Opinion No. 87-63

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OPINION OF: HAL STRATTON, Attorney General

BY: Alicia Mason, Assistant Attorney General

TO: John A. Ware, Associate Director, Museum of New Mexico, P.O. Drawer 2087, Santa Fe, NM 87504

QUESTIONS

Could the Museum of Indian Arts and Culture be liable for its Taos Pueblo Exhibit that displays photographs of Pueblo members who did not authorize, and have objected to, the exhibition.

CONCLUSIONS

No.

ANALYSIS

The only identifiable cause of action that the Pueblo members arguably could have against the Museum would be the tort of invasion of privacy. W. Prosser, Handbook on the Law of Torts § 117 (4th ed. 1971). The Museum is a "state agency," and the Director is a "public employee" as the New Mexico Tort Claims Act, Sections 41-4-1 to 41-4-27 NMSA 1978 defines these terms. Sections 41-4-3(E) and 41-4-3(G). The Tort Claims Act provides that "[a] governmental entity and any public employees while acting within the scope of duty are granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12 NMSA 1978." Section 41-4-4. The Tort Claims Act does not waive immunity from liability for invasions of privacy. Thus, regardless of the merits of any complaint by the Pueblo members, the Museum and its staff would be immune from suit.

Moreover, the facts presented would not support a claim for invasion of privacy. The four "subtorts" of this cause of action are breach of (1) the right to be free from unreasonable intrusion upon one's seclusion; (2) the right to prohibit the appropriation of one's name or likeness; (3) the right to be free from unreasonable publicity about one's private life; or (4) the right to prohibit publicity that unreasonably places one in a false light before the public. 3 Restatement (Second) of Torts § 652A (1977). Of the four, only the second and third subtorts arguably could be applicable to the facts.

The United States District Court for the District of New Mexico discussed the two applicable subtorts in a comparable case, Benally v. Hundred Arrows Press, Inc., 614 F. Supp. 969 (1985). There, Lillie and Norman Benally, members of the Navajo tribe, sued

Hundred Arrows Press and three other publishers that published, without the Benallys' consent, photographs that Laura Gilpin took of them in 1932 and devised upon her death to the Amon Carter Museum of Western Art in Texas. The Benally case is comparable because, under both sets of circumstances, the subjects of the photographs, who orally consented to being photographed, did not consent to their photographs being distributed to the public, either by publication or exhibition. In Benally, the court found no misappropriation of a likeness where the plaintiffs' photographs were used for illustrative, not commercial purposes, and found that the publication was not an unlawful disclosure of a private fact. Id. at 980, 983.

The court found that New Mexico law recognizes all four of the aforestated theories of liability for recovery under invasion of privacy. Id. at 977. Addressing the right to prohibit the appropriation of one's likeness, the court stated that "[t]he tort of misappropriation of a likeness occurs where someone 'appropriates to his own use or benefit the name or likeness of another."' Id. at 978 (citing 3 Restatement (Second) of Torts § 652C (1977)). The appropriation is tortious only if someone seeks direct commercial benefit from the use of the likeness. Id. at 979. "No one has the right to object merely because...his appearance is brought before the public, since [it is not] in any way a private matter and [is] open to public observation...." Id. (citing Restatement § 652C, comment d). The appropriation is tortious if it exploits the value of the photograph for advertising or trade purposes. Id. If the likeness is published as sociologic commentary, and not in association with any advertisement or means of soliciting sales, the appropriation is not tortious. Id.

Although the Museum may incidentally benefit from the exhibited photographs through admission fees, the exhibition would not be characterized as a commercial enterprise. See Trupeano v. Atlantic Monthly Co., 379 Mass. 745, 400 N.E.2d 847 (1980). There, the defendant published an unauthorized photograph of the plaintiff to illustrate an article entitled "After the Sexual Revolution." The court remarked that the publication's purpose was to inform and entertain the reader. Id. at 379 Mass. 751, 400 N.E.2d 851. "The fact that the defendant is engaged in the business of publishing the Atlantic Monthly magazine for profit does not by itself transform the incidental publication of the plaintiff's picture into an appropriation for advertising or trade purposes." Id. See also Nelson v. Times, 373 A.2d 1221, 1224 (Me. 1977) (alleged tortfeasor did not benefit from, and therefore did not misappropriate, unauthorized photograph of an infant member of the Penobscot Tribe on the reservation merely because he engaged in the publication business for profit). Therefore, the Museum's nonprofit exhibition of Taos Pueblo photography for its artistic and sociologic value is not a commercial use that would constitute a tort on grounds of misappropriation.

The second arguably applicable subtort of invasion of privacy, referred to as the unlawful public disclosure of a private fact, consists of publicity that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public. Benally v. Hundred Arrows Press, Inc., 614 F. Supp. at 980 (citing Restatement § 652D). The threshold determination is whether the disclosure concerns a private fact. Id. at 981. "Merely exposing a person to **undesired** publicity is insufficient per se to

constitute a tort even though the exposure was unauthorized.... Certainly, it could not be argued that a person's normal facial appearance is of private concern only...." Id. (emphasis added). In Benally, the court found that "[w]hen the plaintiffs consented to pose for the photograph it became irrelevant whether they were in a public or private place. Furthermore, the photograph does not expose any more to the public eye than would be exposed to one who encountered [the] plaintiffs in public." Id. Consequently, the Museum's exhibition of photographs that depict Pueblo members on the reservation would not constitute exposure of private facts.

Assuming, without deciding, that the photographs did expose private facts, their exhibition would be tortious only if the photographs were highly offensive to ordinary sensibilities. See id. at 982. The level of offensiveness is measured by ordinary sensibilities, not by the sensibilities of the Pueblo members who hold traditional beliefs that the exhibition may offend. Id. Accord, Bitsie v. Walston, 85 N.M. 655, 515 P.2d 659 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973) (the photograph of a Navajo child, printed without authorization, on note cards sold to raise funds for children with cerebral palsy was not unlawful disclosure of a private fact). There is no evidence that the photographs at issue are highly offensive to the viewing public.

Finally, the right of privacy is a personal right that does not extend to family members of the person whose rights allegedly were violated. Bitsie v. Walston, 85 N.M. at 658, 515 P.2d at 673. No one therefore can assert a claim in protest of the Museum's exhibition of a deceased relative's photograph.

ATTORNEY GENERAL

HAL STRATTON Attorney General