No.: 12-1923

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ANN BOGIE,

Plaintiff-Appellant,

v.

JOAN ALEXANDRA SANGER ROSENBERG a/k/a JOAN RIVERS, ET AL.,

Defendants-Appellees.

APPEAL OF A CIVIL CASE FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN
THE HONORABLE JUDGE WILLIAM M. CONLEY

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT, ANN BOGIE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules Appellate Procedure and Rule 26.1(c) of the Seventh Circuit Rules, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case.

1) Ann Bogie (Appellant)

2) Robert Sirianni (Attorney for Appellant);

3) Brownstone, P.A. (Law Firm representing Appellant);

4) Mark Allen Seidl (Attorney for Appellant in District Court);

5) Seidl & Stingl (Law Firm representing Appellant in District Court);

6) Joan Alexandra Sanger Rosenberg a/k/a Joan Rivers (Appellee);

7) IFC Films LLC (Appellee);

8) IFC Entertainment Holdings LLC (sole member of Appellee IFC Films LLC);

9) Rainbow Program Holdings LLC (sole member of IFC Entertainment Holdings LLC);

10) Rainbow Media Enterprises, Inc. (sole member of Rainbow Program Holdings LLC);

11) Break Thru Films, Inc. (Corporate Appellee);

12) Ricki Stern (Appellee);

13) Annie Sundberg (Appellee);

14) Seth Keal (Appellee);

15) Autumn Nero (Attorney for Appellees);

16) David Edwin Jones (Attorney for Appellees);

17) Michael J. Mohr (Attorney for Appellees);

18) Perkins Coie LLP (Law Firm representing Appellees)

19) The Honorable William M. Conley (Chief Judge for the United States District Court for the Western District of Wisconsin).

/S/ Robert Sirianni
Robert Sirianni, Esquire
Attorney of Record for Appellant

STATEMENT REGARDING ORAL ARGUMENT

The Appellant, Ann Bogie ("Ms. Bogie"), believes the issues on appeal are adequately addressed in the Initial Brief and, therefore, does not request oral argument in this case.

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STATEMENT OF JURISDICTION

This Jurisdictional Statement is submitted pursuant to Federal Rule of Appellate Procedure 28(a)(4)(A) and Seventh Circuit Rule 28(a). Appellees removed this matter from Wisconsin state court, invoking the District Court's diversity jurisdiction as conferred under 28 U.S.C. § 1332(a). The citizenship of the parties and their members is follows:

a. Appellant Ann Bogie ("Ms. Bogie") is a citizen of the State of Wisconsin;

b. Appellee Joan Alexandra Sanger Rosenberg a/k/a Joan Rivers ("Joan Rivers") is a citizen of the State of New York;

c. Appellee IFC Films LLC is a Delaware limited liability company and its principal place of business is in the state of New York. The sole member of IFC Films LLC is IFC Entertainment Holdings LLC.

d. IFC Entertainment Holdings LLC is a Delaware limited liability company and its principal place of business is in the state of New York. The sole member of IFC Entertainment Holdings LLC is Rainbow Program Holdings LLC.

e. Rainbow Program Holdings LLC is a Delaware limited liability company and its principal place of business is in the state of New York. The sole member of Rainbow Program Holdings LLC is Rainbow Media Enterprises, Inc.

f. Rainbow Media Enterprises, Inc. is incorporated in the state of Delaware, and its principal place of business is in the state of New York;

a. Corporate Appellee Break Thru Films, Inc., is incorporated in the State of New York, and its principal place of business is also in the State of New York;

b. Appellee Ricki Stern is a citizen of the State of New York;

c. Appellee Annie Sundberg is a citizen of the State of New York;

d. Appellee Seth Keal is a citizen of the State of New York;

Accordingly, as the parties are completely diverse and Ms. Bogie seeks damages in excess of $75,000, exclusive of interest and costs, the District Court properly exercised diversity jurisdiction under 28 U.S.C. § 1332(a).

Ms. Bogie appeals the Opinion and Order ("Order") entered by the United States District Court for the Western District of Wisconsin ("District Court") on March 16, 2012. The District Court dismissed her Amended Complaint with prejudice pursuant to Rule 12(b)(2) and (6) of the Federal Rules of Civil Procedure. The District Court issued its Final Judgment on March 20, 2012. Ms. Bogie filed her Notice of Appeal on May 16, 2012. Jurisdiction lies in this Honorable Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Ms. Bogie alleged that, without her knowledge or consent, Appellees filmed her backstage after a performance by comedienne Joan Rivers and included her interaction with Ms. Rivers in a documentary film sold for profit.

Does Ms. Bogie state a claim for invasion of privacy under Wisconsin law?

STATEMENT OF THE CASE

Ms. Bogie hereby appeals the dismissal of her Amended Complaint with prejudice. Ms. Bogie alleged that, without her knowledge or her consent, Appellees filmed her backstage after a performance by Joan Rivers and reproduced her interaction with Ms. Rivers in a documentary film, "Joan Rivers: A Piece of Work." Appellees then sold the film for profit.

Ms. Bogie claimed the Appellees invaded her privacy under Wisconsin law by (1) intruding upon her privacy in a highly offensive manner in a place that a reasonable person would consider private and (2) appropriating her image for trade purposes without first having obtained her written consent. The District Court held that Ms. Bogie failed to state a claim. This appeal follows.

STATEMENT OF THE FACTS

A. Factual Allegations Raised in the Complaint

The relevant facts, as pled in the Amended Complaint, are as follows:

Between February 1, 2009 and June 11, 2010, Appellees collaborated to produce and distribute a cinematic movie for public viewing entitled "Joan Rivers: A Piece of Work," a documentary film about the renowned comedienne Joan Rivers. (J.A. at 2, ¶ 11). The documentary includes a performance by Joan Rivers in February of 2009 at the Lake of the Torches Casino located in Lac Du Flambeau, Wisconsin. (J.A. at 3-4, ¶ 18).

Ms. Bogie attended the performance, and, after its conclusion, visited with Joan Rivers backstage. (J.A. at 4, ¶ 19). The public was prohibited from entering the backstage area. (J.A. at 4, ¶ 19). Appellees filmed Ms. Bogie's interaction with Rivers without her knowledge or consent. (J.A. at 4, ¶ 20).

On or about June 11, 2010, Appellees released the documentary in theatres throughout the United States, including theaters in Wisconsin. (J.A. at 3, ¶ 13). Appellees included an exchange between Ms. Bogie and Joan Rivers in the documentary without her knowledge or consent. (J.A. at 4, ¶ 20). The movie has been viewed by a substantial number of Wisconsin citizens. (J.A. at 3, ¶ 13).

Appellees released the documentary as a DVD for sale on or about December 14, 2010. (J.A. at 3, ¶ 14). The DVD was sold to, and viewed by, a substantial number of Wisconsin citizens. (J.A. at 3, ¶ 15). Appellees also sold the documentary for viewing on cable television and pay per view, including within the state of Wisconsin. (J.A. at 3, ¶ 16).

B. Contents of DVD: "A Thing Called Money"

Ms. Bogie attached a copy of the documentary to her Amended Complaint, and the District Court independently examined the documentary in connection with its review of the sufficiency of her pleadings. (J.A. at 9 n.3). Because the District Court relied upon the words and images displayed in the documentary in its Order, the documentary is attached hereto as an exhibit for consideration on appeal. (*See*

J.A. Exhibit "A"). The only portion of the documentary relevant to this appeal is Segment 12, which is entitled "A Thing Called Money."

As alleged in the Amended Complaint and found by the District Court, Segment 12 features Ms. Rivers travelling through Wisconsin and speaking disparagingly about the State and its citizens. (J.A. at 3, ¶ 17); (J.A. at 9-10); (J.A. Exhibit "A" at 1:02:12-1:05). At a certain point during her performance, Ms. Rivers engages with a member of the audience. The audience member chides Rivers regarding one of her jokes, informing her that a quip is not very funny to someone with a deaf son. (J.A. Exhibit "A" at 1:05:42).

Ms. Rivers then blasts the audience member with the following riposte:

> **Rivers**: I happen to have a deaf mother. Oh you stupid ass. Let me tell you what comedy is about.
>
> **Audience Member**: Go ahead and tell me.
>
> **Rivers**: Oh please. You are so stupid. Comedy is to make everybody laugh at everything and deal with things. You idiot! My mother is deaf, you stupid son of a bitch. Don't tell me. And just in case you can hear me in the hallway, I lived for nine years with a man with one leg. Okay, you asshole. And we're going to talk about what it's like to have a man with one leg who lost it in World War II and then went back to get it 'cause that's fucking littering. So don't you tell me what's funny.
>
> . . . .

(J.A. Exhibit "A" at 1:05:43-1:06:25).

After the performance, the scene shifts to the backstage area of the casino, with the camera displaying Ms. Rivers signing a book for Ms. Bogie. (J.A. Exhibit "A" at 1:07:50). Ms. Bogie and Rivers then share the following exchange:

Ms. Bogie: You are so . . . I never laughed so hard in my life.

Rivers: Oh, you are a good laugher and that makes such a difference.

Ms. Bogie: Oh, I know. And that that rotten guy . . . .

Rivers: Oh, I'm sorry for him.

Ms. Bogie: I was ready to get up and say . . . tell him to leave.

Rivers: He has a, he has a deaf son.

Ms. Bogie: I know.

Rivers: That's tough.

Ms. Bogie: But he's gotta realize that this is comedy.

Rivers: Comedy.

Ms. Bogie: Right.

(J.A. Exhibit "A" at 1:07:50-1:08:05).

The camera shows two other individuals besides Ms. Bogie and Rivers in the backstage area. (J.A. Exhibit "A" at 1:07:50-1:08:05). Ms. Bogie never looks at the camera or otherwise gives any indication that she is aware that she is being filmed. (J.A. Exhibit "A" at 1:07:50-1:08:05). In the subsequent scene, as Ms.

Rivers exits the building, she admits that she felt "terribly sorry for the man with the deaf son." (J.A. Exhibit "A" at 1:08:06-1:08:10).

C. Procedural History and Findings of the District Court

In her Amended Complaint, Ms. Bogie availed herself of two species of invasion of privacy recognized as causes of action under Wisconsin law. First, Ms. Bogie claimed that her filming violated Section 995.50(2)(a), Wisconsin Statutes, which authorizes recovery for "[i]ntrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass." (J.A. at 4, ¶ 24); WIS. STAT. § 995.50(2)(a).

Second, Ms. Bogie claimed that the subsequent use of her identity during the sale and distribution of the documentary without her knowledge or consent contravened Section 995.50(2)(b), Wisconsin Statutes, which prohibits in pertinent part the "use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person." (J.A. at 5, ¶ 25); WIS. STAT. § 995.50(2)(b). Appellees collectively moved to dismiss her Amended Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[1] (J.A. at 7)

[1] Ms. Bogie does not appeal the dismissal of Appellees Stern, Sundberg and Keal for lack of personal jurisdiction.

The District Court held that Ms. Bogie could not state a claim under Section 995.50(2)(a) because "no reasonable person could have had an expectation of privacy in the backstage area of the casino where the filming took place." (J.A. at 21). The District Court additionally held her allegations "fail to support any finding that the alleged intrusion was 'of a nature highly offensive to a reasonable person.'" (J.A. at 22 (quoting WIS. STAT. § 995.50(2)(a)). Finally, the District Court concluded that Ms. Bogie could not state a claim under Section 995.50(2)(b) because her role in the film was "incidental" and not "substantial," though the language of the statute contains no reference to incidental or substantial claims. (J.A. at 24-26).

Ms. Bogie now appeals the dismissal of her Amended Complaint for failure to state a claim for invasion of privacy under Wisconsin law.

SUMMARY OF ARGUMENT

The District Court erred in three respects. First, the District Court lacked a sufficient evidentiary basis for its finding that no reasonable person could have had an expectation of privacy in the backstage area of the casino where the filming took place. Second, the District Court erroneously concluded that no reasonable person could have found the surreptitious filming of Ms. Bogie's conversation with Ms. Rivers and the subsequent inclusion of the footage in a documentary film without authorization to be highly offensive. Third, the District Court erred in

constructing a bar on "incidental" instances of appropriation under Section 995.50(2)(b), where the plain language of the statute contains no such limitation. This Court should reverse the district court and remand this matter for further proceedings.

ARGUMENT

I. THE DISTRICT COURT LACKED A SUFFICIENT EVIDENTIARY BASIS FOR ITS FINDING THAT NO REASONABLE PERSON COULD HAVE HAD AN EXPECTATION OF PRIVACY IN THE BACKSTAGE AREA OF THE CASINO.

A. Standard of Review

This Court reviews *de novo* a district court's grant of a motion to dismiss under Rule 12(b)(6). *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). In evaluating the sufficiency of a complaint, the Court must construe it in the light most favorable to the non-moving party, accept all well-plead facts as true, and draw all inferences in favor of the non-movant. *Id*.

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to plead a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Therefore, to "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief

that is plausible on its face.'" *Id*. (quoting *Twombly*, 550 U.S. at 570). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 663-64.

B. Argument on the Merits

Under the foregoing standard, Ms. Bogie stated a claim for invasion of privacy under Wisconsin law. In her Amended Complaint, Ms. Bogie alleged that Appellees filmed her backstage after a performance by Joan Rivers and reproduced her interaction with Ms. Rivers in a documentary film, "Joan Rivers: A Piece of Work." (J.A. at 4, ¶ 20). Appellees then sold the film for profit. (J.A. at 3, ¶¶ 13-16). All of these actions were taken without Ms. Bogie's knowledge or consent. (J.A. at 4, ¶ 20).

The District Court dismissed her claim, based in part upon its finding that "no reasonable person could have had an expectation of privacy in the backstage area of the casino where the filming took place." (J.A. at 21). As an initial matter, the court misapprehends the inquiry on a motion to dismiss filed under Rule 12(b)(6). The District Court is only required to determine whether Ms. Bogie stated a plausible claim for relief. *Iqbal*, 556 U.S. at 679. Whether the claim is meritorious is an issue better resolved at the summary judgment stage of the litigation. *See Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) ("it is

not necessary [when considering a motion to dismiss] to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences").

Even on its own terms, the court clearly lacked sufficient evidence on the limited record before it to reach its conclusion. Section 995.50(2)(a), Wisconsin Statutes, codifies the common law tort of intrusion, which the statute defines as an "intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass." WIS. STAT. § 995.50(2)(a); *see generally* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389-92 (1960) (collecting cases and sketching the contours of intrusion at common law). As the subsection requires intrusion into a place that a reasonable person would consider private, a defendant is not subject to liability for filming a person in a public place. *See, e.g.*, *Ladd v. Uecker*, 780 N.W.2d 216, 222 (Wis. App. 2010) (no invasion of privacy for photographing person in baseball stadium); *see also Munson v. Milwaukee Bd. of Sch. Directors*, 969 F.2d 266, 271 (7th Cir. 1992) (applying Wisconsin law and finding no intrusion where surveillance occurred on public streets and highways).

However, in closer cases, where filming does not occur in public, courts typically decline to answer the fact-specific question of whether a reasonable person would consider a place private on pretrial motions. *See, e.g.*, *Stessman v.*

Am. Black Hawk Broad. Co., 416 N.W.2d 685 (Iowa 1987) (reversing grant of motion to dismiss where complaint alleged unauthorized filming occurred in restaurant); *Shulman v. Group W Productions, Inc*., 955 P.2d 469, 490-91 (Cal. 1998) (reversing summary judgment and finding triable issue of fact regarding reasonable expectation of privacy of injured citizen filmed in rescue helicopter); *Turnbull v. Am. Broad. Cos.*, CV 03-3554 SJO(FMOX), 2004 WL 2924590 (C.D. Cal. 2004) (denying summary judgment where plaintiffs alleged filming with hidden camera occurred in acting workshops); *see also Emiabata v. Marten Transp., Ltd.*, 574 F. Supp. 2d 912, 917 (W.D. Wis. 2007) (denying motion to dismiss and finding that refrigerator on drivers' trucks could be a private place); *Fischer v. Mt. Olive Lutheran Church*, 207 F. Supp. 2d 914, 927 (W.D. Wis. 2002) (denying summary judgment: whether church office used by church employee is private place is a question of fact); *Muwonge v. Eisenberg*, 07-C-0733, 2008 WL 753898 (E.D. Wis. Mar. 19, 2008) (denying motion to dismiss where partner in law firm claimed right to privacy in office violated).

Courts are reluctant to prematurely dismiss these claims because, as recognized by the California Supreme Court, the expectation of privacy in claims of intrusion "is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render

the expectation unreasonable as a matter of law." *Sanders v. Am. Broad. Companies, Inc.*, 978 P.2d 67, 72 (Cal. 1999).

In *Sanders*, a television reporter obtained employment as a "telepsychic" with the Psychic Marketing Group and covertly videotaped her conversations with coworkers. *Sanders*, 978 P.2d at 68. After ABC broadcast the video, the plaintiff brought a claim for intrusion. *Id*. Although the jury found for the plaintiff on the intrusion claim, the appellate court reversed the judgment, finding that the plaintiff could have had no reasonable expectation of privacy in his workplace conversations because such conversations could be overheard by others in the shared office space. *Id*.

The California Supreme Court reversed the decision. *Id*. It opined that "whether a reasonable expectation of privacy is violated by such recording depends on the exact nature of the conduct and all the surrounding circumstances." *Id*. It further stated that "liability under the intrusion tort requires that the invasion be highly offensive to a reasonable person, considering, among other factors, the motive of the alleged intruder." *Id*. Although the court reserved judgment on the degree of offensiveness, it held that an intrusion action "is not defeated as a matter of law simply because the events or conversations upon which the defendant allegedly intruded were not completely private from all other eyes and ears." *Id*.

In other words, whether an individual has a reasonable expectation of privacy in a semi-private setting is a fact-intensive determination. Consequently, it is ordinarily inappropriate to dispose of such an intrusion claim on a motion to dismiss. *See Stessman*, 416 N.W.2d at 688 (noting the "danger" of disposing of claims on a motion to dismiss). In *Stessman*, the plaintiff claimed that a television reporter invaded her privacy by filming her while she dined in a restaurant. *Id.* at 685. A television network subsequently broadcast the footage. *Id.* The trial court found that the plaintiff failed to state a cause of action and dismissed the case. *Id*. at 686. On appeal, the defendants argued for affirmance, noting that the plaintiff was "already in public view" in a restaurant open to the public, "where anyone could observe her." *Id*. at 687.

The Iowa Supreme Court reversed the dismissal. *Id*. at 688. It explained that dismissal was inappropriate on a motion to dismiss because the actual circumstances surrounding the filming were unknown. *Id*. at 687. The court hypothesized that the plaintiff might have been "seated in the sort of private dining room offered by many restaurants," in which case the intrusion might have disturbed her seclusion in an actionable manner. *Id*. As such, the Iowa Supreme Court held that the lower court erred in dismissing her complaint as insufficient as a matter of law. *Id*. at 688.

As in *Stessman*, the District Court here lacked an adequate evidentiary basis for its conclusion that Ms. Bogie had no expectation of privacy backstage. In order to justify its decision, the District Court misrepresents the contents of Segment 12, noting that the "conversation between Bogie and Rivers occurred in what appears to be a relatively-crowded backstage area, with the din of chatter in the background." (J.A. at 21). The District Court further observes that the "camera, and thus the camera person, appear to be in close proximity to Rivers and Bogie" and that Ms. Bogie "appears to be standing in a line waiting to talk with Rivers and have her sign a book." *Id*.

The District Court describes a crowded and bustling backstage autograph session. But the footage shown in Segment 12 belies this description. There is no evidence that the backstage area is crowded; only two people, aside from Ms. Bogie and Rivers, stand in the background. (J.A. Exhibit "A" at 1:07:50-1:08:05). There is no "din of chatter" audible; only Ms. Bogie and Ms. Rivers can be heard speaking. *Id*. There is no line of people waiting to have books signed; only Ms. Bogie is shown getting an autograph. *Id.*

Nor does the footage support the suggestion that the "camera, and thus the camera person, appear to be in close proximity to Rivers and Bogie." It is impossible to tell whether the footage was shot from close range or whether it was shot from afar with the camera lens zoomed in on its subjects. Even if it were shot

in their immediate proximity, Appellees could have, as in *Sanders*, employed some form of hidden camera without alerting Ms. Bogie to the fact that she was being filmed. The point is that Segment 12 reveals remarkably little about the backstage environment, the particular circumstances surrounding the filming and, ultimately, Ms. Bogie's expectation of privacy in the place where the intrusion occurred.

It is reasonable for a person to expect some degree of privacy in a secluded backstage area. Indeed, tales of libidinous backstage encounters are the stuff of rock'n roll lore. Surely, this Court would not countenance the dismissal of an invasion of privacy claim founded upon the covert filming of a carnal act simply because it occurred backstage. Ms. Bogie's encounter with Rivers is rather less racy, but she nonetheless had a reasonable expectation that her interaction with Rivers would not be surreptitiously filmed and reproduced for profit. In any event, given the dearth of evidence in the record, this Court should follow *Stessman*, reverse the dismissal of Amended Complaint and remand this matter for further development of the record.

The primary case relied upon by the District Court, *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 895 P.2d 1269 (Nev. 1995), does not compel a contrary result. In *Berosini*, a world-renowned animal trainer brought a claim for invasion of privacy alleging that an individual intruded upon his seclusion by filming him backstage before the beginning of his show. *Id.* at 1271.

The film showed Berosini disciplining his trained orangutans by punching them, shaking them and hitting them with a black rod. *Id.* The Nevada Supreme Court reversed a judgment entered against the defendants, holding that the plaintiff presented insufficient evidence regarding the claimed invasion of privacy to support the jury verdict entered in his favor. *Id*.

Berosini is readily distinguishable, both in its procedural posture and its rationale. *Berosini* reached the Nevada Supreme Court on an appeal from a final judgment entered after the conduct of a full jury trial. *See id.* Thus, unlike the case at bar, the Nevada Supreme Court had the benefit of a fully-developed record that allowed it to evaluate the plaintiff's claim. *See id*. at 1279-80.

The court relied heavily upon that record. It noted that the "record reveals that a number of people were readily able to see or hear what was going on in Berosini's 'private' area." *Id*. at 1280 n.18. It also repeatedly referred to Mr. Berosini's trial testimony in support of its decision. *See id*. at 1279-81. By contrast, the District Court here lacked comparable record evidence that would allow it to assess Ms. Bogie's expectation of privacy backstage.

More importantly, the rationale of the Nevada Supreme Court does not support the dismissal of her claim. The *Berosini* Court found it significant that the plaintiff testified that his "concern for *privacy* was *based upon the animals*" and that his "main concern is that [he] have no problems going on stage and off stage."

Id. at 1280 (italics in original). Therefore, because his only concern related to "possible *interference*" with his training procedures and because he "never expressed any concern about backstage personnel merely seeing him or hearing him during these necessary final preparations," the court concluded that the filming did not "intrude upon the [his] *expected* seclusion." *Id*. at 1280-81 (italics in original).

In fact, the decision had nothing to do with the reasonableness of Berosini's expectation of privacy backstage. Indeed, the court expressly stated that it did not "find it necessary to discuss the question of reasonability (objective expectation of privacy) or Berosini's privacy interests because, as said, his concern was not with being seen." *Id*. at 1281 n.20. The portion of *Berosini* quoted by the District Court, (J.A. at 22), lies in the section of the opinion relating to the offensiveness of the filming—not in the section concerning the existence of an intrusion—though the context of the filming is considered by the court. *See id*. at 1281-82. However, the opinion is limited to the particular backstage at issue: "This was not, after all, Berosini's dressing room; it was a holding area for his orangutans." *Id*. at 1282. Therefore, *Berosini* cannot be read as a sweeping prohibition on intrusion actions arising from backstage. As such, it does not support the dismissal of her Amended Complaint.

Because the record is bereft of any substantive evidence regarding the reasonableness of Ms. Bogie's belief that the backstage was private, this Court should reverse the decision of the District Court.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT NO REASONABLE PERSON COULD HAVE FOUND THE UNAUTHORIZED FILMING OF MS. BOGIE'S CONVERSATION WITH MS. RIVERS AND ITS INCLUSION IN A DOCUMENTARY TO BE HIGHLY OFFENSIVE.

The District Court erroneously concluded that no reasonable person could have found the unauthorized filming of Ms. Bogie's conversation with Ms. Rivers and the subsequent inclusion of the footage in a documentary film—all done without Ms. Bogie's knowledge or consent—to be highly offensive. The offensiveness of the conduct alleged is three-fold.

First, Ms. Bogie alleged that she was filmed without her knowledge or consent. This intrusion, standing alone, is highly offensive. *See In re Marriage of Tigges*, 758 N.W.2d 824, 830 (Iowa 2008). In *Tigges*, a husband covertly videotaped his wife's activities in the bedroom of their marital home. *Id.* at 825. The trial court entered a judgment in favor of the wife, a ruling that was affirmed by the appellate court. *Id.*

On appeal to the Iowa Supreme Court, the husband argued that videotaping was not highly offensive to a reasonable person because the videotape captured nothing of a private or a sexual nature in the bedroom. *Id*. at 829. The court

disagreed. It reasoned that the "wrongfulness of the conduct springs not from the specific nature of the recorded activities," but instead from the fact that the wife's "activities were recorded without her knowledge and consent at a time and place and under circumstances in which she had a reasonable expectation of privacy."

Here, as in *Tigges*, Ms. Bogie alleged that she was filmed without her knowledge or consent. Although the intrusion in *Tigges* occurred in an unquestionably more private place, the reasoning of that court is equally applicable here. For the reasons articulated in the foregoing section, Ms. Bogie had a reasonable expectation of privacy in the backstage area. Therefore, the fact that Appellees filmed Ms. Bogie without her knowledge or consent in a private place is sufficiently offensive to withstand a motion to dismiss. *See id*. at 829.

Second, a reasonable trier of fact could conclude that the covert capture and reproduction of Ms. Bogie's private expression of scorn for an individual whose son is deaf is highly offensive. In this regard, the offensiveness of the instrusion is akin to eavesdropping or wiretapping, which courts have held sufficiently offensive to take to a jury. *E.g.*, *Fischer v. Mt. Olive Lutheran Church*, 207 F. Supp. 2d at 927-28 (offensiveness of unauthorized eavesdropping found to be jury question under Wisconsin law); *see also Shulman*, 955 P.2d at 494 (reversing summary judgment and noting that the offensiveness of the use of hidden cameras

and miniature cordless and directional microphones used for newsgathering depends upon the motivation of the gatherer and facts of each individual case).

Ms. Bogie's comment, calling a man with a deaf son "rotten" and intimating that she was ready to "tell him to leave," could easily be construed as insensitive, particularly since it could be associated with the invective hurled at the audience member by Ms. Rivers. Ms. Bogie intended this communication to be shared only with Ms. Rivers, and, as in *Mt. Olive*, Appellees clandestine recording of her communication could be construed as a highly offensive act under Wisconsin law. *Mt. Olive Lutheran Church*, 207 F. Supp. 2d at 927-28.

Third, the subsequent dissemination of Ms. Bogie's communication with Ms. Rivers—without her consent and for the purpose of profit—is highly offensive. As recognized by the California Supreme Court in *Shulman*, such "secret monitoring denies the speaker an important aspect of privacy of communication—the right to control the nature and extent of the firsthand dissemination of his statements." *Shulman*, 955 P.2d at 494 (quoting *Ribas v. Clark*, 696 P.2d 637, 640 (Cal. 1985)).

Here, Ms. Bogie not only was filmed without her knowledge or consent uttering remarks that could construed as offensive, those remarks were then included in a documentary and distributed in Wisconsin and throughout the nation. Ms. Bogie complains that her appearance in the documentary portrays her

"approving the condescending and disparaging remarks by Defendant Rivers toward the State of Wisconsin." (J.A. at 4, ¶ 21). The District Court dismissed this claim out of hand, suggesting that Ms. Bogie "revealed no information that could be found by a reasonable person to be of a highly personal nature, much less highly offensive nature." (J.A. at 23).

The District Court misinterprets the statute. Section 995.50(2)(a) requires that the "nature" of the intrusion be "highly offensive." WIS. STAT. § 995.50(2)(a). It contains no requirement that the perpetrator intrudes into a matter that is highly personal. Here, Ms. Bogie alleges that she was filmed without her knowledge or consent uttering words she might wish to retract. Furthermore, through the unauthorized distribution of her interaction with Ms. Rivers, she has become associated with the offensive commentary of the comedienne in the eyes of Wisconsin citizens. These allegations are sufficient to state a claim for intrusion.

Finally, the District Court suggests that Ms. Bogie cannot state a claim because she "chose to put herself in these public forums." (J.A. at 23). This suggestion is directly refuted by the allegations of her Amended Complaint, in which she alleges that the backstage was closed to the public. (J.A. at 4, ¶ 19). Segment 12 does not show any footage that would suggest otherwise. This Court should consequently reject the notion, repeated throughout the Order, that Ms. Bogie's interaction with Rivers took place in a public forum.

Accordingly, as Ms. Bogie has stated a claim for intrusion under Section 995.50(2)(a), this Court should reverse the dismissal of her Amended Complaint and remand this matter to the District Court.

III. THE DISTRICT COURT ERRED IN CONSTRUCTING A BAR ON "INCIDENTAL" INSTANCES OF APPROPRIATION UNDER SECTION 995.50(2)(b), WHERE THE PLAIN LANGUAGE OF THE STATUTE CONTAINS NO SUCH LIMITATION.

The District Court fundamentally misinterprets the language of Section 995.50(2)(b) by reading a bar into the statute on instances of "incidental" appropriation. This interpretation conflicts with the plain language of the statute, which permits recovery for the "use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person." WIS. STAT. § 995.50(2)(b).

As observed by one appellate court, the statutory formulation is consistent with Wisconsin common law and with the Restatement (Second) of Torts § 652C, which provides:

> One who appropriates to his own use or benefit the name of likeness of another is subject to liability to the other for invasion of his privacy.

Hannigan v. Liberty Mut. Ins. Co., 604 N.W.2d 33 (Wis. App. 1999); Restatement (Second) of Torts § 652C (1977).

Under *Hannigan*, a defendant must have "appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or

other values of the plaintiff's name or likeness." *Id*. (quoting comment c, Restatement (Second) of Torts § 652C (1977)).

Ms. Bogie's Amended Complaint meets this standard. She alleged that the Appellees' "main purpose in producing and selling such movie and DVD was and is, to obtain monetary benefit and to portray [Ms.] Rivers' lifestyle, comedy, and opinions in a manner that would gain favorable approval from the viewing public." (J.A. at 4, ¶ 21). She further alleges that she has "image, reputation, prestige, and social standing and other value in her name and image," and that the Appellees filming and use of her image "constituted the use of the publicity value of [her] image and valued reputation, prestige, social standing or other value of her name and image." (J.A. at 4, ¶ 23).

Though her pleading lacks precision, Ms. Bogie can state a claim for appropriation. Ms. Bogie's image and her reputation in her own community have value. The Appellees used Ms. Bogie to soften the harshness of the exchange between Rivers and the audience member. Ms. Bogie, who is portrayed as a Wisconsin Everywoman, expressed her disdain for the audience member and her affinity for Ms. Rivers. This allowed Ms. Rivers to appear more sympathetic and more human than if Ms. Bogie were not included in the film. Thus, by rehabilitating the image of Ms. Rivers after her verbal assault on the audience member, the inclusion of Ms. Bogie adds value to movie.

The District Court found that Ms. Bogie could not state a claim for appropriation because the Appellees only made "incidental" as opposed to "substantial" use of her image. (J.A. at 26). For support, the District Court quoted *Stayart v. Yahoo! Inc.*, 10C0043, 2011 WL 3625242 (E.D. Wis. 2011) for the following proposition: "To use a person's name for advertising or trade purposes, there must be a substantial rather than an incidental connection between the use and the defendant's commercial purpose." *Id.* at *2.

The provenance of this proposition is dubious. The *Stayart* Court quoted a law review article, The Tort of Misappropriation of Name or Likeness under Wisconsin's New Privacy Law. *Id*. (citing Judith Endejan, Comments, *The Tort of Misappropriation of the Name or Likeness under Wisconsin's New Privacy Law*, 1978 WIS. L. REV. 1029, 1047-48 (1978)). The law review article, in turn, refers to California and New York law for support for its contention that a "substantial connection between the use of the name and the advertisement or commercial sponsorship must be shown." Judith Endejan, Comments, *The Tort of Misappropriation of the Name or Likeness under Wisconsin's New Privacy Law*, 1978 WIS. L. REV. 1029, 1047-48 (1978).

This suggestion might make sense as a matter of policy; however, the language of the statute does not support this interpretation. The statute defines appropriation as the "use, for advertising purposes or for purposes of trade, of the

name, portrait or picture of any living person, without having first obtained the written consent of the person." WIS. STAT. § 995.50(2)(b). The broadly-worded statute requires the written consent of "any living person" whenever her name or likeness is used "for advertising purposes or for purposes of trade." The legislature could have included language limiting recovery to instances of *substantial* use of a person's likeness. However, it chose not to do so.

The Wisconsin legislature, instead, adopted the sort of categorical prohibition suggested by such decisions as *Clayman v. Bernstein*, 38 Pa. D. & C. 543 (Com. Pl. 1955):

> an individual has the right to decide whether that which is his shall be given to the public and not only to restrict and limit but also to withhold absolutely his talents, property, or other subjects of the right of privacy from all dissemination. The facial characteristics or peculiar caste of one's features, whether normal or distorted, belong to the individual and may not be reproduced without his permission. Even the photographer who is authorized to take a portrait is not justified in making or retaining additional copies for himself.

Clayman v. Bernstein, 38 Pa. D. & C. 543, 546 (Com. Pl. 1955). The statutory text reflects the legislature's intent to prevent entities from profiting from a person's likeness without that person's authorization, regardless of whether the use is incidental. The language of the statute, not a law review article, controls.

For the foregoing reasons, Ms. Bogie states a claim for appropriation under 995.50(2)(b). This Court should reverse the dismissal of her Amended Complaint and remand this matter for further proceedings.

CONCLUSION

Based upon the foregoing arguments and legal authority, Appellant, ANN BOGIE, respectfully requests that this Honorable Court reverse the dismissal of her Amended Complaint and remand this matter to the District Court.

DATED this 29th day of June, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

/s/ Robert Sirianni
ROBERT SIRIANNI, ESQUIRE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman Font.

/s/ Robert Sirianni
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