No. F054138

In the Court of Appeal

Of the State of California

Fifth Appellate District

CYNTHIA MORENO, et al

Plaintiffs and Appellants,

v.

HANFORD SENTINEL, INC. et al

Defendants and Respondents.

APPELLANTS' OPENING BRIEF

Appeal from
Fresno County Superior Court Case No. 06CECG04125AMC
The Honorable Aldolfo Corona

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STATEMENT OF APPEALABILITY

This appeal is taken from a final judgment that disposes of all issues between the parties and is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a).

STATEMENT OF THE CASE

On March 8, 2007, plaintiffs and appellants filed a First Amended Complaint for Damages for Intentional Infliction of Emotional Distress and Invasion of Privacy ("FAC") against defendants and respondents Coalinga-Huron Unified School District ("District") and Roger Campbell, along with other defendants who are no longer a part of this case. (Appellant's Appendix ("AA") 5-12.)[1]

The District and Campbell demurred to the FAC (AA 13-25), and the trial court sustained the demurrer without leave to amend on September 19, 2007. (Order, AA 47-54.) Judgment was entered on October 1, 2007. (AA 56-57.)

Appellants timely appealed on October 25, 2007.

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[1] Plaintiffs had first obtained relief from the governmental claim presentation requirements. (AA 1-4)

(AA 59-60.)

STATEMENT OF FACTS

In the FAC, plaintiffs and appellants Cynthia Moreno, Araceli Moreno, Maria Moreno and David Moreno alleged that on October 3, 2005, following a visit to the city of Coalinga, Cynthia wrote "An ode to Coalinga" ("Ode") and posted it on an online personal journal on mySpace.com, using only her first name. (FAC ¶ 9, AA 8.) The Ode began by stating that "the older I get, the more I realize how much I despise Coalinga," and went on to make a number of extremely negative statements about the City of Coalinga and its inhabitants. (FAC ¶ 9, AA 8.) On October 9, 2005, Cynthia removed the Ode from the journal so that it was no longer available online. (FAC ¶ 9, AA 8.)

The next day, Cynthia and her family learned that defendant Roger Campbell, an employee of defendant District and the principal of Coalinga High School (FAC

¶¶ 6, 10, AA 7-8),[2] had submitted the Ode for publication to the local newspaper, *The Coalinga Record* ("*Record*"), by giving it to his friend, Pamela Pond, who was the editor of the *Record*. (FAC ¶ 10, AA 8.) Cynthia's younger sister, plaintiff Araceli Moreno, was a student at Coalinga High School at the time. (FAC ¶ 16, AA 10.)

Neither Cynthia nor any member of her family gave Campbell permission to submit the Ode to *The Record* for republication, or to use her name in connection with any republication. (FAC ¶ 10, AA 8.) Campbell knew that he had no permission to submit the Ode for republication in the *Record*, and had no permission to use Cynthia Moreno's name in connection with that republication, but did so with the intent to punish the Morenos for the Ode. (FAC ¶ 11, AA 8.)

The Morenos contacted Pond, Campbell's friend and the *Record's* editor, and advised her of the damages

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[2] Although the FAC does not specifically identify Campbell as the principal, the District's website (http://www.coalinga-huron.org/chusd/Our%20Schools/Coalinga%20High%20School/Default.asp) identifies him as the principal, and appellants ask the Court, as they did below (AA 36-39), to take judicial notice of this undisputed fact pursuant to Evidence Code section 452, subdivision (h).

that republication of the Ode would cause; after promising the Morenos that the Ode would not appear in the *Record*, Pond republished the Ode in the Letters to the Editor section of the *Record*, attributing it to Cynthia using her full name. (FAC ¶ 10-14, AA 8-9.)

Publication of the Ode caused a violent reaction within the community, prompting death threats and the firing of a shot at the family home. (FAC ¶ 16, AA 10.) As a result, the Morenos had to move out of Coalinga and sell the family business; Araceli left Coalinga High School, and Cynthia dropped out of college. (FAC ¶ 16, AA 10.)

All members of the family suffered severe emotional distress. (FAC ¶ 16, AA 10.)

ARGUMENT

A. STANDARDS GOVERNING APPELLATE REVIEW OF ORDERS

SUSTAINING DEMURRERS WITHOUT LEAVE TO AMEND, AND SUMMARY OF ARGUMENT

An appellate court reviews a trial court's order sustaining a demurrer de novo, exercising its "independent judgment as to whether a cause of action has been stated as e matter of law." (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1038.) Like the trial court, the reviewing court must:

> assume the truth of all properly pleaded material allegations of the complaint ... and give the complaint a reasonable interpretation by reading it as a whole and its parts in their context.

(*Silberg v. Anderson* (1990) 50 Cal.3d 205, 210.)

Plaintiffs need only plead facts showing, either directly or by reasonable implication (*Kong,* 108 Cal.App.4th at 1037), that they "may be entitled to some relief." (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.) The courts are not concerned with any possible difficulty the plaintiffs may have in proving their allegations. (*Alcorn,* 2 Cal.3d at 496.)

Where, as here, the demurrer was sustained without leave to amend, the reviewing court must also consider

whether "there is a reasonable possibility the defect can be cured by amendment." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) On this issue the reviewing court applies an abuse-of-discretion standard, but if the appellants can establish there was such a reasonable possibility of curing the defect, then the trial court abused its discretion and the reviewing court should reverse. (*Blank*, 39 Cal.3d at 318; *Kong*, 108 Cal.App.4th at 1038.) Plaintiffs need not have requested leave to amend in the trial court – the question is preserved on appeal even in the absence of such a request. (Code Civ. Proc. § 472c, subd.(a); *Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 7-8.)

In this case, the trial court narrowly interpreted the FAC, failing to give a reasonable interpretation to the allegations, and erroneously concluding that the Ode's brief online posting precluded the Morenos from obtaining any recovery for the overwhelming injuries they suffered from the publication. This Court should reverse, and give the Morenos a chance to pursue their claims for the malicious actions of Campbell and the District.

B. TRIAL COURT ERRED BY FOCUSING ON SINGLE ALLEGATION IN DETERMINING THAT COMPLAINT DID NOT STATE AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM, AND FURTHER ERRED IN RULING AS A MATTER OF LAW THAT THE PRINCIPAL'S ACTIONS WERE NOT OUTRAGEOUS

In the Tentative Ruling that was eventually adopted as its order, the trial court reviewed the elements necessary to establish a claim of intentional infliction of emotional distress, including the requirement that a defendant's conduct be outrageous, and then concluded:

> [T]he only allegation against these defendants set forth in the first cause of action is found at ¶ 10 of the First Amended Complaint wherein it is alleged that Defendant Campbell submitted the Ode to the Record. As a matter of law, this action does not meet the standard of outrageousness necessary to constitute a cause of action for intentional infliction of emotional distress.

(Order, AA 49.)

The trial court erred in sustaining the demurrer on the First Cause of Action without giving the FAC as a whole, including the additional allegations, a reasonable interpretation. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 210.) As Morenos' counsel argued at length during the oral argument, the Morenos did not base their claim of outrageousness solely on the fact

that Campbell submitted the Ode to the newspaper. (Reporter's Transcript on Appeal ("RT") 30-32.)

The FAC also alleged that the Ode was no longer available online due to an initial, negative response, and that Campbell not only knew he was acting without permission in submitting the Ode to the local newspaper, but did so to punish the Morenos for the contents of the Ode, with the intention of causing them emotional distress. (FAC ¶¶ 9-11, 19 AA 8, 11.) The Morenos further alleged that the extremely inflammatory statements about Coalinga in the Ode would be bound to incite local residents and did so, forcing the Morenos to move out of town and causing them severe emotional distress. (FAC ¶¶ 9-11, 16, AA 8, 10.)

The person taking these outrageous and vindictive actions was not a teenage rival of one of the Moreno girls, but Araceli Moreno's high school principal. This is not a case, like *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209-210, where authorities simply failed to take action but did not allegedly engage in any affirmative misconduct. In this case, the official most responsible for protecting Coalinga High students intentionally engaged in conduct

that caused the family of one of those students to be harassed to the point where she had to leave school. (FAC ¶ 16, AA 10.)

As the California Supreme Court has explained:

> "'"Behavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress...."'"

(*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1122, quoting *Cole v. Fair Oaks Fire Protection District* (1987) 43 Cal.3d 148, 155 n.7.)

Contrary to the trial court's statement, outrageousness is not typically "a matter of law for the court" (Order, AA 49), but "normally presents an issue of fact to be determined by the trier of fact." (*Trerice v. Blue Cross of Calif.* (1989) 209 Cal.App.3d 878, 883." As the Supreme Court explained in *Alcorn*, where reasonable minds may differ on the issue of outrageousness, the matter cannot be resolved by demurrer, and a jury must decide whether the conduct has been sufficiently outrageous. (*Alcorn*, 2 Cal.3d at 499.) *Alcorn* held that a complaint alleging that

plaintiff's supervisor had used racial epithets and then fired him was sufficient to survive demurrer, even though mere insulting language normally would not constitute outrageous behavior. (*Alcorn*, 2 Cal.3d at 498-499.)

The intentional infliction of emotional distress tort arises out of the modern concept that:

> "Peace of mind is now recognized as a legally protected interest, the intentional invasion of which is an independent wrong, giving rise to liability without the necessity of showing the elements of any of the traditional torts."

(*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1259, quoting 5 Witkin, *Summary of California Law* (10th ed. 2005) Torts § 450, p. 668.)

This is not a case where the plaintiffs were subjected to "mere insults, indignities, threats, annoyances, petty oppression, or other trivialities." (*Agarwal v. Johnson* (1979 25 Cal.3d 932, 946.) The Morenos lost their business, lost their home, left schools, and suffered severe emotional distress, all as a result of Campbell's intentional conduct and abuse of his position. (FAC ¶¶ 10-11, 16.)

A reasonable jury could conclude that a high

school principal's conduct in submitting an inflammatory document to a local newspaper in order to punish a student's family constituted outrageous conduct under *Molko*, 46 Cal.3d at 1122, particularly when it had the desired effect of threatening their safety and forcing them to leave town.

Campbell's conduct was sufficiently outrageous to allow the plaintiffs to survive a demurrer, and the trial court erred in sustaining that demurrer.

C. TRIAL COURT ERRED IN FINDING THAT PLAINTIFFS HAD NO REASONABLE EXPECTATION OF PRIVACY

The trial court concluded that, because Cynthia had posted the Ode on myspace.com, the Morenos could not have had a reasonable expectation of privacy and therefore could never meet the first element necessary to state a claim for the intrusion into private affairs type of invasion of privacy. (Order, AA 51.)

While there is no doubt that plaintiffs must establish a reasonable expectation of privacy in order to recover for a tortious intrusion into private affairs (*Shulman v. Group W Productions, Inc.* (1998) 18

Cal.4th 200, 214-216, 230-231), the trial court erroneously ignored the California Supreme Court's later explanation that:

> "neither in *Shulman* nor in any other case have we stated that an expectation of privacy, in order to be reasonable for the intrusion tort, must be of *absolute* or *complete* privacy.

(*Sanders v. American Broadcasting Companies* (1999) 20 Cal.4th 907, 915.)

Sanders held that the covert videotaping of communications that were non-confidential, and could readily be overheard by others, could still constitute an intrusion, because an intrusion can occur whenever the mass media exposes events or communications "that were visible and audible to some limited set of observers at the time they occurred." (*Sanders*, 20 Cal.4th at 911-912, 915.) The Court explained that:

> [P]rivacy, for purposes of the intrusion tort, 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....
> "The mere fact that a person can be seen by someone does not automatically mean that he or she can be legally forced to be subject to being seen by everyone."...

> Privacy for purposes of the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion

(*Sanders*, 20 Cal.4th at 916, 918.)

Even when the Ode was online, it did not identify Cynthia by her full name, and could only be read by those who wanted to view her journal; prior entries had produced little response, primarily from personal acquaintances. (FAC ¶ 19, AA 11.) While the Ode was online, it was subject to federal copyright protection under 17 U.S.C. section 101 *et seq.*, precluding others from simply reproducing it without permission, as Campbell and the *Record* did. Before Campbell had even submitted the Ode to the *Record,* Cynthia had removed it from her journal so that it was no longer available online. (FAC ¶¶ 9-10, 19, AA 8, 11.)

While the Morenos did not have an expectation of absolute or complete privacy in the Ode, they did not need to have such an expectation to state the cause of action. (*Sanders,* 20 Cal.4th at 915.) The Morenos reasonably believed that the Ode would not be republished in its entirety in the local newspaper so

that it would be readily available to every resident of Coalinga. As in *Sanders* and *Shulman*, the actions of defendants here "den[ied] the speaker an important aspect of privacy of communication – the right to control the nature and extent of the firsthand dissemination of his statements." (*Sanders*, 20 Cal.4th at 915, quoting *Shulman*, 18 Cal.4th at 234-235.)

In addition to alleging that they had a reasonable expectation of privacy, the Morenos also properly alleged facts to support the other element of the tort – that Campbell's action would be highly offensive to a reasonable person. (*Shulman*, 18 Cal.4th at 231.) "Determining offensiveness requires consideration of all the circumstances of the intrusion, including its degree and setting and the intruder's 'motives and objectives.'" (Shulman, 18 Cal.4th at 236.)

In this case, high school principal Campbell took an explosive journal entry, which was no longer available even to those few who wanted to see it online, and had it republished in the local newspaper, using Cynthia Moreno's full name, so that everyone in Coalinga could read it. A reasonable jury could

certainly find it highly offensive that Campbell submitted the Ode for publication in the local newspaper, without permission, in order to punish the Morenos. (FAC ¶¶ 9-11, AA 8; *Shulman*, 18 Cal.4th at 236.)

This reprehensible action by a high-ranking public official, which as he anticipated caused immense damage to an entire family, cannot be dismissed as some type of inoffensive prank. Neither Cynthia nor her family had any desire to have the Ode available on every doorstep in their hometown, and its publication has devastated them. (FAC ¶ 16, AA 10.)

D. THE MORENOS PROPERLY ALLEGED THAT DEFENDANTS HAD PUBLICLY DISCLOSED PRIVATE FACTS

The trial court concluded that the Morenos could not state a claim for public disclosure of private facts because the Ode was not private, having entered the public domain as soon as it was posted on the Internet. (Order, AA 52.) The trial court further concluded that the Morenos did not establish that Campbell had publicly disclosed the Ode because the FAC

merely alleged that he gave it to his friend, Pamela Pond, the editor of the *Record*. (Order, AA 52-53.)

1. The Ode Was Not In The Public Domain And Was Not of Legitimate Public Interest

The elements of the public disclosure form of the invasion of privacy tort are: "'(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.'" (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214, quoting *Diaz v. Oakland Tribune* (1983) 139 Cal.App.3d 118, 126.) Californians also enjoy a constitutional right to privacy following the 1972 amendment of the California Constitution to include the right of privacy as among the "inalienable rights" enjoyed by its "free and independent" people. (*Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 15-16, quoting Cal. Const., Article I, section 1.) An invasion of the constitutional right or privacy is established by showing "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant

constituting a serious invasion of privacy." (*Hill*, 7 Cal.4th at 39-40.)

As with an intrusion into private affairs claim, the facts in a public disclosure claim must be private, but there is no requirement that the privacy be absolute. The trial court cited no case holding that a brief online posting placed a document in the public domain,[3] relying instead on the pre-Internet statement in *Diaz* that "[g]enerally speaking, matter which is already in the public domain is not private, and its publication is protected.'" (Order, AA 52, quoting *Diaz*, 139 Cal.App.3d at 131.)

But *Diaz* went on to explain that even "matter which was once of public record may be treated as private facts where disclosure of that information would not be newsworthy." (*Diaz*, 139 Cal.App.3d at 132.) The Court noted that the facts being disclosed

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[3] Even in the technical context of trade secrets, [p]ublication on the Internet does not necessarily destroy the secret if the publication is sufficiently obscure or transient," and courts do not assume that something "became part of the public domain simply by having been published on the Internet." (*DVD Copy Control Association Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 251, 253.)

in *Diaz* were actually not part of the public record, and that the plaintiff had taken affirmative steps to conceal those facts. (*Diaz*, 139 Cal.App.3d at 132.) In this case, of course, the Ode was also not of public record, and the Morenos took prompt, affirmative steps to conceal the Ode, removing it from the online journal and extracting a promise from the *Record's* editor that it would not be republished. (FAC ¶¶ 9, 12-13; AA 8-9.)

This is not a case like *Kapellas v. Kofman* (1969) 1 Cal.3d 1, where the allegedly private facts were reported in the police blotter and so "would already have been matters of public record." (*Kapellas*, 1 Cal.3d at 20.) Unlike the situation in *Sipple v. Chronicle Publishing Company* (1984) 154 Cal.App.3d 1040, where allegedly private information regarding the sexual orientation of a prominent member of the San Francisco gay community had been reported in magazines and was known to hundreds of people, the Ode was not a "matter which [the Morenos left] open to the public eye." (*Sipple*, 154 Cal.App.3d at 1047.)

As the Supreme Court has explained, the critical

element in a public disclosure claim is "the presence or absence of legitimate public interest, *i.e.* newsworthiness in the facts disclosed." (*Shulman*, 18 Cal.4th at 215.) "All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of *legitimate* public interest." (*Shulman,* 18 Cal.4th at 222 (emphasis in original.) "'[P]ublic interest' does not equate with mere curiosity." (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132.) If the concept of "newsworthiness" simply meant "all coverage that sells papers or boosts ratings ... it would seem to swallow the publication of private facts tort, for 'it would be difficult to suppose that the publishers were in the habit of reporting occurrences of little interest.'" (*Shulman*, 18 Cal.4th at 219.)

While the legitimate public interest extends beyond hard news to information provided for educational and amusement entertainment purposes, "it does not include 'a morbid and sensational prying into private lives *for its own sake*.'" (*Shulman*, 18 Cal.4th at 224-225, quoting Rest.2d Torts, § 62D, com. h

(emphasis in original.) Even if a particular event is newsworthy, if the identification of the plaintiff as the person involved added nothing of significance to the story, the identification can constitute an invasion of privacy. (*Shulman*, 18 Cal.4th at 225.) The Court must consider the "social value" of the publication, as well as the "degree of intrusion and the extent to which the plaintiff played an important role in public events." (*Shulman*, 18 Cal.4th at 222-223.)

The FAC alleges that the Ode "was not newsworthy, was not of legitimate public concern, was not a matter of public knowledge within the community, and was not part of the public domain." (FAC ¶ 20, AA 11. Under the principles set out in *Shulman*, there was simply no legitimate public interest in matters of high school gossip such as the Ode. The Ode had little social value, and was simply the work of a very young person reacting to some slight, real or imagined. None of the Morenos had played any important role in public events, and the publication caused a degree of intrusion that is almost unimaginable, forcing an entire family to

move out of its hometown. (*Shulman*, 18 Cal.4th at 222-223; FAC ¶¶ 9, 15-16, 18-20, AA 10-11.)

Even if the Ode itself could somehow be considered newsworthy, the identity of its author and her family was certainly not newsworthy. (*Shulman*, 18 Cal.4th at 225; *M.G. v. Time Warner*, Inc. (2001) 89 Cal.App.4th 623, 631-633; FAC ¶ 20; AA 11.) Identification of the author as Cynthia Moreno caused the damage to the plaintiffs – while people who already knew Cynthia Moreno may have been able to identify her from her journal, the vast majority of the *Record's* readers would not have known who wrote the Ode except for the publication of her full name. The Moreno name "added nothing of significance to the story, and was therefore an unnecessary invasion of privacy." (*Shulman*, 18 Cal.4th at 223; see also *Baugh v. CBS, Inc.* (N.D. Cal. 1993) 828 F.Supp.745, 755.)

The trial court erred in sustaining the demurrer on the Morenos' public disclosure of private facts claim.

2. Campbell Publicized Ode When He Gave It To Local Newapaper For Publication

Turning to the publicity element of the tort, the trial court stated that the FAC:

> alleges in essence that Campbell gave a copy of the Ode to Pamela Pond who then submitted the Ode for publication in the "Letters to the Editor" section of the Coalinga Record.

(Order; AA 53.)

Concluding that the FAC therefore alleged only that Campbell had given the Ode to Pond, the court concluded as a matter of law that the he had not made the Ode public. (Order, AA 52-53.)

In reaching this conclusion, the trial court simply refused to "give the complaint a reasonable interpretation by reading it as a whole and its parts in their context." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 210.) The Morenos did not allege that Campbell gave the Ode to one person, who then decided to publicized it. The FAC actually alleged that Pond was not only Campbell's friend but also the editor of the *Record*, that Campbell had not simply given her a copy but "had submitted the Ode to the *Record*," that Campbell "knowingly submitt[ed] the Ode for republication in the *Record* without permission, ...

with the intent to punish the Morenos for the Ode," and that the newspaper "published the Ode as part of a conspiracy with the person who had provided the Ode to editor Pond [Campbell]." (FAC ¶¶ 4, 10-11, 15; AA 6, 8-10.)

It is difficult to imagine what more the Morenos could have alleged to establish that Campbell had communicated the Ode to the public "as distinguished from one individual or a few." (*Kinsey v. Macur* (1980) 107 Cal.App.3d 265, 270.) Campbell did not give the Ode to one person but submitted it to the newspaper, where the editor happened to be a friend of his who joined in a conspiracy to publish it to harm the Morenos. While Campbell was not himself part of the media, he did everything in his power to "communicat[e] [the Ode] to the public at large." (CACI 1801.)

E. PUBLICATION OF THE ODE INVADED THE PRIVACY OF THE ENTIRE MORENO FAMILY

Finally, the trial court concluded that, other than Cynthia, the Moreno family lacked standing to sue

for invasion of privacy, because only her privacy had been invaded. (Order; AA 53.)

While it is true that invasion of privacy claims are typically unavailable to family members, the damage suffered by David, Maria and Araceli Moreno in this case has been just as overwhelming as that inflicted on Cynthia Moreno. The claims of these family members are based on the effect on *them* of the defendants' vindictive publication of the Ode, not simply on some vicarious concern for Cynthia's suffering. The family members' claims are based on the effect of the defendants' vindictive publication of the Ode on them – publication of the Ode caused a violent reaction that included death threats, the firing of a shot at the family home, the family's forced relocation, harassment of Araceli at school that caused her to leave it, and even damage to David's business, which is closing after 20 years. (FAC ¶¶ 11, 15-16, 20-21; AA 8-11.)

As the court explained in *Vescovo v. New Way Enterprises, Ltd.* (1976) 60 Cal.App.3d 582, the right of privacy is normally personal and does not extend to members of the family "'*unless, as is obviously*

possible, their own privacy is invaded along with his.'" (*Vescovo*, 60 Cal.App.3d at 588 (emphasis in original.) *Vescoco* held that, even though their names were not used in a suggestive advertisement, the daughter and husband of a woman whose name and address were included in an advertisement could recover for invasion of privacy because, as a result of the publication, their own privacy had been invaded by people responding to the advertisement. (*Vescovo*, 60 Cal.App.3d at 587-588.)

The trial court did not address *Vescovo*, relying instead on a series of cases following *Coverstone v. Davies* (1952) 38 Cal.2d 315, which held that parents could not recover for violation of his privacy based on publications about their son's arrest and prosecution, which was a matter of general public interest, because the their "only relation to the asserted wrong is that they are related to the victim of the wrongdoer and were therefore brought unwillingly into the limelight. (*Coverstone*, 38 Cal.2d at 323-324; see also *Flynn v. Higham* (1983) 149 Cal.App.3d 677, 683, *Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59,

62.)

This is not a "limelight" case. This is a case where, as a direct result of defendants' actions, shots have been fired at the Moreno home, and they have been forced to leave their hometown. The defendants cannot escape the consequences of their actions simply because the *Record* did not identify David, Maria and Araceli as additional inhabitants of the house being fired upon. There is no reason to deny the other members of Cynthia's family, who have also suffered tremendously as a result of the defendants' actions, the chance to recover for the damage caused.

F. AT A MINIMUM, COURT SHOULD REMAND TO ALLOW AMENDMENT OF COMPLAINT

Finally, as discussed in section A *supra*, if there was a reasonable possibility of curing the defect, the trial court abused its discretion in sustaining the demurrer without leave to amend, even in the absence of a request for leave to amend in the trial court. (Code Civ. Proc. § 472c, subd.(a); *Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 7-8.)

In this case, the Morenos did request leave to amend to cure any defects perceived by the court (AA 34; RT 42), and again request it. The trial court took a restrictive view of the allegations against the District and Campbell, but the Morenos believe that Campbell and Pond conspired to publish the Ode, as alleged in paragraph 15 of the FAC. (AA 10.) The Morenos could easily amend paragraph 10 of the FAC [4] to allege conspiracy at greater length, making the District and Campbell even more clearly liable for all of the actions attributed to Pond and the publishers of the *Record*. (*Applied Equipment Corporation v. Litton*

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[4] 10. In or about October 10, 2005, the Morenos learned that defendant Campbell, who was a friend of editor Pond, had submitted the Ode to her to be published in the *Record*, and that she was considering publishing the Ode in the *Record*. Plaintiffs are informed and believe and thereon allege that Campbell and Pond had formed a conspiracy to inflict emotional distress on the Morenos and invade their privacy by publishing the Ode in the Letters to the Editor section of the *Record,* and that all of the acts alleged herein were taken pursuant to that conspiracy. Neither Cynthia Moreno nor any member of the Moreno family gave Campbell or Pond permission to republish the Ode, to submit the Ode for republication in the *Record*, or to use her name in connection with any republication.

Saudi Arabia Limited (1994) 7 Cal.4th 503, 510-511.)

Not only would such additional allegations resolve some of the trial court's objections, but they would also make the District and Campbell liable for the false light form of invasion of privacy alleged in paragraph 21 of the FAC. (FAC ¶ 21; AA 12.) The decision to place the Ode in the Letters to the Editor section placed the Morenos in a false light that was "highly offensive to a reasonable person." (*Fellows v. National Enquirer, Inc.* (1986) 42 Cal.3d 234, 238.) While defendants knew that the Morenos had not submitted the Ode to the *Record* and in fact objected to its publication there, the average reader of the *Record* would believe that Cynthia Moreno not only held these negative, inflammatory opinions about Coalinga and its residents, but wanted everyone in Coalinga to know it. Sending the Ode to the Coalinga newspaper editor is a significantly more provocative action than simply posting it in an online journal, which few people would normally see. (FAC ¶¶ 9, 15, 19, 21; AA 8-12.)

This is not a case where the false light would be discernible only to someone "with extra sensitive

perception" (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 805-806), but one that would follow by reasonable implication from the damning and false impression that Cynthia Moreno wanted everyone in Coalinga to know how she felt about them. The District and Campbell should be held responsible for placing the Morenos in a false light before the public.

Finally, the Morenos ask leave to allege a claim against the defendants under the fourth form of invasion of privacy, misappropriation of a person's name. (*Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 24; *Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 541-542.) Stating a misappropriation claim requires allegations that a defendant appropriated plaintiff's name to defendant's advantage, commercially or otherwise, without consent, and resulting in injury to plaintiff. (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 417; CACI 1803.) While one form of misappropriate concerns the right of publicity, another form "is the appropriate of the name ... that brings injury to the feelings, that concerns one's own peace of mind, and

that is mental and subjective." (*Dora*, 15 Cal.App.4th at 542.) To prevail on the claim, plaintiffs must also establish a lack of newsworthiness, as with other forms of invasion of privacy. (*Dora*, 15 Cal.App.4th at 542-544.)

Although the FAC did not specify a claim for misappropriation, the Morenos have already alleged that defendants used Cynthia Moreno's name, and particularly her last name, without permission, in publishing the Ode in the *Record*, causing overwhelming damage to the family (FAC ¶¶ 10-16, 21; AA 8-10, 12.) Campbell obtained an advantage by forcing the Morenos to leave Coalinga, and the Morenos have further alleged that the Ode was not newsworthy. (FAC ¶¶ 16, 18-21; AA 10-12.) They ask leave to clarify their claim for misappropriation against these defendants.

CONCLUSION

The malicious actions of Campbell and the District caused overwhelming injury to the Moreno family. The Morenos ask this Court to reverse the erroneous

decision of the trial court sustaining the demurrer, and allow them to pursue their claims for damages.

DATED: August 2, 2010 LAW OFFICES OF PAUL KLEVEN

By:_____
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CERTIFICATE OF COUNSEL

I certify that this Appellant's Opening Brief contains 5516 words, as calculated by my WordPerfect 11 word processing program.

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