STATE OF MICHIGAN

COURT OF APPEALS

DIAMALYNN ARNOLD,

Plaintiff-Appellant,

v

TORIANO TREADWELL and ANTHONY THOMAS, d/b/a PHENOMENON PRODUCTIONS,

Defendants-Appellees,

and

DON DIVA SOUTH, INC., and HARP PRODUCTIONS, INC., d/b/a DON DIVA ENTERTAINMENT and d/b/a DON DIVA,

Defendants.

UNPUBLISHED
July 16, 2009

No. 283093
Oakland Circuit Court
LC No. 2007-080617-CZ

Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendants Toriano Treadwell and Anthony Thomas, d/b/a Phenomenon Productions, in this invasion of privacy and unjust enrichment case.[1] We affirm in part and reverse in part.

Defendants are photographers who display their work on several websites. Plaintiff is an aspiring model who wished to add photographs to her portfolio. She entered a contractual agreement with defendants: defendants promised to conduct several photography shoots of plaintiff free of charge, and in return, defendants received the right to post her photographs on

[1] The trial court had previously entered default judgment against defendants Don Diva South, Inc., and Harp Productions, Inc., d/b/a Don Diva Entertainment and d/b/a Don Diva ("Don Diva Magazine"). We will refer to defendants-appellees Toriano Treadwell and Anthony Thomas as "defendants" throughout this opinion.

EyeCandyModeling.com. Defendants ran EyeCandyModeling.com and several other websites, including ATAModels.net. Some visitors used the websites for recreational purposes. However, other visitors viewed the websites to search for models to hire, and defendants acted as intermediaries between these visitors and the models posted on these websites. Defendants earned between 15 and 20 percent of the income resulting from any modeling contracts generated by a model's exposure on defendants' websites.

Plaintiff alleges that after the photography shoots, defendants posted the photographs and plaintiff's profile (including her first name, state of residence, and measurements) on ATAModels.net without her authorization. She further alleges that defendants submitted a photograph to *Don Diva* Magazine for a pictorial without her authorization.[2] That photograph was later published in the "Sticky Fingers" pictorial in *Don Diva* Magazine.[3] Plaintiff's photograph was also published in a lap dance magazine with an advertisement promoting subscriptions to *Don Diva* Magazine. Following the publications, plaintiff sued defendants and *Don Diva* Magazine for invasion of privacy and unjust enrichment. The trial court granted defendants' motions for summary disposition pursuant to MCR 2.116(C)(8) and (10), dismissing plaintiff's claims of invasion of privacy and unjust enrichment.

Plaintiff first claims that the trial court erred when it granted defendants' motion for summary disposition because there was evidence that the posting on ATAModels.net portrayed her in a false light, supporting her invasion of privacy claim. We disagree. We review de novo a trial court's determination regarding a motion for summary disposition. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). "Evidence offered in support of or in opposition to the motion can be considered only to the extent that it is substantively admissible." *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *MacDonald*, *supra* at 332.

> The common-law right of privacy is said to protect against four types of invasion of privacy.

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[2] *Don Diva* Magazine is a self-described "street bible" that covers various aspects of "urban street lifestyle." Excerpts and articles regarding *Don Diva* Magazine suggest that it glamorizes violent gang culture. The magazine features interviews with convicted criminals and advises readers regarding hiding controlled substances, avoiding money-laundering charges, and buying bulletproof tires. The excerpts also suggest that the magazine demeans women by categorizing them as "freaks," "sluts," "hos," and "nymphos." Moreover, profanity abounds.

[3] Plaintiff maintains that the "Sticky Fingers" pictorial section, which contains photographs of women in various stages of dress and undress, is designed as a forum for masturbation.

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

2. Public disclosure of embarrassing private facts about the plaintiff.

3. Publicity which places the plaintiff in a false light in the public eye.

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness. [*Battaglieri v Mackinac Ctr for Pub Policy*, 261 Mich App 296, 300; 680 NW2d 915 (2004), quoting *Tobin v Civil Service Comm*, 416 Mich 661, 672; 331 NW2d 184 (1982).]

In *Early Detection Ctr, PC v New York Life Ins Co*, 157 Mich App 618, 630; 403 NW2d 830 (1986), this Court noted that a claim for false-light invasion of privacy requires "a communication broadcast to the public in general or publicized to a large number of people that places the injured party in a light that would be highly offensive to a reasonable person." In addition, "[t]he actor must have had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Id.* "[T]his cause of action cannot succeed if the contested statements are true." *Porter v City of Royal Oak*, 214 Mich App 478, 487; 542 NW2d 905 (1995). Further, "where falsity is not needed to state a claim, the gravamen of this tort is that a defendant's publication 'attribut[ed] to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position.'" *Battaglieri*, *supra* at 303-304, quoting *Duran v Detroit News, Inc*, 200 Mich App 622, 632; 504 NW2d 715 (1993).

The parties do not dispute that photographs and profile posted on ATAModels.net accurately represented plaintiff's likeness and poses. Nevertheless, plaintiff maintains that she only approved the posting on EyeCandyModeling.com, not ATAModels.net. She suggests that ATAModels.net is more sexually suggestive than EyeCandyModeling.com and that the posting falsely insinuated that she is the type of person who is willing to be shown on it.

In *Douglass v Hustler Magazine, Inc*, 769 F2d 1128, 1131, 1136 (CA 7, 1985),[4] the plaintiff agreed to have her nude photographs published in *Playboy* magazine, but some were not. Later, these photographs were published, without authorization, in a pictorial in *Hustler* magazine. *Id.* at 1132. The plaintiff sued for false-light invasion of privacy because the photographs insinuated that she was the kind of person willing to be shown naked in *Hustler* magazine. *Id.* at 1135. The jury found for the plaintiff. *Id.* at 1132. On appeal, the Seventh Circuit chronicled the voluminous evidence of the degrading and lewd content in *Hustler* magazine. *Id.* at 1135-1136. For example, the magazine pictured naked women, provided an orgasm tutorial, and advertised pornography. *Id.* The court concluded that a reasonable jury could have found it highly objectionable for the plaintiff to be falsely portrayed as the kind of person willing to be shown in *Hustler* magazine. *Id.* at 1135-1138. It rejected the defendant's claim that, because the plaintiff posed for *Playboy* magazine, the *Hustler* magazine pictorial

[4] Lower federal court decisions may be persuasive, but they are not binding on state courts. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

could not be degrading to her. *Id.* at 1136-1138. It reasoned that there were palpable differences between the content and perspectives of *Playboy* magazine and *Hustler* magazine. *Id.*

In this case, although plaintiff claimed that ATAModels.net is more sexually suggestive than EyeCandyModeling.com, she failed to offer evidence of the content on ATAModels.net to support her claims, thereby preventing review regarding whether a reasonable person would have found the website highly objectionable. Moreover, unlike the facts differentiating *Playboy* magazine and *Hustler* magazine in *Douglass*, *supra* at 1136-1138, there are no facts demonstrating palpable differences between ATAModels.net and EyeCandyModeling.com. Rather, each website was created by defendants to advertise defendants' photography and provide a forum for visitors to discover models. Given these similarities, we conclude that plaintiff has failed to present evidence supporting her contention that a reasonable person who authorized her photographs for EyeCandyModeling.com would not find it highly objectionable if similar photographs were posted on ATAModels.net. Therefore, we conclude that the trial court did not err by granting summary disposition on plaintiff's false-light claim with respect to defendants' placement of her photographs on ATAModels.net.

Next, plaintiff claims that the trial court erred when it granted defendants' motion for summary disposition because there was evidence that defendants' submission of her photograph to *Don Diva* magazine resulted in publications that portrayed her in a false light. Specifically, she maintains that the publications falsely insinuated that she willingly appeared in and endorsed *Don Diva* magazine. She claims that these insinuations are highly objectionable because the content of the magazine is offensive. Again, we disagree.

Even if the portrayal of plaintiff was false and highly objectionable, defendants must have had knowledge of or acted in reckless disregard of the falsity of the publicized matter and the false light in which plaintiff would be placed to establish this cause of action. *Early Detection Ctr*, *supra* at 630. Courts use the following actual malice test for this element of false-light invasion of privacy:

> "Actual malice is defined as knowledge that the published statement was false or as reckless disregard as to whether the statement was false or not. Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. 'Reckless disregard' is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published." [*Battaglieri*, *supra* at 304, quoting *Ireland v Edwards*, 230 Mich App 607, 622; 584 NW2d 632 (1998).]

Where a plaintiff claims an injury from an allegedly harmful insinuation, the plaintiff must show by clear and convincing evidence that the defendant "intended or knew of the implications that the plaintiff is attempting to draw . . . ." *Id.* at 305, quoting *Saenz v Playboy Enterprises, Inc*, 841 F2d 1309, 1318 (CA 7, 1988).

There is no evidence that defendants knew of or intended a highly objectionable portrayal of plaintiff. Rather, they claimed that they submitted plaintiff's photograph for the pictorial solely to garner national exposure for her modeling career. Treadwell reviewed an issue of the magazine beforehand. He noted that it had an "underground [or] . . . street base," but he was unaware of the "Sticky Pages" section. In addition, defendants had no knowledge of the lap dance magazine advertisement until plaintiff filed suit. Even if defendants failed to investigate *Don Diva* magazine sufficiently to discover its apparent portrayal of gang culture, debasement of women, and use of profanity, plaintiff presented no clear and convincing evidence suggesting that defendants had serious doubts concerning the insinuations that could arise from their submission. Absent a genuine issue of material fact regarding defendants' knowledge or reckless disregard, we conclude that the trial court did not err by granting summary disposition on plaintiff's false-light claim with respect to defendants' submission of a photograph to *Don Diva* magazine.

Plaintiff also claims that the trial court erred when it granted defendants' motion for summary disposition of her appropriation claim. Plaintiff argues that the trial court improperly analyzed whether her image has significant commercial value, which she maintains is an element of the right of publicity, not an element of appropriation. Further, plaintiff argues that there was adequate evidence of appropriation to survive summary disposition. Although we conclude that the trial court did not err when it analyzed whether plaintiff's image has significant commercial value, we conclude that a question of fact exists regarding whether plaintiff's image has significant commercial value and agree with plaintiff's contention that she presented sufficient evidence to survive summary disposition of her appropriation claim.

"The invasion of privacy cause of action for appropriation is founded upon 'the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others.'" *Battaglieri*, *supra* at 300-301, quoting 3 Restatement Torts, 2d, § 652(C), cmt a. Unlike plaintiff's false-light claim, a cause of action for appropriation does not require an allegation "that a statement about a plaintiff was an intrusion upon seclusion or private matters or that it was in any way false. Instead, any unauthorized use of a plaintiff's name or likeness, however inoffensive in itself, is actionable if that use results in a benefit to another." *Id.* at 301.

In the Sixth Circuit, appropriation "has become known as the 'right of publicity."' *Carson v Here's Johnny Portable Toilets, Inc*, 698 F2d 831, 834 (CA 6, 1983); see also *Hauf v Life Extension Foundation*, 547 F Supp 2d 771, 777-778 (WD Mich, 2008). Whereas the other theories of invasion of privacy protect a plaintiff's right "'to be let alone,"' the "right of publicity" protects a plaintiff's "pecuniary interest in the commercial exploitation of his identity." *Id.*, quoting *Zacchini v Scripps-Howard Broadcasting Co*, 433 US 562, 573; 97 S Ct 2849; 53 L Ed 2d 965 (1977). This protection encourages a plaintiff's further investment of time and resources necessary to develop the property right. See *Carson*, *supra* at 835; *Zacchini*, *supra* at 573. By tying appropriation to the right of publicity, a plaintiff must prove (1) that she has a pecuniary interest or significant commercial value in her identity, and (2) that the defendants engaged in commercial exploitation of her identity. *Hauf*, *supra* at 778. Because appropriation is "'in the nature of a property right,'" *Battaglieri*, *supra* at 300-301, quoting Restatement Torts, 2d, § 652(C), cmt a, it follows that a plaintiff should demonstrate that right with proof of a pecuniary interest of significant commercial value.

In this case, there is a genuine issue of material fact regarding whether plaintiff had a pecuniary interest or significant commercial value in her identity and whether defendants exploited her identity for their benefit. First, a plaintiff need not be a national celebrity to demonstrate significant commercial value. *Hauf, supra* at 778. Rather, the plaintiff '"must demonstrate that there is value in associating an item of commerce with [her] identity."' *Id.*, quoting *Landham v Lewis Galoob Toys, Inc*, 227 F3d 619, 624 (CA 6, 2000). Moreover, "'[t]he defendant's act of misappropriating the plaintiff's identity . . . may be sufficient evidence of commercial value.'" *Hauf, supra* at 778, quoting *Landham, supra* at 624. Here, defendants' posting of plaintiff's photographs on ATAModels.net and their submission of her photograph to *Don Diva* magazine constitute sufficient evidence of the commercial value in plaintiff's likeness. Nevertheless, additional evidence presented by plaintiff, specifically, that plaintiff has contracted to model clothing in a fashion show, to play an extra in a music video, and to work as an exotic dancer, supports a finding that there is value in associating an item of commerce with plaintiff's identity. Second, defendants benefited from the use of plaintiff's photographs. The posting on ATAModels.net demonstrated defendants' photography skills and the pictorial in *Don Diva* magazine advertised their website, EyeCandyModeling.com. The trial court erred when it granted defendants' motion for summary disposition of plaintiff's appropriation claim.

Finally, plaintiff claims that the trial court erred when it granted defendants' motion for summary disposition of her unjust enrichment claim. We disagree. This Court has defined unjust enrichment as the "'(1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.' When unjust enrichment exists, 'the law operates to imply a contract in order to prevent it.'" *Sweet Air Inv, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007), quoting *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 327-328; 657 NW2d 759 (2002). However, the law will not imply a contract where an express one exists. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). Because the parties had an express verbal contract regarding the use of the photographs, the trial court could not imply a contract and it did not err when it granted defendants' motion for summary disposition in this regard.

We affirm the portion of the trial court's order granting defendants' motion for summary disposition of plaintiff's false light and unjust enrichment claims, but we reverse the portion of the order dismissing plaintiff's appropriation claim and remand for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra