COURT FILE NO.: 15-SC-138379
DATE: November 17th, 2017

ONTARIO

SUPERIOR COURT OF JUSTICE

SMALL CLAIMS COURT

BETWEEN:	)	
	)	
BASIA VANDERVEEN	)	Paul Champ, for the Plaintiff
	)	
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	)	
– and –	)	
	)	
	)	
	)	
WATERBRIDGE MEDIA INC.	)	Émilie Leblanc Lacasse, for the Defendant
	)	
	)	
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	)	

REASONS FOR DECISION

LECLAIRE, D.J.

[1] The Plaintiff, Mrs. Basia Vanderveen, is making various claims against the defendant, Waterbridge Media Inc., for breach of privacy (i.e. intrusion upon seclusion;), pecuniary damages for appropriation of personality and punitive damages. The background to the claim is that the defendant received a contract from Bridgeport, a real estate developer, to produce a sales video for a planned but unbuilt residential condominium project in the Westboro neighborhood of Ottawa. That mandate involved showcasing the Westboro area and the lifestyle that the restaurants, coffee shops, public transit points, bicycling paths, jogging trails, and other local amenities offered to its residents.

[2] The plaintiff was filmed jogging on a walking trail located next to a small river in Westboro sometime in the summer or fall of 2014. Following the editing process, the plaintiff appears in the Bridgeport publicity video for 2 seconds, on the right third of the screen. The left

third of the screen is a shot of a male cyclist on a bicycle path and the middle third is an shot of a male holding a coffee cup with a coffee shop in the background. Each of these is an "action" shot in the sense that each individual is in movement.

[3] In presenting her case, counsel for Mme Vanderveen called Emilia Kutrovska, a friend who saw the Bridgeport promotional video in the fall of 2015, recognized the jogger as being Mme Vanderveen and brought it to the attention of the plaintiff. Mme Vanderveen testified on her own behalf. She has been a communication consultant for 20 years and has received BA and MBA degrees. Her image in the promotional video came to her attention in October 2015 and she took immediate steps by way of e-mails to Bridgeport to have her image removed from the video. Bridgeport involved the producer of the video, Waterbridge Media Inc., in their replies to her. There followed a series of e-mail exchanges between the plaintiff and the defendant some of which can be described as impolite, acerbic, and insulting.

[4] These exchanges are largely the basis for the plaintiff's claim to punitive damages. Given the view that I take of these exchanges, there is no need to repeat them in these reasons. I shall have more to say about this later.

[5] In her evidence, the plaintiff said that she began jogging after having gained weight following the birth of her 2 children. On receiving video from Mme Kutrovska, she watched it and immediately felt shock and confusion. She felt that the video "blasted her image to the world without her consent or permission." She described herself as being self-conscious and said that the overweight pictures of her caused her discomfort and anxiety and that the jogging outfit that she was wearing in the video would now fall off given the weight loss obtained as a result of training for and participating in iron man triathlons. The image of herself in the video is clearly not the image she wished portrayed publicly.

[6] There followed the exchange of e-mails over the next few days. The first exchange from the defendant to the plaintiff on October 1, 2015 (Ex. 1, Tab 1, Page 7) which was copied to Kevin McMahon of Bridgeport states, among other matters, that it would cost $400 of post-production costs to modify the video to remove the 2 second video of the plaintiff. While I entirely accept the evidence of Mr. Nik Topolovec, managing associate of the defendant

company, that that portion of his message was directed to Mr. McMahon to assist him in his decision making, since full control of the finished promotional video now belonged to Bridgeport. I can understand Mme Vanderveen's reaction that that information was directed at her since the e-mail was addressed to her. She felt that this was an attempt at "extortion." The view that I take of this e-mail and the others that followed is that these amounted to misunderstanding and miscommunication between the parties.

[7] Mme Vanderveen was distraught at this discovery that her image was being used in this manner without her consent and anxious to have it removed. Mr. Topolovec interpreted her messages as being critical of the professionalism of his company and being sarcastic and, as he said, he "mirrored" his responses in a similar vein. I find that, regarding the e-mail exchanges, the misunderstandings and miscommunication were mutual, unfortunate, unintentional, and set aside any portion of the claim based on these.

[8] I now focus on the filming of the plaintiff in the summer/fall of 2014 and the final published video of October 2015.

[9] Mme Vanderveen told me that she recalls seeing the camera on the occasion of that run in the fall of 2014 and that she shielded her face in an effort to send the message that she did not wish to have her picture taken. Mr. Topolovec testified that Bridgeport was a "hands-on" client which choose how and where to shoot in Westboro, which coordinated most locations and was aware of the consent requirement for employees of various work locations which it selected for the video. There was no written contract between Waterbridge and Bridgeport. The defendant was not aware of the use that Bridgeport would make of the video. Mr. Topolovec's view of the consent issue was that the consent was required from individuals in private spaces but not from people in public places, Mr. Topolovec said that if these see the camera and continue moving, consent is implied. The question of how to establish that the individual has seen the camera was not addressed. This is entirely consistent with the justification expressed in the e-mail exchange with the plaintiff on October 1, 2015 where he wrote:

> "However, media captured in a public space with no expectation of privacy and where persons are not defamed is standard in the industry." (Ex. 1, Tab 1, Page 7)

[10] Mr. Topolovec testified that the focus of the shoot split into thirds of the cyclist, coffee drinker, and jogger, was not the people but the "environment, river and geography and not the people." I entirely reject that evidence. In that split screen as well as other locations, such as the coffee shop serving dessert or the yoga studio, people are present and central to the location and the picture. The photographer was not just filming a moving river, he or she was waiting for a runner to jog along the adjacent jogging trial to advertise the possibility of the particular activity in Westboro.

[11] Mr. Topolovec's associate in Waterbridge also testified. Mr. Jesse Dybka is in charge of video production. He sometimes attended on-site shooting and oversees the editing process. He explained that the obtention of consents to appear in a photo or video in the circumstances of this video were "impractical" given that hundreds of people would be photographed in a public setting but only a few dozen at most would appear in the edited and final video. Mr. Dybka said that Waterbridge was now a different company from 2015, and that a number of people working there had increased from 6 to 11 and that the procedures about obtaining consents were now more serious and had been "tightened up." In public areas, people are now approached ahead of time, which I took to mean before filming them, and their questions are answered regarding the use of the film and their role in it. Mr. Dybka briefly spoke about paying actors who appeared in the videos and the varied amounts that would be paid. Mme Vanderveen's evidence that the video was removed from Bridgeport's website within the week and from YouTube within a few days was not contradicted or otherwise put in issue.

[12] I believe that the legal principles that I am required to apply in this case are set out in the Ontario Court of Appeal decision in *Jones v. Tsige* (2012 ONCA 32) where Sharpe, J. writing for a unanimous court sets out the question "Does Ontario law recognize a right to bring a civil action for damages for the invasion of personal privacy?" and proceeds to answer in the affirmative.

[13] I note that the legal principles discussed, the societal values protected and the determination of the quantum of damages in *Jones v. Tsige* are entirely consistent with the decision of the Supreme Court of Canada in *Aubry v. Les Editions Vice-Versa* (1998 1 S.C.R.

591), a case grounded in the *Civil Code of Quebec* and the *Charter of Human Rights and Freedoms* rather than the common law in Ontario.

[14] In analyzing whether Ontario law recognized an action for invasion of privacy, Sharpe, J. canvassed scholarly articles, case law in Ontario and other provinces, *Charter* jurisprudence, Acts relating to private information, Provincial Privacy Acts, the state of the law in the USA and various commonwealth jurisdictions and concluded with the following at paragraph 65 of his reasons:

> "In my view, it is appropriate for this court to confirm the existence of a right of action for intrusion upon seclusion. Recognition of such a cause of action would amount to an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society."

[15] Sharpe, J. went on to set out the elements of the action for intrusion upon seclusion in the following terms:

> "I would essentially adopt as the elements of the action for intrusion upon seclusion the Restatement (Second) of Torts (2010) formulation which, for the sake of convenience, I repeat here:
>
> > One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.
>
> The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private

> affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum."

[16] Applying the above legal principles to the facts of this case, I have no hesitation in concluding that in capturing the image of Mme Vanderveen and publishing it in a commercial video for Bridgeport, the defendant committed the tort of intrusion upon seclusion. There can be no doubt, on the evidence before me, that the defendant's conduct in taking her picture was intentional; that was admitted. There existed no legal justification for taking her image or filming her running. I find that a reasonable person, this legally fictitious person who plays an important role in legal determinations, would regard the privacy invasion as highly offensive and the plaintiff testified as to the distress, humiliation or anguish that it caused her.

[17] While *Jones v. Tsige* dealt with the examination of *Jones*' bank account by *Tsige* on 174 occasions over a 4 year period, I am satisfied that the elements of intrusion upon seclusion mentioned above apply to capturing the persona or likeness of an individual and using it for commercial purposes without consent.

[18] While recognizing that the decision in the *Aubry v. Vice-Versa* is not binding upon me for reason's stated above, I am entirely in agreement with the comments and sentiments of Lamer C.J., writing in dissent for other reasons, when he wrote:

> "In the case at bar, I am of the view that the dissemination of the respondent's image constituted a violation of her privacy and of her right to her image. In the abstract, to appropriate another person's image without his or her consent to include it in a publication constitutes a fault. I am of the view that a reasonable person would have been more diligent and would at least have tried to obtain the

respondent's consent to the publication of her photograph. The appellants did not do everything necessary to avoid infringing the respondent's rights."

[19] Along the same line of legal reasoning L'Heureux‑Dubé J. and Bastarache J., writing for the majority, wrote the following:

> "Since the right to one's image is included in the right to respect for one's private life, it is axiomatic that every person possesses a protected right to his or her image. This right arises when the subject is recognizable. There is, thus, an infringement of the person's right to his or her image, and therefore fault, as soon as the image is published without consent and enables the person to be identified. See Field v. United Amusement Corp., [1971] C.S. 283."

[20] In my view, none of the limitations or defences that Sharpe J. discusses apply in this case. The filming of Mme Vanderveen's likeness was a deliberate and significant invasion of her privacy given its use in a commercial video intended to be part of a public marketing campaign for condominiums in Westboro or as a "sales tool" as Mr. Topolovec put it. While Mme Vanderveen is concerned about the persona that she presents and about her personal privacy I find that she is not unusually concerned or unduly sensitive about this.

[21] The defendant, through its witnesses advanced a few defences. Mr. Topolovec wrote in an e-mail to the plaintiff that individuals in public places and settings could be photographed without their consent and Mr. Dybka stated in evidence that obtaining a "consent" on such situations was "impractical" given the high number of people who would be photographed compared to the greatly reduced number that would appear in the edited final product. I reject any such attempts at exoneration. In my view the important right to privacy prevails over any non-public interest, commercially motivated and deliberately invasive activity. On this point, the authors of the majority opinion in *Aubry v. Vice Versa* put it this way:

> "None of the exceptions mentioned earlier based on the public's right to information is applicable here. Accordingly, there appears to be no justification for giving precedence to the appellants other than their submission that it would

be very difficult in practice for a photographer to obtain the consent of all those he or she photographs in public places before publishing their photographs. To accept such an exception would, in fact, amount to accepting that the photographer's right is unlimited, provided that the photograph is taken in a public place, thereby extending the photographer's freedom at the expense of that of others. We reject this point of view. In the case at bar, the respondent's right to protection of her image is more important than the appellants' right to publish the photograph of the respondent without first obtaining her permission."

[22] On the question of damages, Sharpe J. in *Jones v. Tsige* spent time discussing this issue and appended a 4 page listing of privacy related cases and the damages awarded in each case. It is clear that proof of actual loss is not required in a cause of action for intrusion upon seclusion. Sharpe, J. writing for the court in *Jones v. Tsige* wrote the following in determining the question of damages:

"In my view, damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done. I would fix the range at up to $20,000. The factors identified in the Manitoba Privacy Act, which, for convenience, I summarize again here, have also emerged from the decided cases and provide a useful guide to assist in determining where in the range the case falls:

(1) the nature, incidence and occasion of the defendant's wrongful act;

(2) the effect of the wrong on the plaintiff's health, welfare, social, business or financial position;

(3) any relationship, whether domestic or otherwise, between the parties;

(4) any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and

> (5) the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.
>
> I would neither exclude nor encourage awards of aggravated and punitive damages. I would not exclude such awards as there are bound to be exceptional cases calling for exceptional remedies. However, I would not encourage such awards as, in my view, predictability and consistency are paramount values in an area where symbolic or moral damages are awarded and absent truly exceptional circumstances, plaintiffs should be held to the range I have identified."

[23] In applying these principles to the facts of this case, I consider the following as important factors.

[24] The likeness of the plaintiff is on the screen for 2 seconds. The plaintiff was clearly upset about her image being publicly portrayed in a manner which she did not select or approve. It was imposed upon her. This was a for-profit commercial enterprise. Damages for this tort have an upper limit of $20,000 where there has been no pecuniary loss.

[25] In the case of *Jones v. Tsige*, damages in the amount of $10,000 were awarded, the midway point of the upper limit amount of $20,000 where the court found that the defendant's actions were "deliberate prolonged and shocking."

[26] In this case the filming resulted in a 2 second clip in a 2 minute video. The video was discontinued and removed from YouTube within one week.

[27] In the circumstances I believe that an award of damages in the amount of $4,000 for the breach of privacy would be in line with the analysis of Sharpe J.

[28] I award damages of $100 for the appropriation of personality. I take that to be a reasonable amount that is in the range of what would have been paid to an actor in similar circumstances.

[29] As I wrote earlier, given the view that I take of the e-mail exchanges, there is no basis to consider an award of punitive damages. (Cf. *Whiten v. Pilot Insurance Co.* 2002 SCC 18).

[30] In the event that the parties cannot agree on costs, written submissions (limited to 5 pages, double spaced) shall be served and filed by December 8th, 2017 by the plaintiff followed by the defendant's submissions before January 5th, 2018.

[31] I commend both Mr. Champ and Miss Leblanc Lacasse for the manner of their conduct in this trial.

Roger Leclaire, D.J.

Released: November 20th, 2017