

# Chicago Daily Law Bulletin

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## Reality TV gone bad: Suit given green light

An arrestee's allegation that the city of Naperville police officers and a television production company depicted her arrest on television without her consent stated a cause of action for violation of the arrestee's privacy rights.

In these days of reality TV, it seems as though people are falling all over themselves to have their private lives televised for all to see. As the case that is reviewed in today's column demonstrates, Eran Best is not one of those people. *Eran Best v. Stacey Malec, et al.* No. 09 C 7749 (U.S.D.C., N.D.Ill., E.D., 2010)

In 2007, the city of Naperville contracted with the producers of "Female Forces," an unscripted "reality" television series which involved the filming of several female Naperville police officers as they performed their duties. According to the contract, members of the public could not be depicted on the show unless the producers obtained a signed release in which the person consented to being televised.

In February 2008, Eran Best was pulled over by Naperville Police Officer Timothy Boogerd because of an expired license plate sticker. After obtaining Best's identifying information, Boogerd requested that Stacey Malec, a female police officer who was being accompanied by a *Female Forces* camera crew, join him at the scene. This caused a 30-minute delay in the processing of Best's traffic stop.

Upon Malec's arrival, the production crew filmed Malec advising Best that she was a police officer and telling her that the television crew was filming a documentary about Malec. Boogerd and Malec performed a field sobriety test, which she passed. She was arrested, nonetheless, for driving on a suspended driver's license, handcuffed and placed in the back of Boogerd's squad car, and then transported to the Naperville Police Station. During transport, Boogerd told Best that the footage of her arrest would not be shown on television if she did not sign a written consent form. At the station, a "Female Forces" producer urged her to sign a written consent, however, Best repeatedly refused.

Despite the fact that she never signed a consent form, a "Female Forces" episode depicted Best being given a field sobriety test, and then being placed in handcuffs, during which Best's voice was audible. In addition, one scene showed Boogerd and Malec searching Best's car while discussing the fact that Best likes "Coach purses, bags, and shoes, and drives a Jaguar." Malec

was depicted stating, "Do I feel sorry for [Best]? No. Pretty little blond girl, 25 years old, driving a Jaguar - yeah, that's Naperville." In addition, as Malec was speaking to the camera at one point, the camera focused on a dashboard computer which displayed Best's date of birth, height, weight, driver's license number, and brief descriptions of previous arrests and traffic stops, including at least one that took place when she was a minor.

As a result, Best filed a federal civil rights lawsuit against Malec and Boogerd, the city of Naperville, the A&E Television Network, and other television production companies, alleging that their conduct violated her federal civil rights under 42 U.S.C. § 1983 and also several rights guaranteed to her under Illinois State Common Law. All defendants moved to dismiss the state law claims for various reasons.

U.S. District Judge [Matthew F. Kennelly](#) of the Northern District of Illinois, in large part, denied the defendants' motions to dismiss. Initially, Kennelly reviewed the law governing Best's contention that the media defendants violated her right under the Illinois Right of Publicity Act (IRPA), 765 ILCS 1075/30, which prohibits use of an individual's identity for commercial purposes without written consent:

"The Illinois statute defines a commercial purpose as 'the public use or holding out of an individual's identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising.' 765 ILCS 1075/5."

Kennelly concluded that Best had adequately alleged a violation of IRPA:

"The 'Female Forces' show is a for-profit product, broadcast on a network with commercial advertisements. People pay for television service, including via subscriptions to cable networks such as the Biography Channel. It appears that broadcasting the footage concerning Best on 'Female Forces' satisfies the 'commercial purpose' requirement under IRPA."

In denying the media defendants' motion to dismiss the IRPA claim, Kennelly acknowledged that the defendants might have an argument that use of the footage did not violate IRPA because Best's identity was used in "in connection with legitimate coverage of public activities." However, Kennelly concluded that the media defendants had failed to adequately develop the argument in a manner which supported application of the exemption:

"Defendants make reference to the First Amendment protections granted to books and newspapers, and they cite Supreme Court cases (and the Second Restatement of Torts) that discuss First Amendment protections for newspapers. By these references, defendants may be suggesting that the 'Female Forces' program is a news or public affairs broadcast and thus exempt from IRPA under section 35(b)(2), which exempts 'use of an individual's identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account, or any political campaign.' 765 ILCS 1075/35(b)(2). They may also be attempting to argue that the First Amendment precludes the application of IRPA to programs like 'Female Forces.' Neither of these arguments are squarely presented in the defendants' brief, however, and the court declines to grant a motion to dismiss on an argument that defendants have failed to develop fully. The

court therefore denies defendants' motion to dismiss count 2."

Turning to Best's invasion of privacy claim based upon the publication of private facts, Kennelly again set forth the governing law:

"In Illinois, to succeed on a claim for public disclosure of private facts, a plaintiff must prove that: '(1) publicity was given to the disclosure of private facts; (2) the facts were private and not public facts; and (3) the matter made public would be highly offensive to a reasonable person.' *Johnson v. K-Mart Corp.*, 311 Ill. App. 3d 573, 579, 723 N.E.2d 1192, 1197 (2000)."

Against that backdrop, Kennelly rejected the defendants' contention that the facts which were visible on the monitor in Malec's patrol car were not private facts, the display of which would be highly offensive to a reasonable person:

"Best has alleged that the publication of this information was highly offensive and caused her great distress. Given the nature of at least some of the information, and given the risk of identity theft that is presented by the exposure of such information in association with a person's name, the court concludes that it is reasonable to infer that disclosure of such information would be highly offensive to a reasonable person. The court is satisfied that Best's complaint satisfies this element of the test."

Kennelly further found that Best had stated a claim against the defendants for intentional infliction of emotional distress based upon the conduct of Malec and Boogerd in mocking her, and then displaying that discussion on television after Best had been assured that it would not be shown on television:

"If Best's claim were based solely on the fact that Malec and Boogerd made a few remarks that amount to mocking or teasing about Best's perceived wealth or fancy taste, the defendants might be correct that she was complaining about 'mere insults [and] indignities,' and motion to dismiss the intentional infliction of emotional distress claim might fare better. As it stands, however, Best's complaint alleges not only that the comments were made but that the defendants aired footage including those mocking comments without her consent, knowing that she objected and ignoring the assurances that they had given her that it would not be televised. This, in the court's view, elevates this claim above the level of 'mere insults,' at least for purposes of a motion to dismiss."

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