

FAMILY MEMBERS HAVE A RIGHT OF PRIVACY IN PHOTOGRAPHS OF DEAD DAUGHTER AND SIBLING. LAW OFFICERS OWE A DUTY OF CARE NOT TO E-MAIL PHOTOGRAPHS

Can a family member claim a right of privacy in gruesome photos of a dead loved one? Yes. The deceased person does not have a right of privacy. The right of privacy of the decedent is extinguished at death. Surviving family members do not have a right of privacy in written or pictorial representations of the life of a decedent. In *Catsouras v. Dept. of California Highway Patrol*, 2010 DJDAR 1703, Daily Journal, January 29, 2010, however, the California Court of Appeal, Fourth Appellate District, Division Three, in Santa Ana, recently held that relatives do have a right of privacy in the gruesome photographs taken during the investigation after the death of their daughter and sibling which were e-mailed on Halloween by CHP officers to friends and family for “shock” value. The photographs of the decapitated body of Nichole Catsouras were, in turn, forwarded to others and spread across the Internet and appeared on thousands of websites. The Appellate Court reversed the sustaining of demurrers without leave to amend of two CHP officers and the grant of a motion for judgment on the pleadings in favor of the California Highway Patrol.

The Court held that the officers owed a duty of care to the family members of the decedent because the family members had a privacy right in her death images. It also held the family could maintain causes of action for intentional infliction of emotional distress and negligence supporting a claim for emotional distress. The CHP could be held vicariously liable. There was no immunity for these causes of action. The family, however, could not maintain causes of action for civil rights violations.

The Court recognized that there were certain instances in which matters pertaining to the dead or dying might involve issues of public interest – for example, if used for education or in the news. The Court also noted the

constitutional protection afforded to the media and press had to be considered when imposing civil liability for invasion of privacy by the press or the media. In this instance, there was no public interest or freedom of the press involved. When the officers e-mailed the photographs, they were not involved in any legitimate investigatory or law enforcement activities. The photographs were sent for pure shock value. There has to be a balancing of legitimate public interest, and the customs and conventions of the community. “The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives.” Such pointless invasion “serves no legitimate public interest and is not deserving of protection.”

The CHP officers owed a duty of care to the family of the decedent, even though the Court first held there was no “special relationship” between the officers and the

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plaintiffs. The Court relied upon well established factors to find that a duty was owed to the plaintiff, including: (1) foreseeability of harm to plaintiff, (2) closeness of the connection between the defendant's conduct and the injury suffered, (3) moral blame attached to the defendant's conduct, (4) policy of preventing future harm, (5) and extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care.

It was unquestionably foreseeable that the parents and siblings of a decapitated teenager would suffer emotional harm upon seeing the photographs of her mutilated remains on the Internet. The Court disagreed with the defendants' contention it was not foreseeable that the photographs would be forwarded to thousands of Internet users "in these days of Internet sensationalism." There was no question of moral blame. "Concepts of morals and justice clearly dictate that those upon whom we rely to protect and serve ought not to be permitted to make our deceased loved ones the subjects of Internet spectacle and then claim a lack of duty."

The Court rejected defendants' contention that finding a duty of care would impose an intolerable burden on the CHP and its officers. If the CHP had a policy prohibiting the conduct, it would provide an incentive to enforce it. If it did not have such a policy, it would be an incentive to establish one.

The Court was critical of the CHP officers and did not hesitate in conveying that criticism: "It is a sad day, to be sure, when those upon whom we rely to protect and serve do the opposite, and make the decapitated corpse of a teenage girl the subject of international gossip and disrespect, and inflict devastating emotional harm on the parents and siblings of that girl. The CHP should know better. Every one of its officers should know better. The CHP is in a position to ensure that this does not happen again."

Plaintiffs may try to use the reasoning of this decision to argue for liability for e-mailing photographs obtained and/or maintained by insurance companies, law offices, copier services, and others who have access to these types of photographs being forwarded to friends for entertainment, rather than forwarded for business purposes.

- Laura J. Barns

EXCESSIVE FORCE CLAIMS CANNOT BE DECIDED ON EXTENT OF INJURY, ONLY ON REASONABLENESS OF FORCE

In *Wilkins v. Gaddy*, the U.S. Supreme Court held that a prisoner struck by a corrections officer could go forward with his claim for excessive force even though a trial court had dismissed the complaint on the grounds that the alleged injuries were "*de minimis*," i.e., negligible. The correct inquiry for a court in deciding whether to let a case go forward, is not whether the plaintiff's injuries were minimal, but rather whether the type and amount of force used was excessive under the circumstances. While this case was brought under the Federal Civil Rights Act, 42 U.S.C. Section 1983, it is likely that the same principles could be applied to any excessive force case.

In *Wilkins*, Jamey Wilkins was a North Carolina state prisoner who alleged that he was "maliciously and sadistically" assaulted without provocation by corrections officer Gaddy. Allegedly, Gaddy "snatched [Wilkins] off the ground and slammed him onto the concrete floor," and "then proceeded to punch, kick, knee and choke [Wilkins] until another officer had to physically remove him from [Wilkins]."

As far as injuries, the plaintiff alleged a bruised heel, lower back pain, increased blood pressure, migraine headaches, dizziness, and psychological trauma including panic attacks. The trial court noted that many of these conditions were preexisting and on its own motion, dismissed the case. It was noted that he had prior high blood pressure and mental health issues even before the assault and the Court determined that a bruised heel was a negligible injury.

The U.S. Supreme Court rejected the trial court's approach. An excessive force claim cannot be dismissed simply because the injuries are arguably minimal. The "core judicial inquiry" is not the extent of the injury, but rather, whether the force applied was reasonable under the circumstances to accomplish the goal of restraint, or whether it was excessive under the circumstances.

The Court noted that the extent of injury was relevant to the amount of force used, but not by itself the deciding factor. In other words, if someone is claiming that he was

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INSURERS PROTECTED FROM THE FALLACY OF THE INTENTIONAL “ACCIDENT”

There is a common misconception that home owner's insurance provides coverage for any and all issues related to or occurring in one's home. In particular, the average home insurance policy owner assumes they are covered from lawsuits as long as the incident occurs on their property. This is not always true, and particularly when the "accident" really amounts to intentional conduct.

Though the assumption that all incidents occurring in the home are covered is pervasive in the general population, we will highlight one of the legal distinctions which may in fact exclude the homeowner from coverage.

Namely, an occurrence is not an "accident" where the consequences were unforeseen, but the conduct was intentional. The larger question is when is it the duty of the issuing insurance company to defend a suit which potentially seeks damages within the coverage of the policy? In this instance, an insurance policy defined the obligation to the policy holder by stating that the policy covers "those damages which an insured becomes legally obligated to pay because of property damages resulting from an occurrence to which this coverage applies." Furthermore, an occurrence is defined as "an accident including exposure to conditions which results during the policy period property damage."

To most average policy holders, the focus of the preceding statement is the term "accident." Many policy holders would assume the policy is stating "We will defend you, as long as you did not mean to do whatever it was that you did." This makes sense, as it would be unfair and unsustainable if insurance companies were forced to defend cases where the policy owner willfully and intentionally caused damage.

However, one must carefully investigate what constitutes an accident. While the layman's definition of an accident tends to focus on the unforeseen result of the conduct, the court refers to the nature of the

conduct itself, rather than to its consequences. An accident does not occur when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage. This is a vital distinction.

We turn our attention to court cases which highlight the court's interpretation of what constitutes an accident. The case of *Allstate Ins. Co v. Saluhutdin* centers on a property clash between the Saluhutdins and the Alcantaras. The Alcantaras began building a fence on the disputed land, aligning the fence with a string tied to a post the Saluhutdins believed they owned. Mrs. Saluhutdin, believing the post belonged to her, removed the string, ultimately leading to an action by the Alcantaras for trespass and emotional distress.

What's interesting though is what happened next. The Saluhutdins tendered their defense to their insurance company. However, the court rejected the Saluhutdins' contentions that Mrs. Saluhutdin's actions constituted an "accident" and that the resultant lawsuit should be defended under her homeowner's policy. Specifically, the court made the distinction that Mrs. Saluhutdin intentionally cut the string. Whether she believed she was within her rights to do so was not important. The court stated "The intentional act of Mrs. Saluhutdin in removing the string remains the 'crucial act' in the present case ... She claims that she didn't intend to trespass because she thought it was her land. But, that doesn't change the fact that the damage was the result of a deliberate and intentional act. Her motive or rationale for acting in this manner is irrelevant."

In *Fire Insurance Exchange v. Bourguignon*, the limitations on what is classified as an accident in home owner's insurance was also discussed. Kenneth and Dorothy Bourguignon owned property which adjoined property owned by Louise Leach. Louise Leach granted the Bourguignons an access easement over a portion of her property. That is to say, Ms. Leach gave the Bourguignons permission to build a structure which overlapped her property by five and a half feet by signing

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punched, kicked, thrown around, slammed to the ground, etc., and all he had to show for it was a single bruise on his heel, the mild extent of actual injury would be relevant to a determination of how much force was actually used. Normally, however, those are factual questions for the jury to decide. And while the Court is sometimes called on to decide whether the facts show excessive force or not, such as on an MSJ or Rule 56 motion (the Federal equivalent of an MSJ), the minimal extent of injury would not be a deciding factor, rather, it would be inferential evidence as to the amount of force used.

Wesierski & Zurek defends municipalities, grocery stores, hotels, and many other public and private defendants from excessive force and false arrest claims. There are many immunities and defenses that apply even to private defendants in such cases. Please feel free to call the firm to consult on any such issues that may arise.

- Paul J. Lipman

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a “Lot Line Adjustment” application which was submitted and subsequently approved by the City of Big Bear.

In 2002, Louise Leach sold her property to the Parsons. The Parsons disputed the validity of the previously signed Lot Line Adjustment, noting that Louise Leach had conveyed a one-third interest in the property to her two sons prior to signing the Lot Line Adjustment. Neither son had signed the Adjustment form.

In the ensuing lawsuits, the Bourguignons tendered their defense to petitioner Fire Insurance Exchange, who had issued them a homeowner’s policy in 1999. Fire Insurance Exchange declined to defend the suit and requested summary judgment on the grounds that Fire Exchange does not have an obligation to defend against nonaccidental occurrences. As the Bourguignons had intentionally built a portion of their structure over the property line (regardless of the fact that they had assumed they were within their rights to do so), any losses to the Parsons were not the result of an accident.

Though Fire Insurance’s request for summary judgment was denied because there were triable issues of fact, the underlying logic for denying the claim is firmly established. Therefore, on a case by case basis, an early determination can often be made as to whether the insureds’ actions constitute an “accident” providing justification for denial of claims where damages occur due to intentional conduct.

- Minh Hoang

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