

Westlaw

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(Cite as: 172 Cal.App.4th 1125, 91 Cal.Rptr.3d 858)

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Court of Appeal, Fifth District, California.
Cynthia MORENO et al., Plaintiffs and Appellants,
v.
HANFORD SENTINEL, INC., et al., Defendants
and Respondents.

No. F054138.

April 2, 2009.

Certified for Partial Publication.^{FN*}

FN* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts 2 and 3 of the discussion.

As Modified April 30, 2009.

Background: The author of a journal entry on a social networking website and other members of her family brought action against author's sister's high school principal, who submitted the journal entry for republication in the local newspaper, and against the school district, for invasion of privacy and intentional infliction of emotional distress. The Superior Court, Fresno County, No. 06CECG04125AMC, Adolfo M. Corona, J., sustained demurrer without leave to amend. Plaintiffs appealed.

Holdings: The Court of Appeal, Levy, J., held that:
(1) principal did not disclose a private fact about author;
(2) principal did not invade author's family members' privacy; and
(3) author's family members did not have standing to assert invasion of privacy claims.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Evidence 157 ↪ 20(1)

157 Evidence

157I Judicial Notice

157k20 Management and Conduct of Occupations

157k20(1) k. In general. Most Cited Cases

In an action by a student and her family against a high school principal and school district for invasion of privacy and intentional infliction of emotional distress related to principal's alleged republication of a journal entry from a social networking website, the Court of Appeal would take judicial notice that principal was the principal of the high school.

[2] Torts 379 ↪ 331

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)1 Privacy in General

379k331 k. Nature and extent of right in general. Most Cited Cases

The tort of invasion of privacy protects a right to be let alone.

[3] Constitutional Law 92 ↪ 1210

92 Constitutional Law

92XI Right to Privacy

92XI(A) In General

92k1210 k. In general. Most Cited Cases

Constitutional Law 92 ↪ 1215

92 Constitutional Law

92XI Right to Privacy

92XI(A) In General

92k1215 k. Reasonable, justifiable, or legitimate expectation. Most Cited Cases

To state a claim for violation of the constitutional right of privacy, a party must establish (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) a serious invasion of the privacy interest. West's Ann.Cal. Const. Art. 1, § 1.

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[4] Torts 379 ↪330

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)1 Privacy in General

379k330 k. In general. Most Cited

To prevail on an invasion of privacy claim, the plaintiff must have conducted himself or herself in a manner consistent with an actual expectation of privacy.

[5] Torts 379 ↪350

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)3 Publications or Communications in General

379k350 k. In general. Most Cited

The elements of the tort of invasion of privacy through public disclosure of private facts are: (1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.

[6] Torts 379 ↪350

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)3 Publications or Communications in General

379k350 k. In general. Most Cited

A matter that is already public or that has previously become part of the public domain is not a private fact, and thus its disclosure does not constitute the tort of public disclosure of private fact.

[7] Torts 379 ↪351

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)3 Publications or Communications in General

379k351 k. Miscellaneous particular cases. Most Cited Cases

A journal entry posted on a social networking website disparaging the author's hometown was not a private fact, and thus high school principal's alleged act of submitting the entry to be published in the local newspaper under the author's full name did not constitute the tort of invasion of privacy through public disclosure of private fact, even though the author posted the journal entry to the website under her first name only and removed the entry from the website before learning it had been submitted to the newspaper, where author's identity was readily ascertainable from the website; author's affirmative act made the entry available to anyone with a computer, and the fact that the principal obtained a copy demonstrated that it was accessed by others before being removed.

See Cal. Jur. 3d, Assault and Other Wilful Torts, § 129; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 664; Annot., Waiver or loss of right of privacy (1974) 57 A.L.R.3d 16.

[8] Torts 379 ↪350

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)3 Publications or Communications in General

379k350 k. In general. Most Cited

For a fact to be a private fact, as required for the tort of public disclosure of private fact, the expectation of privacy need not be absolute; "private" is not equivalent to "secret."

[9] Torts 379 ↪350

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)3 Publications or Communications in General

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379k350 k. In general. Most Cited

The claim of a right of privacy, as required for the tort of public disclosure of private fact, is not so much one of total secrecy as it is of the right to define one's circle of intimacy—to choose who shall see beneath the quotidian mask.

[10] Torts 379 ↪350

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)3 Publications or Communications in General

379k350 k. In general. Most Cited

Information disclosed to a few people may remain private, as required for the tort of public disclosure of private fact.

[11] Torts 379 ↪351

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)3 Publications or Communications in General

379k351 k. Miscellaneous particular cases. Most Cited Cases

High school principal did not commit the tort of invasion of privacy against student or her parents by submitting to the local newspaper a journal entry that had been posted on a social networking website by the student's sister, disparaging the town where the family lived, since the principal's alleged act of submitting the journal entry did not disclose a private fact of the sister who posted it, even if the student and parents suffered direct damages as the community reacted violently; because the republication of the journal entry was not an invasion of the sister's privacy, her family members could not state a claim based on the same alleged invasion.

[12] Torts 379 ↪331

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)1 Privacy in General

379k331 k. Nature and extent of right in general. Most Cited Cases

Torts 379 ↪335

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)1 Privacy in General

379k335 k. Persons entitled to sue. Most Cited Cases

For purposes of the tort of invasion of privacy, the right of privacy is purely personal; it cannot be asserted by anyone other than the person whose privacy has been invaded.

[13] Torts 379 ↪361

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)3 Publications or Communications in General

379k361 k. Persons entitled to sue. Most Cited Cases

Even if student's sister had an invasion of privacy claim against high school principal for having a journal entry that sister posted on a social networking website, disparaging the town where her family lived, published in a local newspaper and attributed to the sister by her full name, the student and her parents did not have standing to assert their own invasion of privacy claims, where the newspaper did not identify student or her parents when it published the journal entry; even if the student and parents suffered direct damages as the community reacted violently, their invasion of privacy claim was primarily based on their relationship to student's sister and the community reaction to sister's opinions, not on the principal's conduct directed toward them.

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****860** Law Office of Paul Kleven and Paul Kleven, Berkeley, for Plaintiffs and Appellants.

Auchard & Stewart and Paul Auchard, for Defendants and Respondents.

***1127 OPINION**

LEVY, J.

The issue presented by this appeal is whether an author who posts an article on myspace.com can state a cause of action for invasion of privacy and/or intentional infliction of emotional distress against a person who submits that article to a newspaper for republication. The trial court concluded not and sustained the demurrer to appellants' complaint without leave to amend.

Appellants contend the republication constituted a public disclosure of private facts that were not of legitimate public concern and thus was an invasion of privacy. Appellants note that the republication included the author's last name whereas the myspace.com posting did not. Appellants further argue that the person who submitted the article to the newspaper did so with the intent of punishing appellants and thus they have a claim for intentional infliction of emotional distress.

****861 *1128** As discussed in the published portion of this opinion, the trial court properly sustained the demurrer without leave to amend to appellants' invasion of privacy cause of action. The facts contained in the article were not private. Rather, once posted on myspace.com, this article was available to anyone with internet access. As discussed in the nonpublished portion, the trial court should have overruled the demurrer to the intentional infliction of emotional distress cause of action. Under the circumstances here, a jury should determine whether the alleged conduct was outrageous. Accordingly, the judgment will be affirmed in part and reversed in part.

BACKGROUND

Since the appeal is from the sustaining of a de-

murrer without leave to amend, the facts are derived from the complaint. This court must give the complaint a reasonable interpretation and assume the truth of all material facts properly pleaded. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967, 9 Cal.Rptr.2d 92, 831 P.2d 317.) However, contentions, deductions or conclusions of law will not be accepted as true. (*Id.* at p. 967, 9 Cal.Rptr.2d 92, 831 P.2d 317.)

Following a visit to her hometown of Coalinga, appellant, Cynthia Moreno, wrote "An ode to Coalinga" (Ode) and posted it in her online journal on myspace.com. The Ode opens with "the older I get, the more I realize how much I despise Coalinga" and then proceeds to make a number of extremely negative comments about Coalinga and its inhabitants. Six days later, Cynthia ^{FN1} removed the Ode from her journal. At the time, Cynthia was attending the University of California at Berkeley. However, Cynthia's parents, appellants David and Maria Moreno, and Cynthia's sister, appellant Araceli Moreno, were living in Coalinga. Araceli was a student at Coalinga High School.

FN1. For purposes of clarity, the appellants will be referred to by their first names. No disrespect is intended.

[1] Respondent, Roger Campbell, was the principal of Coalinga High School and an employee of respondent, Coalinga-Huron Unified School District. ^{FN2} The day after Cynthia removed the Ode from her online journal, appellants learned that Campbell had submitted the Ode to the local newspaper, the Coalinga Record, by giving the Ode to his friend, Pamela Pond. Pond was the editor of the Coalinga Record.

FN2. Appellants' request that this court take judicial notice that Roger Campbell is the principal of Coalinga High School is granted.

The Ode was published in the Letters to the Editor section of the Coalinga Record. The Ode was

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attributed to Cynthia, using her full name. Cynthia had not stated her last name in her online journal.

*1129 The community reacted violently to the publication of the Ode. Appellants received death threats and a shot was fired at the family home, forcing the family to move out of Coalinga. Due to severe losses, David closed the 20-year-old family business.

Based on the publication of the Ode, appellants filed the underlying complaint alleging causes of action for invasion of privacy and intentional infliction of emotional distress. In addition to respondents, appellants named Lee Enterprises, Inc., Lee Enterprises Newspapers, Inc., and Hanford Sentinel, Inc., the publishers of the Coalinga Record, as defendants. However, these publisher defendants were dismissed following their motion to strike the complaint as a SLAPP suit (strategic lawsuits against public participation) pursuant**862 to Code of Civil Procedure section 425.16. Appellants abandoned their appeal from this judgment.

DISCUSSION

1. Appellants did not state a cause of action for invasion of privacy.

[2] The right to privacy tort was recognized in 1890 based on the trend in tort law to extend protection to “ ‘the right of determining, ordinarily, to what extent [a person's] thoughts, sentiments, and emotions shall be communicated to others.’ ” (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 23, 26 Cal.Rptr.2d 834, 865 P.2d 633.) In other words, the tort protects “a ‘right “to be let alone.” ’ ” (*Ibid.*) In 1972, the right to privacy was added to the California Constitution by initiative. (*Id.* at p. 15, 26 Cal.Rptr.2d 834, 865 P.2d 633.)

[3][4] To state a claim for violation of the constitutional right of privacy, a party must establish (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) a serious invasion of the privacy interest. (*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v.*

Superior Court (2007) 42 Cal.4th 319, 338, 64 Cal.Rptr.3d 693, 165 P.3d 488.) Four distinct kinds of activities have been found to violate this privacy protection and give rise to tort liability. These activities are: (1) intrusion into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person's name or likeness. Each of these four categories identifies a distinct interest associated with an individual's control of the process or products of his or her personal life. (*Hill v. National Collegiate Athletic Assn., supra*, 7 Cal.4th at p. 24, 26 Cal.Rptr.2d 834, 865 P.2d 633.) However, to prevail on an invasion of privacy claim, the plaintiff must have conducted himself or herself in a manner consistent with an actual expectation of privacy. (*Id.* at p. 26, 26 Cal.Rptr.2d 834, 865 P.2d 633.)

[5] Here, the allegations involve a public disclosure of private facts. The elements of this tort are: “ ‘(1) public disclosure (2) of a private fact (3) which *1130 would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.’ ” (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214, 74 Cal.Rptr.2d 843, 955 P.2d 469.) The absence of any one of these elements is a complete bar to liability. (*Id.* at pp. 214–215, 74 Cal.Rptr.2d 843, 955 P.2d 469.)

a. Having been published on myspace.com, the Ode was not private.

[6] As noted above, a crucial ingredient of the applicable invasion of privacy cause of action is a public disclosure of *private facts*. A matter that is already public or that has previously become part of the public domain is not private. (*Sipple v. Chronicle Publishing Co.* (1984) 154 Cal.App.3d 1040, 1047, 201 Cal.Rptr. 665.)

[7] Here, Cynthia publicized her opinions about Coalinga by posting the Ode on myspace.com, a hugely popular internet site. Cynthia's affirmative act made her article available to any person with a computer and thus opened it to the public eye. Un-

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der these circumstances, no reasonable person would have had an expectation of privacy regarding the published material.

[8][9][10] As pointed out by appellants, to be a private fact, the expectation of privacy in the fact need not be absolute. (*Sanders v. American Broadcasting Companies* (1999) 20 Cal.4th 907, 915, 85 Cal.Rptr.2d 909, 978 P.2d 67.) Private is not equivalent to secret. **863 (*M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 632, 107 Cal.Rptr.2d 504.) “[T]he claim of a right of privacy is not ‘‘so much one of total secrecy as it is of the right to define one’s circle of intimacy—to choose who shall see beneath the quotidian mask.’’ Information disclosed to a few people may remain private.” (*Ibid.*, fns. omitted.) Nevertheless, the fact that Cynthia expected a limited audience does not change the above analysis. By posting the article on Myspace.com, Cynthia opened the article to the public at large. Her potential audience was vast.

That Cynthia removed the Ode from her online journal after six days is also of no consequence. The publication was not so obscure or transient that it was not accessed by others. (Cf. *DVD Copy Control Assn. v. Bunner* (2004) 116 Cal.App.4th 241, 251, 10 Cal.Rptr.3d 185.) The only place that Campbell could have obtained a copy of the Ode was from the internet, either directly or indirectly.

Finally, Cynthia’s last name was not a private fact. Although her online journal used only the name “Cynthia,” it is clear that her identity was readily ascertainable from her MySpace page. Campbell was able to attribute the article to her from the internet source. There is no allegation that Campbell obtained Cynthia’s identification from a private source. In fact, Cynthia’s *1131 MySpace page included her picture. Thus, Cynthia’s identity as the author of the Ode was public. In disclosing Cynthia’s last name, Campbell was merely giving further publicity to already public information. Such disclosure does not provide a basis for the tort. (*Sipple v. Chronicle Publishing Co.*, *supra*, 154 Cal.App.3d at p. 1048, 201 Cal.Rptr. 665.)

b. *The other members of Cynthia’s family do not have an independent cause of action for invasion of privacy.*

[11] Based on the direct damages they allegedly incurred due to publication of the Ode, Cynthia’s parents, David and Maria, and Cynthia’s sister, Araceli, argue that they have standing to sue for invasion of privacy. However, because the publication of the Ode was not an invasion of Cynthia’s privacy, these appellants cannot state a claim based on the same alleged invasion.

[12][13] Moreover, the right of privacy is purely personal. It cannot be asserted by anyone other than the person whose privacy has been invaded. (*Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59, 62, 121 Cal.Rptr. 429.) Thus, even if Cynthia did have an invasion of privacy claim, David, Maria and Araceli would not have standing. The Coalinga Record did not identify David, Maria and Araceli when it published the Ode. Their invasion of privacy claim is primarily based on their relationship to Cynthia and the community reaction to Cynthia’s opinions, not on respondents’ conduct directed toward them. (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1489, 232 Cal.Rptr. 668.)^{FN3}

FN3. David, Maria and Araceli rely on *Vescovo v. New Way Enterprises, Ltd.* (1976) 60 Cal.App.3d 582, 130 Cal.Rptr. 86. However, this case is distinguishable. In *Vescovo*, the right to sue for invasion of privacy was upheld based on facts showing that the defendant’s conduct in publishing a derogatory ad about the teenaged plaintiff’s mother that included the plaintiff’s address caused direct and personal physical intrusions on that plaintiff’s own solitude in her own home. (*Id.* at p. 588, 130 Cal.Rptr. 86.)

In sum, because the Ode was not private, appellants’ claim is precluded under California privacy tort law.^{FN4} Accordingly, **864 the trial court properly sustained the demurrer to the inva-

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sion of privacy cause of action.

FN4. Whether the publication of the Ode infringed on any federal copyright protection the Ode may have had (17 U.S.C. § 101 et seq.) is not before this court and we express no opinion on that issue.

2.-3.FN**

FN** See footnote *, *ante*.

***1132 DISPOSITION**

The portion of the judgment sustaining the demurrer to the intentional infliction of emotional distress cause of action is reversed. In all other respects, the judgment is affirmed. The matter is remanded for further proceedings. The parties shall bear their own costs on appeal.

WE CONCUR: ARDAIZ, P.J., and GOMES, J.

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