

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

Case No.: 12012447-CI-011

vs.

GAWKER MEDIA, LLC, *et al.*,

Defendants.

**DEFENDANTS' BENCH MEMORANDUM REGARDING THE
"COMMERCIAL PURPOSE" ELEMENT OF A MISAPPROPRIATION CLAIM**

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio respectfully submit this Bench Memorandum regarding the "commercial purpose" element of a claim for misappropriation of the right of publicity.

Plaintiff's Proposed Jury Instructions No. 8 states that: "A claim for invasion of privacy based on misappropriation occurs when a defendant, without authorization, uses plaintiff's name or image *to obtain some benefit*" (emphasis added). In the same proposed instruction, Plaintiff proposes that the jury be instructed that it can find Defendants liable for commercial misappropriation of his right of publicity if it finds that Defendants "appropriated plaintiff's name or images without his authorization, in order to *obtain a benefit to their website*" (emphasis added). This is incorrect as a statement of the law.

Florida law is clear that, to prevail on a claim for commercial misappropriation of the right of publicity, a plaintiff must show that his or her name or likeness was used without authorization specifically for a "commercial purpose." *See Tyne v. Time Warner Entertainment Co., L.P.*, 901 So. 2d 802 (Fla. 2005); *Loft v. Fuller*, 408 So.2d 619, 622-23 (Fla. 4th DCA

1981); Fla. Stat. § 540.08.¹ Significantly, “commercial purpose” is a legal term of art that is *not* equivalent simply to obtaining a “benefit,” or, for internet publishers, a “benefit to [one’s] website.” Rather, for a misappropriation claim, an unauthorized use of another’s name or likeness is only for a “commercial purpose” when the name or likeness is used “to directly promote a product or service” distinct from the publication in which the name or likeness appears. *Tyne*, 901 So. 2d at 808. Unauthorized use of a plaintiff’s name or likeness in news reporting, commentary, entertainment, films, works of fiction or nonfiction, or even advertising incidental to such uses is not a “commercial purpose” and is not actionable – even though such works are for profit and therefore provide a benefit to the publisher. *Id.* at 806-808.

The claim in *Tyne* was based on the Hollywood film *The Perfect Storm*, a dramatization of the deaths of six fishermen in 1991. Plaintiffs argued that use of the fishermen’s names and likenesses in a highly-profitable Hollywood film – and in the advertising and promotional material for the film – was for a “commercial purpose” because the purpose of the film was to make money. The Florida Supreme Court rejected this argument, holding that the statute “does not apply to publications, including motion pictures, which do not directly promote a product or service.” *Id.* at 810.

¹ Plaintiff has asserted a common law, rather than statutory, claim for commercial misappropriation of his right of publicity, but it makes no difference for the analysis. In *Loft*, the court explained that the only effect of the statute is to “amplify[y] the *remedies* available for” a right of publicity claim. *Loft*, 408 So. 2d at 622 (emphasis added). Since that time, courts in Florida have consistently found that the common law right of publicity is “substantially identical” to the statutory right under Fla. Stat. § 540.08. See *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1320 n.1 (11th Cir. 2006); *Fuentes v. Mega Media Holdings, Inc.*, 721 F. Supp. 2d 1255 (S.D. Fla. 2010) (employing § 540.08 analysis to dismiss common law right of publicity claim); *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002) (same); 19A FLA. JUR. 2D, DEFAMATION & PRIVACY § 225 (2015) (“The elements of common law invasion of privacy based on the commercial misappropriation of a person’s likeness coincide with the elements of the unauthorized publication of a name or likeness in violation of the statute, and are substantially identical.”).

In reaching this decision, the Florida Supreme Court adopted the reasoning in two prior cases: *Loft*, 408 So.2d 619 and *Lane*, 242 F. Supp. 2d 1205. In *Loft*, a widow brought a misappropriation claim for the use of the name and likeness of her late husband, Robert Loft, a pilot who died in a commercial airline crash. The defendant had featured Mr. Loft in a non-fiction book about the crash and in a film adaptation. *Loft*, 408 So. 2d at 620. Like the plaintiffs in *Tyne*, Mrs. Loft argued that because the book and film were published to make money, they were “commercial.” The court rejected this argument, holding that the use of person’s name or image in “books, magazines or newspapers . . . simply does not amount to the kind of commercial exploitation prohibited by the statute.” *Id* at 623. In *Lane*, plaintiff alleged defendant misappropriated her likeness by selling a videotape of her topless in a “Girls Gone Wild” video and by using the topless video of her in television commercials advertising that video and other “Girls Gone Wild” videos. Plaintiff argued that because her likeness was used in advertisements and because the video itself was sold as a commercial product, she met the “commercial purpose” requirement. 242 F. Supp. 2d at 1212. The court in *Lane* rejected this argument, relying on *Restatement (Third) of Unfair Competition* § 47 to hold that the term “does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising incidental to such uses.” *Id.* at 1213 (emphasis added).

As *Tyne*, *Loft*, and *Lane* all make abundantly clear that the fact that a publisher obtains some financial benefit from selling a newspaper, online news article, video, or other expressive work does not on its own meet the “commercial purpose” requirement of the tort.

Dated: February 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 2016, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

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