbaugh's right of publicity

The radio show syndication business is hyper-competitive, and getting a new show in the air is tough. But in 1994, a program developer known as the USA Talk Network had a clever idea. It created a liberal radio talk-show featuring host Aaron Harber, and called the show "After the Rush." The show was pitched to station managers as one that should follow the conservative "Rush Limbaugh Show," which at the time was broadcast by more than 600 radio stations to an audience of some 20 million listeners. Naturally, Limbaugh was not amused, nor was the company that produces and syndicates his show. The predictable result: a

lawsuit seeking to enjoin any further use of the name "After the Rush" on the grounds it violates the Lanham Act and Limbaugh's right of publicity.

Limbaugh's producer and the USA Talk Network both filed motions for summary judgment. And District Judge Richard Matsch has issued a ruling. With respect to Limbaugh's Lanham Act claims, Judge Matsch has denied both motions, ruling that disputed issues of fact require a trial. In Lanham Act cases, the plaintiff must prove that the defendant's use of a name or logo is likely to cause consumer confusion. The law requires courts to consider several separate factors in deciding whether such confusion is likely. In this case, Limbaugh's producer and the USA Talk Network submitted conflicting evidence as to several of these factors. And that is why Judge Matsch denied both of their summary judgment motions on the Lanham Act claim.

However, Judge Matsch has granted summary judgment to the USA Talk Network with respect to the right of publicity claim, and thus he has dismissed that claim entirely. The judge ruled that Limbaugh's producer (to which Limbaugh had assigned his publicity rights) had not shown that the USA Network or Aaron Harber "attempted to exploit the person of Rush Limbaugh for their commercial benefit." Instead, Judge Matsch concluded, Limbaugh's "name is used because it symbolizes a particular perspective on the public issues which are the grist for the mills of both programs. The ideology of Rush Limbaugh is not protectable by a right of publicity. The publication of a celebrity's opinions and commentaries invites the use of his name by other commentators expressing their contrasting opinions."

PAM Media, Inc. v. American Research Corp., 889 F.Supp. 1403, 1995 U.S.Dist.LEXIS 8754 (D.Colo. 1995) [ELR 17:9:16]

Appellate court approves trial court's evidence rulings and jury instructions in copyright infringement suit against Michael Jackson involving song "Dangerous"

Michael Jackson won a jury verdict in a case in which singer-songwriter Crystal Cartier alleged that Jackson's song "Dangerous" infringed the copyright to her own song "Dangerous." Depending on your point of view, the case illustrates just how dangerous it is to distribute or accept demo tapes, because that is how Cartier claimed that Jackson heard her version of the song. She said that in July of 1990 - just three months

before Jackson recorded "Dangerous" in September 1990 - she distributed two dozen demos of her song to people in Los Angeles, including "people who were close to Mr. Jackson." Jackson denied hearing Cartier's tape and said that his version of "Dangerous" grew out of a song called "Streetwalker" that he had written with William Bottrell back in 1985.

The jury apparently agreed with Jackson. But according to Cartier, it hadn't heard all of the evidence, nor had it had been properly instructed.

On appeal, Cartier took issue with the trial judge's refusal to permit her to introduce secondary evidence of the content of her demo tapes. She wanted to introduce such evidence, because she no longer had a copy of the demo tape she said she distributed in 1990, nor did she have the master tape from which the demo copies had been made. The trial judge refused to permit her to introduce secondary evidence of the demo tapes, because

the judge concluded that Cartier had not made a sufficient effort to locate a copy of one of the original demo tapes. Her lawyers had not, for example, subpoenaed any of the record companies she said she gave copies to in 1990, when those companies assertedly failed to respond to her telephone requests. The appellate court ruled that the trial judge had not erred in refusing to permit her to introduce secondary evidence, under these circumstances.

The trial judge also excluded from evidence two comparison tapes Cartier wanted to play for the jury. As the appellate court described them, the tapes contained excerpts from Cartier's and Jackson's versions of "Dangerous," but the excerpt from the Jackson version was slowed and its key was changed to accommodate this slowing. Also, the excerpts were looped back on themselves to repeat musical phrases which were not repeated in either original version; and the tapes also

spliced together parts of the choruses which were not adjacent in the originals. The trial judge excluded the comparison tapes because he found the changes they made to the songs to be so significant that the tapes no longer represented the songs in question. The appellate court found no abuse of discretion in this decision.

Finally, Cartier objected to a jury instruction in which the jury was directed to find for Michael Jackson (and his co-defendants) unless it found that the "total concept and feel" of the two songs was substantially similar. Cartier argued that the "total concept and feel" test had not been adopted in the Tenth Circuit (the trial took place in Oklahoma). But the appellate court noted that this test has been used in the Eighth and Ninth Circuits, and thus "it was not substantial and obvious error" for the trial judge to have used it in this case.

Cartier v. Jackson, 59 F.3d 1046, 1995 U.S.App.LEXIS 16776 (10th Cir. 1995) [ELR 17:9:17]

National Football League's home game "blackout rule" does not violate the rights of the hearing impaired under the Americans with Disabilities Act or other federal statutes

The National Football League has a "blackout rule" that prohibits live local television broadcasts of home football games that are not sold out 72 hours before game-time. The rule applies only to television broadcasts, not to radio broadcasts, and thus the rule permits local radio coverage of home games even if they are not sold out 72 hours in advance or at all. For the hearing impaired, however, radio is a poor substitute for television. For this reason, hearing impaired fans of

(what used to be) the Cleveland Browns mounted a federal court challenge to the NFL's blackout rule, hoping that a federal judge would order the League, and the networks and television stations that carry its games, to provide the hearing impaired with access to some form of television coverage of otherwise blacked-out games.

The lawsuit was brought by Thomas Stoutenborough and an association known as Self-Help for Hearing Impaired Persons. The centerpiece of their offense was the Americans with Disabilities Act, supplemented by plays that rested on the Communications Act and the Television Decoder Circuitry Act. It was an imaginative and creative offense, and it was treated with apparent respect by Judge George W. White of the Northern District of Ohio and by the Sixth Circuit Court of Appeals. Ultimately, however, the offense was no match for the defense mounted by the NFL and the networks. District Judge White dismissed the lawsuit, in response to

defense motions; and the Sixth Circuit has affirmed, in a decision by Judge Boyce F. Martin.

The Americans with Disabilities Act prohibits discrimination against the disabled by companies that provide services in places of public accommodation. In this case, the defendants argued - and Judge Martin agreed - that the NFL blackout rule does not discriminate, because it applies equally to those who can hear and the hearing-impaired: it prevents both from viewing blacked out home games. Moreover, Judge Martin ruled that the blackout does not occur within a "place of public accommodation." While NFL games may be played within such places, and while television broadcasts may be viewed within such places, television broadcasts themselves do not occur within such places. And thus the Americans with Disabilities Act does not apply to NFL blackouts for that reason too.

Judge Martin also rejected the argument that the blackouts are prohibited by the "public interest" standard of the Communications Act, for two reasons. First, the "public interest" standard does not create a private cause of action. And second, the "public interest" standard does not incorporate by reference the Americans with Disabilities Act.

Finally, Judge Martin ruled that the Television Decoder Circuitry Act is inapplicable to NFL blackouts. That Act requires television set manufacturers to equip certain sets with decoder circuitry that displays closed captioned television broadcasts. None of the defendants in this case are television set manufacturers, however, so the Act does not apply to them.

Editor's note: The NFL's "blackout" rule has long been the subject of litigation and legislation. The first challenge was brought by the U.S. Department of Justice, when the blackout rule was much broader than it is

today. In that case, a federal District Court ruled that certain blackouts (no longer used by the NFL) were illegal, but the court approved local blackouts in a home team's territory when the home team was playing at home. *United States v. National Football League*, 116 F.Supp. 319 (E.D.Pa. 1953). Subsequent efforts by football fans to bar even more NFL blackouts were not successful. *Blaich v. National Football League*, 212 F.Supp. 319 (S.D.N.Y. 1962). Congress got into the "blackout" game in 1973, when it enacted legislation prohibiting blackouts of games that were sold out 72 hours in advance. See, "Solons Clobber NFL: The 20th Anniversary of the TV Sports Blackout Bill" by Philip R. Hochberg (ELR 15:6:3); and "Back to the Future Again: An Oblique Look at the Sports Broadcasting Act of 1961" by Dean A. Rosen (ELR 13:5:3). But the NFL's "blackout rule" has been attacked from the other side as well, by those who want NFL games to be blacked out

when they might compete with high school or college games. Thus, the 1973 federal legislation also required blackouts under certain circumstances, to protect high school and college game attendance. Even after that legislation expired, those who wanted NFL games to be blacked out sought - unsuccessfully - to achieve that result with litigation. *Colorado High School Activities Association v. National Football League*, 711 F.2d 943 (10th Cir. 1983) (ELR 5:10:12) The recent *Stoutenborough* case is the first one in which the Americans with Disabilities Act was the primary basis for challenging the NFL blackout.

Stoutenborough v. National Football League, 59 F.3d 580, 1995 U.S.App.LEXIS 17012 (6th Cir. 1995) [ELR 17:9:17]

Injured professional athletes are entitled to "wage-loss differential" awards under Illinois workers compensation act, appellate court rules in case brought by former Chicago Bears lineman Ted Albrecht

Ted Albrecht was a professional football ironman. He was drafted in the first-round draft by the Chicago Bears, and for five years he started every game as an offensive lineman - from his rookie season in 1977 until he injured his back in the Bears' training camp in 1982. As a result of his injury, he retired from football, started a travel service business and worked as a sportscaster. He was successful there too, earning \$80,000 or more each year from 1983 to 1985. This was less, however, than the \$130,000 he earned in his final year as a Bear, and was much less than other Bears linemen earned during those years.

Because Albrecht was injured on the job, he was entitled to certain benefits under Illinois' workers compensation law. One section of the Illinois law provides that if a worker is "partially incapacitated from pursuing his usual and customary line of employment," he is entitled to receive two-thirds of the difference between the average amount he would have been able to earn had he not been injured and the amount he is able to earn after the injury.

Thus, Albrecht wanted two-thirds of the difference between what he would have earned as an offensive lineman with the Bears had he not been injured and the amount he actually had earned from his travel business and sportscasting. The Bears, however, contended that no one could say for sure what, if anything, Albrecht would have earned with the Bears, because his contract was year-to-year, and therefore even if he had not been injured, he may not have made the team during

the years in question. An arbitrator, the Illinois Industrial Commission and a trial court all agreed with the Bears. But the Illinois Appellate Court has agreed with Albrecht and has therefore ordered the Industrial Commission to award Albrecht this "wage-loss differential."

According to the appellate court, the question of whether professional athletes are entitled to a "wage-loss differential award" was a question of first impression in Illinois. Still, the court had little difficulty in concluding that they are entitled to such an award. The court noted that the "wage-loss differential" section of the workers compensation act contains no special provisions for workers (like professional athletes) who have a "shortened work expectancy," and said the court, "there is no indication that this paragraph was intended to exclude employees in these circumstances." The court therefore concluded that professional football players are covered by the "wage-loss differential" section of

the act, and that their shortened work expectancies does not preclude them from receiving such an award.

Albrecht v. Industrial Commission, 648 N.E.2d 923, 1995 Ill.App.LEXIS 148 (Ill.App. 1995) [ELR 17:9:18]

Federal court dismisses art dealer's claim that New York city auction houses conspired with others to monopolize market for Jackson Pollock paintings

Artist Jackson Pollock died forty years ago, but his legacy lives on - in courts as well as galleries and museums. District Judge Harold Baer, Jr., has had before him a factually fascinating case he described as a "tempest in the art world." Alas, the truth of the alleged facts will not be determined, because Judge Baer has ruled that even if the allegations are true, they do not

state a legally recognized claim. And thus Judge Baer has dismissed the case, in response to a motion by the defendants - New York city auction houses Sotheby's and Christie, Manson & Woods, and the Pollock-Krasner Foundation and Authentication Board.

The plaintiff in the case is an Arizona art dealer named David Kramer. Kramer alleged that he bought a Jackson Pollock painting for \$15,000 at a private sale in Arizona, and that the painting could be worth \$10 million if it were sold at auction in Manhattan. Kramer asked Sotheby's and Christie, Manson & Woods to auction the painting on his behalf; and Christie's told him it would, if he obtained an authentication from the Pollock-Krasner Authentication Board. Kramer then submitted his painting to the Authentication Board, but the Board refused to authenticate it. And Christie's declined to auction it.

Kramer responded with a lawsuit against the Board, the Pollock-Krasner Foundation, Christie's and Sotheby's. In his complaint, Kramer accused the defendants of conspiring with one another in violation of federal and state antitrust laws, with violating New York's deceptive practices law, and with interfering with his advantageous business relationships. After careful consideration, Judge Baer rejected all of these claims.

Kramer's antitrust claims failed because the proper "market" for the sale of Jackson Pollock paintings is not simply the New York city auction market. The proper market for Pollock paintings includes private sales and auctions throughout the country; and Kramer had not shown that the defendants had any market power in that larger market. Moreover, Judge Baer ruled that Kramer's "complaint fails to support the existence of a conspiracy because it presents no coherent theory of participation by Sotheby's or Christie's in the alleged

conspiracy." Kramer theorized that the Pollock-Krasner Foundation and Authentication Board conspired to exclude true Pollock paintings from the market in order to increase the value of Pollocks owned by the Foundation. But Judge Baer could not see how this would help Sotheby's or Christie's. Even if the auction houses would have received greater commissions per sale by auctioning fewer Pollocks, the judge concluded "they would likely profit far more from an increased number of sales that would occur in an open market." Moreover, Judge Baer noted that the auction houses had an independent interest "in not selling forgeries because of potential damage to their reputations, not to mention legal liability."

Judge Baer rejected Kramer's "deceptive practices" claim because Kramer did not allege that Christie's or Sotheby's had been dishonest or misleading, did not allege that he was a consumer, did not allege that the

Board or Foundation were merchants, and did not allege that he purchased anything from them. All of these are essential elements of a New York deceptive practices case. Likewise, Judge Baer dismissed Kramer's interference with business relationships claim, because Kramer did not identify an existing contract that had been interfered with and did not allege that the auction houses had intended to inflict injury on him.

Kramer v. Pollock-Krasner Foundation, 890 F.Supp. 250, 1995 U.S.Dist.LEXIS 8270 (S.D.N.Y. 1995) [ELR 17:9:19]

Immigration and Naturalization Service abused discretion in denying visa petition for National Hockey League player Craig Muni, and may have done so in denying petition of NHL player Stu Grimson, both of whom are Canadian citizens

The National Hockey League is truly an international enterprise. Some teams are based in Canada; others in the United States. Some players are Canadian citizens; others are U.S. citizens. Insofar as the NHL is concerned, the difference between Canada and the United States has no more significance than the difference between Illinois and New York. To the U.S. Immigration and Naturalization Service, however, there is an enormous difference between players who are U.S. citizens and those who are Canadian citizens. And therein lies the rub. Because even though NHL teams may trade players across the U.S.-Canadian border as readily as

they trade players between Illinois and New York, Canadian players must have visas to play professionally for U.S.-based teams. There is a special category of visa that gives preference to aliens who have "extraordinary ability . . . in athletics." By statute, such ability is "demonstrated by sustained national or international acclaim" and by those "whose achievements have been recognized in the field through extensive documentation." But the INS does not grant such visas routinely - not even to those who are major league veterans.

The INS denied necessary visas to Canadian players Craig Muni and Stu Grimson, both of whom were then playing for U.S.-based teams (after having begun their professional hockey careers playing for Canadian-based teams). Both players appealed the INS rulings to the federal District Court in Illinois. And in separate rulings, Judge James Moran and Judge Robert Gettleman have ruled for the players against the INS.

In Muni's case, Judge Moran ruled that the INS had abused its discretion, because it failed to consider several facts that supported Muni's petition for a visa, and because it failed to explain why the facts it did consider were insufficient to establish Muni's extraordinary ability. The judge reviewed Muni's career, and noted that "Muni presented evidence that he is an NFL veteran who was a starting player on the League's best team for several years, has a reputation among his peers as an excellent defenseman, earns a salary well above average for a defenseman, and has been recognized in major media publications." Judge Moran concluded that this evidence established that Muni is "one of those at the top of his field" and thus does have "extraordinary ability." Therefore, the judge granted Muni's motion for summary judgment.

In Grimson's case, the INS had apparently placed great weight on the fact that Grimson's \$300,000 per

year salary was below the NHL average. But Judge Gettleman observed that "the INS appears to be skating on thin ice by placing inordinate weight on comparative salaries, which may vary with a number of factors other than pure athletic ability (e.g. the financial condition of the team, movement of players within the league, and the current availability of other players with the alien's particular attributes)." The judge ruled that on the basis of the record as it then stood, he "would be compelled to conclude that [the INS's] decision to reject out of hand [Grimson's] particular abilities as a hockey player, as well as his having a sustained career in the NHL based on those abilities, was an abuse of discretion." However, Judge Gettleman did not enter judgment against the INS. Instead, he remanded the case to the INS. The judge directed Grimson to submit evidence regarding the necessity of a player with his style of play and abilities, and evidence comparing his skill, salary level and other

abilities to those of comparable players in the NHL, who fulfill the same role for their teams; and the judge directed the INS to consider Grimson's argument that a sustained career in the NHL demonstrates extraordinary ability.

Muni v. I.N.S., 891 F.Supp. 440, 1995 U.S. Dist. LEXIS 6974 (N.D.Ill. 1995); Grimson v. I.N.S. 1995 U.S. Dist. LEXIS 3885 (N.D.Ill. 1995) [ELR 17:9:20]

School district did not violate students' First Amendment rights when it refused to permit "Shindler's List" to be shown as part of high school curriculum because movie was rated "R" by MPAA

The school district in Kenosha, Wisconsin, has a formal policy manual that recognizes that "Commercial

entertainment films" may have "obvious educational value," and when they do and are "appropriate to the subject being studied," they may be shown to students as part of the high school curriculum. However, Kenosha's policy also provides that "No films having a rating of R, N17, or X shall be shown to students at any school."

"Shindler's List" has obvious educational value. For that reason, several Kenosha history teachers wanted to show it to their students, and more than 400 students signed a petition urging the school board to permit them to see it. "Shindler's List" however was rated "R" by the Motion Picture Association of America. And thus the school district refused to permit it to be shown to students as part of the school curriculum.

This clash resulted in a lawsuit brought on behalf of the high school's students against the school district. The suit sought a declaration that the school district's

decision not to permit the viewing of "Shindler's List" violated the students' First Amendment rights, and it sought an injunction barring the district from enforcing its policy prohibiting the instructional use of R-rated movies.

In response to cross-motions for summary judgment, District Judge John Reynolds has ruled that the school district's policy against the showing of R-rated films was rationally related to the district's "legitimate pedagogical concern[s]" and therefore did not violate students' First Amendment rights. For this reason, Judge Reynolds has granted the school district's motion for summary judgment and has dismissed the students' lawsuit.

One issue in the case was whether the school district could rely on MPAA ratings to exclude movies from the curriculum, or whether it had to view films itself in order to make that decision. Judge Reynolds

acknowledged that "a private organization's rating system cannot be used to determine whether a movie receives constitutional protection." "However," the judge added, "that does not mean that the School Board cannot choose to use the ratings system as a filter of films." The reason the school board could properly rely on MPAA ratings is that "school board curriculum decisions need only bear a reasonable relationship to their legitimate purposes." The board had established, through MPAA literature, that "relying on [MPAA] ratings is a reasonable way of determining which movies are more likely to contain harsh language, nudity, and inappropriate material for high school students. . . . An R-rating indicates that reasonable people could determine that high school students should not view the film." "Reasonableness" is all that is necessary in a high school setting, the judge ruled.

Borger v. Bisciglia, 888 F.Supp. 97, 1995 U.S. Dist. LEXIS 244 (E.D.Wisc. 1995) [ELR 17:9:21]

Briefly Noted:

Plagiarism/attorneys fees.

An author of children's books about a dinosaur zoo will have to pay the attorneys fees incurred by Michael Crichton, Steven Spielberg, Universal City Studios, Amblin Entertainment, and publishers Alfred A. Knopf, Inc., and Random House, in their successful defense of a copyright infringement action brought by the author of the children's books. District Judge Lawrence McKenna had earlier ruled that the novel and movie "Jurassic Park" did not infringe the copyright to the children's books, and thus Judge McKenna granted

summary judgment for Crichton, Spielberg and their co-defendants (ELR 16:10:9). Thereafter, the judge decided that the infringement claim was not only without merit, it was "not objectively reasonable." For this reason, the judge decided that the defendants are entitled to recover attorneys fees from the children's book author.

Williams v. Crichton, 891 F.Supp. 120, 1994 U.S. Dist. LEXIS 17450 (S.D.N.Y. 1994) [ELR 17:9:21]

Attorneys fees.

Football player Bryan Cox of the Miami Dolphins is entitled to attorneys fees as the "prevailing party" in his Title VII employment discrimination suit against the National Football League, if he can show that certain changes in NFL policy were prompted by Cox's pre-

lawsuit complaint that he was being harassed by Buffalo Bills fans because of his race. Cox was subjected to "an intense barrage of verbal abuse" just before the start of a game in Buffalo in 1993, and he responded in a way that caused the NFL to fine him. In response, Cox filed a complaint with the EEOC and a suit against the League. The next day, the NFL distributed "guidelines" to its teams, requiring them to remove from their stadiums fans who take part in "racial taunts." District Judge Harold Baer, Jr., has ruled that if these guidelines were the result of Cox's complaint, he would be the prevailing party, even though the case was dismissed without prejudice by stipulation, and thus would be entitled to attorneys fees under Title VII of the Civil Rights Act.

Cox v. National Football League, 889 F.Supp. 118, 1995 U.S.Dist.LEXIS 8529 (S.D.N.Y. 1995) [ELR 17:9:21]

Copyright/trademark protection for radio contest.

A radio station in Maine has been granted summary judgment on most - but not all - of the copyright and trademark infringement claims made against it by a company that creates radio promotional contests similar to one used by the radio station. District Judge D. Brock Hornby has ruled that the contest methods, metaphors and phrases for which the contest company sought copyright protection are not copyright-protected subject matter; and that the evidence was not sufficient to show a likelihood of confusion under trademark or trade dress law. Thus, Judge Hornby dismissed those claims. However, he denied the radio station's motion for summary judgment with respect to a copyright infringement claim based on similarities between a brochure created by the

contest company and one used by the radio station. Editor's note: At an earlier stage of this case, Judge Hornby issued a preliminary injunction barring the radio station's use of the challenged brochure, but he denied the contest company's request for a preliminary injunction barring the station's use of the other contest elements (ELR 17:3:23).

CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc.,
888 F.Supp. 192, 1995 U.S.Dist.LEXIS 8107 (D.Me.
1995) [ELR 17:9:22]

Son of Sam law.

A federal court lawsuit against Warner Communications and the New York State Crime Victims Board, seeking profits from the Warner Bros. movie "Dog Day

Afternoon," has been dismissed, under the doctrine of res judicata. The suit was brought by George Heath who once was a fellow prisoner of John Wojtowicz. In the early 1970s, Wojtowicz sold the rights to his life story for one percent of the profits from any film that might be made about him; and after a series of transactions, Heath acquired an interest in Wojtowicz's share of those profits. Heath's state court claims for those profits were unsuccessful, however (ELR 17:5:16). He also made similar claims in federal court. District Judge John Sprizzo has now dismissed that lawsuit as well, on the grounds that the claims made in the federal lawsuit had already been decided against Heath in the state case.

Heath v. Warner Communications, Inc., 891 F.Supp. 167, 1995 U.S.Dist. LEXIS 8898 (S.D.N.Y. 1995) [ELR 17:9:22]

Open meetings act.

The Dallas Downtown Sports Development Committee must hold its meetings in public, as required by the Texas Open Meetings Act, District Judge Joe Kendall has ruled in a case brought by two Dallas taxpayers and citizens. The Sports Development Committee was appointed by the mayor to negotiate with the owners of the Dallas Mavericks basketball team and the Dallas Stars hockey team, both of whom had "indicated" they would move their teams out of the Dallas-owned Reunion Arena to the suburbs of Dallas, unless the city substantially modified the Arena or built a new facility.

Finlan v. City of Dallas, 888 F.Supp. 779, 1995 U.S.Dist.LEXIS 7982 (N.D.Tex. 1995) [ELR 17:9:22]

INTERNATIONAL CASES

In dispute between British recording artist Bill Nelson and his former manager arising out of unwritten management agreement, British court rules that manager was entitled to commission of 20% of artist's gross (rather than net) income but was not entitled to reimbursement of his personal expenses

Oral agreements, someone once said, aren't worth the paper they're written on . . . and in the long run, they are often more expensive than carefully prepared written agreements. This is as true in Great Britain as it is in the United States, as British recording artist Bill Nelson and his former manager Mark Rye have learned, to their undoubted chagrin.

Following a ten-year relationship (from 1980 to 1990), Nelson and Rye parted company, under strained

circumstances. Nelson claimed that Rye owed him 280,000 pounds, while Rye claimed that Nelson owed him 64,000 pounds. The discrepancy was due in part to their disagreement over whether Rye's commission was to have been 20% of Nelson's gross income, as Rye contended, or 20% of Nelson's net income, which was of course what Nelson contended. The discrepancy also was due to their disagreement over whether Rye was entitled to be reimbursed for his personal expenses (incurred, for example, while on the road with Nelson) or only for expenses incurred on behalf of Nelson himself and members of Nelson's band. The reason they disagreed about such fundamental terms of their relationship was that Nelson and Rye did not have a written agreement. The two had agreed that Rye would manage Nelson's career during a conversation they had while walking in a garden or local village; and that agreement was never reduced to a signed writing. By the time their

relationship deteriorated, neither could recall exactly what had been said more than a decade before.

At the conclusion of a trial in the Chancery Division, Judge Laddie concluded that Rye was to have received a commission based on Nelson's gross income. The judge reached this conclusion for several reasons. First, at the outset of their relationship, Rye's lawyer had prepared a letter to Nelson's lawyer confirming the terms of a management agreement; and though Nelson's lawyer took exception to some of the letter's terms, he did not object to the letter's assertion that Rye's commission was to be 20% of Nelson's gross income. Second, at the time they had their original conversation, both Rye and Nelson knew that it was possible that Nelson's expenses would meet or even exceed his income, and thus there may not have been any net. If Rye's commission were a percentage of Nelson's net, Rye would have worked for nothing; and Judge Laddie thought it quite

unlikely that Rye would have agreed to do so. Third, Rye's accountings clearly reflected that he was taking a commission based on Nelson's gross income, and Nelson did not object or complain until their relationship deteriorated. Thus, the judge ruled in Rye's favor on the issue of commissions.

Judge Laddie ruled against Rye on the expense issue, however. Here, the judge concluded that Rye had never communicated his expectation that his personal expenses would be reimbursed, and the correspondence between the lawyers made no mention of expenses. While Rye argued that expense reimbursement should be implied, Judge Laddie ruled that there was no compelling reason to imply any such term where Rye's commission was 20% of Nelson's gross income. Expenses advanced by Rye on Nelson's behalf, or on behalf of Nelson's band, were another matter; those were

reimbursable. But Rye's personal expenses had to come out of his commission, Judge Laddie concluded.

Nelson v. Rye, U.K. Chancery Div. (1995) (available in LEXIS Enggen Library, Cases File) [ELR 17:9:23]

IN THE NEWS

Harry Fox Agency and CompuServe agree to arrangement for issuing mechanical licenses to forum managers for online digital delivery of music recordings

The Harry Fox Agency and CompuServe have agreed to a "Licensing Arrangement" that will permit CompuServe forum managers to quickly and easily obtain mechanical licenses permitting the online digital

delivery of music recordings. The Licensing Arrangement is one feature of the recent settlement of a class action lawsuit brought against CompuServe by Frank Music, alleging that CompuServe had infringed the copyrights to more than 900 songs by permitting CompuServe subscribers to upload and download music recordings (ELR 17:7:22). Under the new Licensing Arrangement, CompuServe forum managers will be assigned personal identification numbers which they will use to identify themselves when electronically requesting mechanical licenses from the Harry Fox Agency. These licenses will be granted by Fox electronically, on behalf of music publishers represented by Fox for mechanical licensing purposes; and these licenses will authorize forum managers to digitally deliver - over the CompuServe computer network - recordings of specifically identified songs. The terms of the license will be "substantially identical" to the terms contained in

Fox's existing licenses for the manufacture and sale of conventional recordings, and the license fee will be the statutory rate in effect at the time the digital recording is downloaded (unless a lower rate was previously and specifically agreed to by the owner of a song's copyright). Currently, that rate is 6.95 cents per song (ELR 17:7:21). Music publishers represented by the Harry Fox Agency have been given an opportunity to opt out of the new Licensing Arrangement, if they wish to do so. And Fox will provide access to its song file database, so forum managers will be able to identify those songs for which mechanical licenses are electronically available. While this Licensing Arrangement was entered into as part of the settlement of the Frank Music lawsuit, it also is precisely the sort of license contemplated by Congress in the new "Digital Performance Right in Sound Recordings Act of 1995" (ELR 17:6:3). Thus, while this Licensing Arrangement only benefits CompuServe

forum managers at the present time, it is likely that similar arrangements soon will be entered into by Fox with other online services as well.

[Feb. 1996][ELR 17:9:24]

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[ELR 17:9:25]