No. SJC-13138

In the

Commonwealth of Massachusetts

Supreme Judicial Court for the Commonwealth

Tamara Lanier,
Plaintiff-Appellant

v.

President and Fellows of Harvard College & Others,
Defendants-Appellees

On Appeal from Judgment of the
Middlesex County Superior Court—Woburn

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CORPORATE DISCLOSURE STATEMENT

President and Fellows of Harvard College is the legal entity comprising Harvard University, and is the proper party to this litigation. Pursuant to Massachusetts Rule of Appellate Procedure 16(a)(2) and Supreme Judicial Court Rule 1:21, President and Fellows of Harvard College certifies that it is a non-profit corporation with no parent corporation and that no public company owns any interest in it.

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INTRODUCTION

In 1850, a photographer named Joseph T. Zealy created daguerreotypes—i.e., images developed through an early photographic process—of seven enslaved individuals in South Carolina: Alfred, Delia, Drana, Fassena, Jack, Jem, and Renty. These daguerreotypes were commissioned for Louis Agassiz, a Harvard zoologist who held abhorrent racial views, and who intended to use the images captured in the daguerreotypes to further those views.

The daguerreotypes were found in storage at Harvard's Peabody Museum in 1976. Recently, the Peabody Museum published a multidisciplinary study of these images entitled, *To Make Their Own Way in the World: The Enduring Legacy of the Zealy Daguerreotypes*. With a foreword written by Harvard Professor Henry Louis Gates, Jr. and chapters written by numerous prominent academics and artists, the work "examines the images, their creation, the people behind the camera, and the people in the frame, through various lenses of American history, art history, anthropology, and the history of science."[1] These images have led scholars to introduce the people depicted in the daguerreotypes to the world and to demonstrate to the public the devastation of slavery through striking imagery rather than narrative.

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[1] *Researching the Zealy Daguerreotypes*, Peabody Museum of Archaeology & Ethnology Harv. Univ. (2021), https://www.peabody.harvard.edu/TMTOW-RESEARCH.

According to Plaintiff Tamara Lanier, she is the owner of the daguerreotypes of Renty and Delia because (i) Renty and Delia were the rightful owners of the daguerreotypes due to the horrific circumstances in which the daguerreotypes were created, and (ii) she, as a descendant of those individuals, now possesses their property interest. Under the legal rule Ms. Lanier proposes, the public should not be allowed readily to access these and similar historically significant images. Rather, every subject of a photograph and similar media—and the subject's descendants—would have a property interest in the photograph itself, and thus be able to exclude the photographer, media organizations, or museums from displaying it. That position is wrong as a matter of law.

This case comes before the Court on the pleadings, so the Court must accept for purposes of this appeal that Ms. Lanier is a lineal descendant of Renty and Delia. Even if that is accurate, Ms. Lanier's claim fails at the threshold because there is no support for the proposition that a person, in any circumstance, derives a property interest in a physical photograph (or painting, or sculpture, etc.) because that photograph contains that person's image. Every court to have considered that rule has rejected it, and for good reason. If Ms. Lanier's rule were adopted, then museums, newspapers, and others could not create and display photographs—especially historically significant images created in horrific circumstances—without fear of a lawsuit by an alleged descendant of one of the subjects of the

photographs. The public would be deprived of some of the most famous images of enslaved individuals, war, the Holocaust, Abu Ghraib, and other similar historical events—images protected in their creation and display by the First Amendment, and images the public has an overwhelming interest in viewing. Ms. Lanier's novel proposal should be rejected, as the Superior Court correctly held.

Nor is that the only reason to affirm the judgment below. Ms. Lanier's claims are not only legally meritless but time-barred. And the one claim Ms. Lanier continues to press that does not rest on the erroneous property-related theory just described—a claim under the Massachusetts Civil Rights Act—fails for several additional reasons. As explained in detail below, the judgment of the Superior Court should be affirmed.

STATEMENT OF CASE

On March 20, 2019, Tamara Lanier filed a complaint against Harvard in Middlesex County Superior Court, alleging both state and federal claims. AV1-005; AV1-010. Harvard removed the case to the United States District Court for the District of Massachusetts. Ms. Lanier filed an amended complaint and moved to remand the case to state court. The motion was allowed in July 2019. AV1-006. In November 2019, Ms. Lanier filed a second amended complaint in the Superior Court. AV1-006. Harvard moved to dismiss on March 11, 2020. AV1-

007. On March 2, 2021, the Superior Court (Sarrouf, J.) allowed Harvard's motion. AV1-008; *see infra* at 19-22.

Ms. Lanier filed her notice of appeal on March 17, 2021. AV2-030. On June 29, 2021, this Court allowed Ms. Lanier's motion for Direct Appellate Review.

STATEMENT OF ISSUES

1. Whether the Superior Court correctly dismissed Ms. Lanier's property-related claims after concluding that Ms. Lanier does not have a property interest in the daguerreotypes as a matter of law, even assuming that she is a descendant of Renty and Delia.

2. Whether Ms. Lanier's property-related claims are time-barred because they were filed more than three years after Ms. Lanier knew that Harvard possessed the daguerreotypes but denied her claim to the images.

3. Whether several of Ms. Lanier's property-related claims fail on other grounds, including because Ms. Lanier cannot establish that she is the rightful owner of the daguerreotypes and because there is no cause of action in Massachusetts for intentional interference with a property right.

4. Whether the Superior Court correctly dismissed Ms. Lanier's Civil Rights Act claim after concluding that the claim was time-barred and that Ms. Lanier lacked standing to assert it.

STATEMENT OF FACTS

A. Factual Background

The background relevant to resolving Ms. Lanier's appeal is based on the factual allegations in the second amended complaint (the operative complaint on appeal) ("the Complaint"), taken as true for purposes of the motion to dismiss only and read in the light most favorable to Ms. Lanier, as well as "the documents attached and incorporated in the complaint." *Harhen v. Brown*, 431 Mass. 838, 839 (2000).

Origin and Use of the Daguerreotypes.

The Complaint alleges that in 1850, Louis Agassiz, then a member of the Harvard faculty, traveled to South Carolina to collect photographs of individuals he characterized as "racially 'pure' slaves born in Africa" in support of polygenism—a theory espoused by Agassiz that "racial groups do not share a common origin." AV1-41 (¶ 46); AV1-42 (¶ 63); AV1-43 (¶¶ 67-69, 74). Agassiz visited a plantation in Columbia, South Carolina, owned by B.F. Taylor, where Ms. Lanier alleges that "Agassiz selected several enslaved men and women to be photographed," including "an older man named Renty" and his daughter, Delia. AV1-43 (¶¶ 75-77). Renty and Delia were subsequently taken to a studio owned by Joseph T. Zealy, where they were ordered to disrobe and photographed. AV1-46 (¶¶ 107-10). Agassiz later received the photographs, which are known as

daguerreotypes due to the process used to create them. *Id.* (¶¶ 107-12). He also published an article "refer[ring] to his recent study of black bodies." *Id.* (¶ 113). The daguerreotypes were found in the Harvard Peabody Museum's collection in 1976. AV1-049 (¶¶ 141-42).

Ms. Lanier's Communication with Harvard Concerning Her Ancestry.

Ms. Lanier became interested in her genealogy after her mother died in 2010. AV1-51 (¶¶ 164-66). Ms. Lanier alleges that her mother, Mattye Thompson, who was born in Montgomery, Alabama, repeatedly told Ms. Lanier always to remember that she is a Taylor not a Thompson. AV1-44 (¶¶ 81-83). Mattye Thompson also told Ms. Lanier that her family traced its origin to a man named "Renty Taylor, or Papa Renty," who was known as the "Black African" and was "enslaved in South Carolina on the B.F. Taylor plantation." *Id.* (¶¶ 88-90). Ms. Lanier claims that her mother also told her that the last name of Papa Renty's grandson, Renty Taylor III, changed to Thompson when he "was transferred from South Carolina to the Thompson family in Montgomery, Alabama." AV1-45 (¶¶ 100-02). Ms. Lanier alleges that while researching her family, she learned about the Renty and Delia daguerreotypes in the Peabody Museum collection. AV1-51 (¶¶ 167-68). The Complaint contains no other allegations concerning

whether Ms. Lanier is a descendant of the enslaved man named Renty who appears in the daguerreotype.[2]

On March 17, 2011, Ms. Lanier sent an email to Harvard's then-President Drew Faust. AV1-51 (¶¶ 169-70). In the letter, Ms. Lanier stated that Agassiz commissioned the daguerreotypes in 1850 "to capture what he believed to be evidence [of] racial superiority" and that Harvard possessed the "piercing and poignant images of the evils of slavery." AV1-093.[3] Ms. Lanier further explained that she had "historical and US Census information confirming" that Renty and Delia Taylor "are, in fact, [her] ancestors" and asked Harvard to review "documentation to reaffirm" that relationship. AV1-093; *see also* AV1-51 (¶¶ 169-70). No documentation, however, was attached to that correspondence. AV1-93. President Faust replied that she understood that Ms. Lanier had previously spoken with relevant Peabody Museum staff, who had arranged for her to "view the daguerreotypes" and had agreed to be in touch with Ms. Lanier if research that they were then conducting on the daguerreotypes yielded "new

[2] Ms. Lanier alleges that she looked for information about the Taylors in "libraries and archives in South Carolina," AV1-51 (¶ 167), but does not allege what, if any, relevant information she discovered there.

[3] Ms. Lanier and President Faust's March 2011 correspondence is explicitly referenced in the Complaint and thus can be considered "without converting [the] motion to dismiss into [a] motion for summary judgment." *Harhen*, 431 Mass. at 839-40.

relevant information." AV1-094. President Faust also invited Ms. Lanier to share with the Peabody Museum any additional information she discovered. *Id*. Ms. Lanier alleges that Harvard "never contacted [her] about ongoing projects, new information, or interest in verifying her lineage and connection to the daguerreotypes." AV1-52 (¶ 174).

Three years later, in March 2014, Ms. Lanier's hometown newspaper, the Norwich Bulletin, published an article describing Ms. Lanier's story.[4] The article extensively quoted Ms. Lanier and her family, reciting her account of her purported connection to Renty and Delia. AV1-138-40. At the same time, the article made clear that "Peabody Museum officials don't agree" with that account. AV1-140. In particular, the article quoted one Peabody Museum employee as saying that Ms. Lanier had "given [the Museum] nothing that directly connects her ancestor to the person in [the Peabody Museum's] photograph." *Id.*; *see also* AV1-52 (¶ 176).

After another three-and-a-half years passed, in October 2017, Ms. Lanier sent an email to President Faust stating that her "own research and certification confirm[ed] that [she is a] linea[l] descendant of the individual in the Daguerreotypes" and "request[ing] . . . [that] the Slave Daguerreotypes [be]

[4] The 2014 Norwich Bulletin article is incorporated by reference in the Complaint. AV1-052 (¶ 176); *see supra* at 16 n.3.

immediately relinquished to [her]." AV1-96.[5] On November 13, 2017, a Peabody Museum staff member responded that "new and exciting research" regarding the daguerreotypes "has been completed" and that "[a] volume of essays is currently under peer review for publication," which was "expect[ed] to appear in about a year." AV1-98. The Peabody Museum invited Ms. Lanier to share any additional documentation or information she could provide. *Id.* Ms. Lanier does not allege that she submitted any additional materials.

B. Procedural Background

The Complaint asserts five property-related claims against Harvard: replevin (Count One), conversion (Count Two), intentional harm to a property interest (Count Five), negligent infliction of emotional distress (Count Six), and equitable restitution (Count Seven). Each of those claims is based on Ms. Lanier's allegation that she is a descendant of the individuals pictured in the daguerreotypes, and that she therefore possesses a property interest in the daguerreotypes.[6] The Complaint also asserts two additional non-property-related

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[5] Ms. Lanier's 2017 correspondence is incorporated by reference in the complaint. AV1-054 (¶¶ 195-200); *see supra* at 16 n.3.

[6] *See, e.g.*, AV1-055 (¶ 211) ("The plaintiff, as next of kin of Renty, is the person entitled to possession of the daguerreotypes of Renty and of his daughter, Delia."); AV1-056 (¶ 213) ("At the time of said acts, Ms. Lanier's right of ownership and/or possession was superior to Harvard's."); AV1-058 (¶ 204) ("Ms. Lanier has a legally protected property interest in the daguerreotypes of Renty and Delia."); AV1-058-59 (¶¶ 203-05) (Ms. Lanier suffered emotional distress "as a direct

claims. The first (Count Three) is a claim under Massachusetts General Law, chapter 214, § 3A, for the "unauthorized use" of Renty and Delia's images without their consent. AV1-056 (¶¶ 203-07). The second (Count Four) alleges that Harvard violated the Massachusetts Civil Rights Act when, in the mid-nineteenth century, it engaged in "advocacy in favor of a slave-based economy," AV1-058 (¶ 210), including by commissioning and using the daguerreotypes in the 1840s and 1850s, *id.* (¶ 211).

Harvard moved to dismiss all of Ms. Lanier's claims, AV1-007, and on March 2, 2021, the Superior Court (Sarrouf, J.) allowed Harvard's motion, AV1-008.

In its Order, the Superior Court began by analyzing Ms. Lanier's five "property-related" claims. AV2-018. The court agreed with Harvard (and with Ms. Lanier's concession) that these claims were all "based on the legal assertion that Renty and Delia had a property interest in the photographs and that Lanier, as a descendant of Renty and Delia, currently holds such property interest." AV2-023; *see also* AV2-018 n.6. Thus, a "necessary" requirement for each of those

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result" of Harvard's "denial of [Ms. Lanier's] claim of lineage"); AV1-059 (¶ 203) ("Ms. Lanier is the rightful owner of the daguerreotypes of Renty and Delia.").

claims is that Renty and Delia have a "property interest" in the daguerreotypes. AV2-023.[7]

The court determined that no such property interest exists. "It is a basic tenet of common law," the court reasoned, "that the subject of a photograph has no interest in the negative or any photographs printed from the negative." AV2-024. "[R]ather, the negative and any photographs are the property of the photographer." *Id.* That rule applies "even where an image is taken without the subject's consent" and "regardless of how objectionable the photograph's origins may be." *Id.* Accordingly, the court concluded that "Renty and Delia did not possess a property interest in the photographs." AV2-025. And because Ms. Lanier's property interest was entirely derivative of Renty and Delia's, the court held that "Lanier, likewise, does not have a property interest in [the daguerreotypes]." *Id.*

[7] A legally protected property interest is an express element of four of the five claims—Counts One, Two, Five, and Seven. *See Portfolioscope, Inc. v. I-Flex Sols. Ltd.*, 473 F. Supp. 2d 252, 256 (D. Mass. 2007) ("[C]onversion and replevin . . . claims require an allegation of wrongful possession of tangible property."); *Santagate v. Tower*, 64 Mass. App. Ct. 324, 336 (2005) (equitable restitution requires that "the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff" (quotation omitted)); Restatement (Second) of Torts § 871 (intentional harm to property interest requires intentional deprivation of a "legally protected property interest"). The fifth claim—for negligent infliction of emotional distress (Count Six)—requires the defendant to foreseeably harm the plaintiff. *See Jupin v. Kask*, 447 Mass. 141, 147 (2006). Harvard's alleged conduct could not have foreseeably harmed Ms. Lanier if she had no legal claim to the daguerreotypes. AV2-023, n.12.

The court additionally held that several of the property-related claims must be dismissed because they are time-barred. The court explained that Ms. Lanier's property-related claims were subject to a three-year statute of limitations that began running as soon as Ms. Lanier was "on notice that someone may have caused her injury." AV2-018 (quoting *Donovan v. Phillip Morris USA, Inc*., 455 Mass. 215, 228 (2009)). Applying that standard, the court concluded—based on Ms. Lanier's "own admissions"—that she was on notice of her claims by at least March 2011, when she sent her letter to President Faust explaining her ancestry and acknowledging that Harvard had the daguerreotypes. AV2-022. The court declined, however, to dismiss Ms. Lanier's replevin and conversion claims as untimely, despite acknowledging that they were subject to the same statute of limitations. AV2-019-20.

The court also dismissed Ms. Lanier's two non-property-related claims (Counts Three and Four). The court concluded that the statutory right to prevent the unauthorized use of one's image does not survive the subject's death, meaning that Ms. Lanier could not assert such a claim on Renty and Delia's behalf. AV2-25. The court likewise dismissed Ms. Lanier's Civil Rights Act claim, concluding (i) that the statute did not authorize Ms. Lanier to sue on Renty and Delia's behalf; and (ii) that any such claim was time-barred as the challenged conduct "took place in the nineteenth century"—"well beyond the three-year statute of limitations

period." AV2-026. Any effort by Ms. Lanier to assert a claim on her own behalf also fails, the court explained, because Ms. Lanier had never alleged that Harvard used "threats, intimidation, or coercion" to interfere with her rights as required to state a Civil Rights Act claim. AV2-027 (quoting *Brum v. Dartmouth*, 428 Mass. 684, 707 (1999)).

Ms. Lanier appealed the dismissal of her property-related claims and her Civil Rights Act claim, and this Court allowed her motion for Direct Appellate Review. Ms. Lanier's opening brief does not appeal the dismissal of Count Three, asserting "unauthorized use of an image" under Massachusetts General Law, chapter 214, § 3A, and she has thus forfeited that argument. *See Travenol Labs., Inc. v. Zotal, Ltd.*, 394 Mass. 95, 97 (1985) (issue not raised in principal brief need not be considered).

SUMMARY OF ARGUMENT

The Superior Court correctly dismissed Ms. Lanier's five property-related claims. Counts One, Two, Five, Six, and Seven—asserting replevin, conversion, intentional harm to a property interest, negligent infliction of emotional distress, and equitable restitution—all stem from Ms. Lanier's allegations that (i) Renty and Delia, as the subjects of the daguerreotypes, had a property interest in them, and (ii) she, as their descendant, has inherited that interest. This Court should affirm the Superior Court's judgment for three independent reasons. *See infra* at 26-52.

First, Renty and Delia did not have a property interest in the daguerreotypes, and so neither does Ms. Lanier, even under her own theory of the case. It is established at common law that the subject of a photograph does not possess a property interest in the photograph by virtue of being its subject. Rather, the photographer—not the subject—holds the property interest in the negatives and the printed photograph. That rule encourages freedom of expression consistent with core First Amendment values. *See infra* at 28-30.

That rule fully applies to photographs captured in tortious circumstances. Every court to have considered the question has agreed, and for good reason. From the Civil War to the Holocaust to images of lynchings and prisoners at Abu Ghraib, photographs—and gruesome imagery in particular—have been used to educate the public, expose corruption, and shock consciences in a way that the printed word alone cannot. Ms. Lanier's proffered rule would deter or even bar photojournalists and museums from capturing and displaying this imagery, and it would thus undermine the public's strong interest in viewing images of especially troubling historical periods that have been (and continue to be) crucial in propelling social change. Ms. Lanier's rule would also be impossible to administer. Courts would have no good way of assessing and adjudicating competing property interests among multiple subjects in an image or the multiple ancestors of those subjects. Nor could a court or jury reasonably determine

whether a tort is sufficiently serious to warrant a transfer of property interests. *See infra* at 30-41.

Second, Ms. Lanier's property-related claims are time-barred. Each of those claims is subject to a three-year statute of limitations that begins running when the plaintiff knows or reasonably should have known that she may have been harmed. Ms. Lanier's own allegations make clear that she knew by 2011 at the latest both the basis for her ancestry claim and that Harvard possessed the daguerreotypes. At that point, she had all the information she needed to assert her property-related claims. Moreover, she knew in 2014 that Harvard publicly rejected her claim. She nevertheless waited until 2019, well beyond the three-year limitations period, to assert her claims. *See infra* at 41-46.

The Superior Court properly concluded that three of Ms. Lanier's claims are time-barred. It held, however, that two of her claims—for replevin and conversion—were timely because Ms. Lanier did not make a formal demand for the daguerreotypes until 2017. This conclusion was incorrect because a formal demand is necessary to trigger the limitations period only when the defendant's possession was not wrongful at the outset, such that a demand is required to put the defendant on notice of a claim of wrongful possession. Where, as here, the plaintiff alleges that the defendant's possession of the property was wrongful from the start, no demand is necessary. *See infra* at 46-49.

Third, several of Ms. Lanier's property-related claims fail for additional reasons. To state claims for replevin, conversion, and equitable restitution, a plaintiff must allege not only that she has a possessory interest in the property at issue, but also that the property rightfully belongs to her. Ms. Lanier does not (and cannot) make that showing because she cannot establish either that she is Renty and Delia's only living ancestor or that she is the rightful owner among multiple ancestors. Ms. Lanier's intentional harm to a property interest claim fails because Massachusetts courts have never recognized such a claim, and Ms. Lanier offers no reason for this Court to do so in these circumstances. *See infra* at 49-52.

The Superior Court also correctly rejected Ms. Lanier's attempt to assert a claim under the Massachusetts Civil Rights Act. In her Complaint, Ms. Lanier alleged that in the mid-nineteenth century, Harvard violated Renty and Delia's rights under the Act when it advocated in favor of slavery (despite the judicial prohibition against it), including through its commissioning and use of the daguerreotypes. That claim, like Ms. Lanier's property-related claims, is time-barred. Ms. Lanier also lacks standing to assert it, as a plaintiff may bring a Civil Rights Act claim only on her own behalf. *See infra* at 52-53.

Ms. Lanier argues on appeal that she *is* asserting her Civil Rights Act claim on her own behalf in challenging Harvard's failure to recognize her property interest in the daguerreotypes. But she cannot now recharacterize the allegations in

her Complaint, and her new allegations do not state a claim in any event. *See infra* at 53-54.

STANDARD OF REVIEW

This Court reviews de novo the allowance of a motion to dismiss. *Buffalo-Water 1, LLC v. Fid. Real Est. Co., LLC*, 481 Mass. 13, 17 (2018). To survive a motion to dismiss, a complaint requires "more than labels and conclusions"; its "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quotation omitted). This Court may affirm the dismissal of a complaint based on "any ground apparent on the record that supports the result reached in the lower court." *Gabbidon v. King*, 414 Mass. 685, 686 (1993).

ARGUMENT

I. The Superior Court Correctly Dismissed Ms. Lanier's Property-Related Claims.

As the Superior Court recognized, five of Ms. Lanier's claims—for replevin (Count One), conversion (Count Two), intentional harm to a property interest (Count Five), negligent infliction of emotional distress (Count Six), and equitable restitution (Count Seven)—rely on her assertion that she possesses a property interest in the daguerreotypes. AV2-023. Ms. Lanier has conceded as much on multiple occasions. *See* AV1-109 (referring to these counts in her opposition to Harvard's motion to dismiss as her "property claims"); Opening Brief ("OB") 31

("Renty's possessory interest in the images is an essential element" of replevin claim); OB41 (conversion claim requires that "plaintiff has an ownership or possessory right or interest in the property"); OB43 (intentional harm to a property interest claim requires "harmful invasions of property interests").[8]

The Superior Court correctly concluded that these property-related claims fail as a matter of law. First, Ms. Lanier has no property interest in the daguerreotypes as a matter of law and so her claims—all of which depend on a showing of a property interest—cannot survive, as the Superior Court held. Second, even if Ms. Lanier had a cognizable property interest in the daguerreotypes, her property-related claims would be time-barred because they accrued well outside the three-year statute of limitations. The Superior Court correctly dismissed some of the property-related claims on that alternative ground, but it should have dismissed all of them as untimely. Finally, several of these property-related claims fail for numerous claim-specific reasons. This Court

[8] Despite describing her equitable restitution claim as a "property claim[]" in her opposition to Harvard's motion to dismiss, AV1-109, Ms. Lanier now contends that "no applicable law specifically identifies proof of a possessory interest as an element" of that claim, OB44. That argument is both waived and wrong. As Ms. Lanier elsewhere recognizes, "[t]he fundamental substantive basis for restitution is that the defendant has been unjustly enriched by receiving something . . . *that properly belongs* to the plaintiff." OB53 (emphasis added); *see also Santagate*, 64 Mass. App. Ct. at 335-36 (plaintiff asserting an equitable restitution claim must show that defendant was enriched by "receiving something, tangible or tangible that properly belongs to plaintiff" (quotation omitted)).

should affirm the dismissal of Ms. Lanier's property-related claims.

A. Ms. Lanier Lacks Any Property Interest In The Daguerreotypes.

Ms. Lanier claims a property interest in the daguerreotypes based on two assertions: (i) the enslaved individuals pictured in some of the daguerreotypes, Renty and Delia, were the rightful owners of the daguerreotypes; and (ii) Ms. Lanier is now the rightful owner because she is one of Renty and Delia's descendants. The threshold question is whether Renty and Delia had a tangible property interest in the daguerreotypes.

The answer to that question, the Superior Court correctly concluded, is no. That is so not because Renty and Delia were enslaved, but because no person acquires a property interest in a photograph of which they are the subject. That rule applies even where the photograph was taken without the subject's consent and/or in abhorrent circumstances. A contrary holding would chill important forms of expression protected by the First Amendment, undermine crucial public interests, and create insurmountable administrative problems.

1. The Subject Of A Photograph Does Not Have A Property Interest In That Photograph.

At common law, it is settled that the subject of a photograph has "no property in the negative or the photographs printed." *Thayer v. Worcester Post Co.*, 284 Mass. 160, 163-64 (1933); *see also Press Publ'g Co. v. Falk*, 59 F. 324, 326 (S.D.N.Y. 1894) ("That she was the subject of the picture would not, alone

make it hers."); *Cont'l Optical Co. v. Reed*, 119 Ind. App. 643, 652 (1949) ("the subject of a photograph does not own the negative or have any property rights therein"). Instead, the photograph is "the property of the photographer, not of [the subject]." *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 883 (9th Cir. 1988).

That rule furthers important public policy goals also reflected in the First Amendment. The First Amendment is meant to protect and encourage "freedom of expression"—including in the form of "pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures." *ETW Corp. v. Jireh Publ'g Inc.*, 332 F.3d 915, 924 (6th Cir. 2003); *see also Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (recognizing First Amendment protection afforded "pictures, films, paintings, drawings and engravings"). When photographers and photojournalists know they will own the photographs they take, they have every incentive to develop their craft, seek out compelling and perhaps even difficult material to record, and produce an abundance of original content to use as publicly or as privately as they choose. Absent that protection, "there would be little incentive" for photographers to capture images, "and the public would be denied an important source of . . . information" and expression. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 557 (1985). There are already means within the law for the subject of an image to preclude the owner of a photograph from misusing that image, within the bounds of the First Amendment. *See, e.g.*, M. G. L. c. 214,

§ 3A (prohibiting unauthorized commercial use of image). But under no circumstance does the subject obtain ownership of the photograph itself.

Other areas of property law strike a similar balance. In the realm of copyright, for example, it is settled that "the nature of the thing depicted or the subject of the photograph . . . is not regarded as a copyrightable element." *Natkin v. Winfrey*, 111 F. Supp. 2d 1003, 1010-11 (N.D. Ill. 2000) (quotation omitted); 2 Patry on Copyright § 4:18 ("Copyright does not extend to the subject matter of the image."). Accordingly, while the photograph itself can be copyrighted, the subject of that photograph cannot. Likewise, "[i]mages and likenesses . . . are not protectable as a trademark." *ETW Corp.*, 332 F.3d at 922-23. These intellectual property rules—like the common law rule on ownership of the tangible photograph—supply an "incentive to create and disseminate ideas" without unduly limiting the rights of others to express themselves, or defend against misappropriation of their own image. *Harper & Row Publishers, Inc.*, 471 U.S. at 558; *see also Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

2. The Rule Applies Where Photographs Are Taken Without Consent Or In Tortious Circumstances.

Ms. Lanier all but concedes that there is not a single precedent—in any jurisdiction—holding that an individual obtains a property interest in a photograph by virtue of being its subject. Instead, she urges this Court to carve out a novel exception to the common law rule, arguing that it does not apply when a

photograph is taken without the consent of the subject or in "tortious circumstances." *See* OB33-38. That proffered exception has been rejected by every court to have considered it, including this one. Indeed, such a rule would undermine important First Amendment and public interests by depriving the public of access to crucially important historical images and would create insurmountable administrative burdens that are avoided by the current governing rule.

(a) Every court to have considered the issue has rejected the rule Ms. Lanier proposes.

As the Superior Court recognized, no court has ever adopted Ms. Lanier's proposed rule. AV2-024 ("Fully acknowledging the continuing impact slavery has had in the United States, the law, as it currently stands, does not confer a property interest to the subject of a photograph regardless of how objectionable the photograph's origins may be."). To the contrary, courts, including this one, have rejected property-related claims asserted by subjects of photographs even where the photograph was taken without the subject's consent and/or in tortious circumstances.

In *Themo v. New England Newspaper Publishing Co*., 306 Mass. 54 (1940), for example, this Court rejected the argument that lack of consent confers a property interest in a photograph on the subject of that photograph. The plaintiffs there sued a newspaper for taking their photograph "without [their] permission" and then publishing the photographs in the paper, also "without . . . consent." *Id.*

at 54. This Court nonetheless affirmed the dismissal of the plaintiffs' claims. The plaintiffs could only prevail, this Court explained, if they "had an absolute legal right to exclude from a newspaper any photograph of them taken without their permission." *Id.* at 58. The Court rejected that argument, emphasizing that recognition of such a right would mean that "no newspaper could lawfully publish a photograph of a parade or a street scene." *Id.*; *see also United States v. Jiles*, 658 F.2d 194, 200 (3d Cir. 1981) (criminal defendant had no property interest in photograph taken without consent while he was in juvenile detention); *Grandal v. City of N.Y.*, 966 F. Supp. 197, 203 (S.D.N.Y. 1997) (plaintiff had no property interest in photograph taken of him without consent at police station after arrest).

Ms. Lanier contends that these cases are inapposite as they did not involve a claim of serious tortious or criminal conduct "*in the creation* of the images at issue." OB48. But courts considering precisely that issue have rejected similar claims even after recognizing that the photographs were taken as a result of "serious or offensive invasion[s] of privacy." *See, e.g.*, *Brunette v. Humane Soc'y of Ventura Cnty.*, 40 F. App'x 594, 597 (9th Cir. 2002). In *Brunette v. Humane Society of Ventura County*, 294 F.3d 1205 (9th Cir. 2002), for example, Humane Society officers searched the plaintiff's ranch, despite not having statutory authority to execute search warrants. *Id.* A news reporter accompanied the Humane Society and took several photographs of the premises that he later

published in articles and editorials "decrying [the plaintiff's] mistreatment of animals and impugning her character." *Id.* at 1208. The plaintiff sued the news outlet, asserting among other claims, a state law cause of action for conversion of the images of her property. *Brunette*, 40 F. App'x at 597. Despite concluding that the plaintiff had adequately alleged both a trespass and a "serious and offensive" invasion of her privacy, the Ninth Circuit concluded that she did not have a "property right protected by a conversion claim" and affirmed dismissal of that claim. *Id.*

Likewise, in *Berger v. Hanlon*, 1996 WL 376364 (D. Mont. Feb. 26, 1996), *aff'd in relevant part, rev'd in part,* 129 F.3d 505 (9th Cir. 1997), a reporter took photographs while accompanying authorities in a search of the plaintiffs' private property. *Id.* at *1. As in *Brunette*, the court rejected the plaintiffs' conversion claims as to photographs taken during the search because "the photographs were the property of the photographer, not of the person photographed." *Id.* at *10; *cf. Zacchini v. Scripps-Howard Broad. Co.*, 47 Ohio St. 2d 224, 227 (1976), *rev'd on other grounds*, 433 U.S. 562 (1977) (rejecting conversion claim in case where plaintiff was filmed against his express wishes because "it has never been held that one's countenance or image is 'converted' by being photographed").

Ms. Lanier's efforts to distinguish *Brunette* and *Berger* fail. She appears to misread *Brunette*, suggesting that the court there found "no serious or offensive

invasion of privacy." OB49 (quotation omitted). To the contrary, the Ninth Circuit concluded that the plaintiff's allegations were "sufficiently serious and offensive to state a claim for invasion of privacy." *Brunette*, 40 F. App'x at 597. Yet the court still rejected the plaintiffs' claim for conversion of the photographs of her property.

As to *Berger*, Ms. Lanier points out that the court concluded that federal authorities there were "lawfully executing" the search warrant of the plaintiffs' home and the plaintiffs "consented to entry." OB48. But those findings were the basis for the court's rejection of the plaintiffs' trespass and intentional infliction of emotional distress claims, not their *conversion* claim. The sole basis for the court's rejection of that claim was its conclusion that "the photographs were the property of the photographer, not of the person photographed." *Berger*, 1996 WL 376364, at *10. Ms. Lanier also flags the "extensive subsequent appellate history of the case." OB48 n.92. That history, however, supports Harvard. The Ninth Circuit ultimately reversed the district court's holding on the trespass and intentional infliction of emotional distress claims—that is, the court held that plaintiffs *did* state a claim for trespass and intentional infliction of emotional distress, *see Berger v. Hanlon*, 188 F.3d 1155, 1157 (9th Cir. 1999)—but did not disturb dismissal of the conversion claim.

None of this is to say, of course, that intentional torts such as invasion of

privacy and trespass are equivalent to slavery. Obviously, they are not. But the principle underlying the legal rule set out in these cases is the same as the one at issue here, and there is no basis for courts to draw the line proposed by the plaintiff. *See Mass. Gen. Hosp. v. C.R.*, 484 Mass. 472, 490 (2020) (recognizing need to afford "due respect" for the fact that "other branches of government" are "responsible for . . . complicated policy choices"); *Commonwealth v. Leno*, 415 Mass. 835, 841 (1993) (noting the "undesirability of the judiciary substituting its notions of correct policy for that of a popularly elected Legislature" (quotation omitted)).

In any event, even if the Court *could* draw such a line, it should not do so. The rule Ms. Lanier proposes would have serious adverse consequences. As explained directly below, the public's interest in access to historical images is at its zenith when the images reflect especially disturbing historical periods or events—an interest that would be entirely undermined by Ms. Lanier's proffered rule. *See infra* at 35-41.

(b) Important constitutional and public interests counsel strongly against adopting the novel rule Ms. Lanier proposes.

Even setting aside the complete lack of precedent for Ms. Lanier's proposed "tortious circumstances" rule, this Court should reject such a rule because it would have a chilling effect on numerous important activities protected by the First

Amendment, including newspaper reporting, photojournalism, and museum displays (among others), and would undermine the public's strong interest in access to historically significant images.

Journalists and museum curators have long "used the photograph's ability to stir emotion and engender visceral understanding to provoke debate about some of the most important issues our nation has faced." Brief Amici Curiae of Historians of Art and Photography in Support of the Petitioners ("Historians Br."), *Scott v. Saint John's Church in the Wilderness*, 133 S. Ct. 2798 (2013) (No. 12-1077), 2013 WL 1412096, at *2. During the Civil War, gruesome images depicting battlefields full of corpses "transformed the public debate" and "shattered long held ideals and perceptions" that romanticized the war. *Id.* at *4. "The photographs offered something unattainable in written descriptions—a visceral, graphic representation of the gruesome truth of the Civil War . . . that could not be sentimentalized and romanticized through the fluid motions of the author." *Id.* at *5. Horrifying imagery also profoundly shaped attitudes during the Second World War. "The Nazis were masterful at recording visually their own rise to power as well as the atrocities they committed, immortalizing both victims and perpetrators." *See* Marianne Hirsch, *Surviving Images: Holocaust Photographs and the Work of Postmemory*, 14 Yale J. Criticism 5, 6-7 (2001). Those images "were instrumental in enabling the world to begin to bear witness to the truth and

full horror of the Holocaust." Ruth-Anne Lenga, Seeing Things Differently: The Use of Atrocity Images in Teaching About the Holocaust, in *Holocaust Education: Contemporary Challenges and Controversies* 195, 202 (Foster, et al., eds. 2020).

More recently, American soldiers photographed their abuse and mistreatment of prisoners being held at the Abu Ghraib prison in Iraq. Those photographs "[s]parked a national debate on the treatment of prisoners in the war on terrorism." Historians Br., 2013 WL 1412096, at *14. Again, "[t]he photos did what print could not do. They showed front and center what human rights groups had been saying for months: that the Bush administration [sic] was abusing prisoners within U.S. custody." *Id.* at *15 (quoting Damon, Arwa et al., *Questions of Torture, Abuse Rooted in Bush-era Decisions* (July 30, 2009)).

Photographs have also played an important role in forcing Americans to reckon with this Nation's history of slavery and racism. In *Without Sanctuary: Lynching Photography in America*, collector James Allen published more than 100 photographs and postcards of lynchings that originally were sold as souvenirs to crowds in attendance. As Congressman John Lewis summarized in the book's foreword: "Many people today, despite the evidence, will not believe—don't want to believe—that such atrocities happened in America not so very long ago." Congressman John Lewis, Foreword to James Allen et al., *Without Sanctuary: Lynching Photography in America* 7, 7 (2000). "The photographs in this book

make real the hideous crimes that were committed against humanity" and "bear witness to the hangings, burnings, castrations, and torture of an American holocaust." *Id.* Congressman Lewis expressed a hope that the book (and its images) would inspire "the living, and as yet unborn generations, to be more compassionate, loving, and caring" and to "prevent anything like this from ever happening again." *Id.*; *see also* Clay Calvert et al., *Gruesome Images, Shocking Speech & Harm to Minors: Judicial Pushback Against the First Amendment After* Brown v. Entertainment Merchants Association*?*, 13 Va. Sports & Ent. L.J. 127, 155 (2014) ("combining lyrical power and images of the horrific acts, [*Without Sanctuary*] lives on through judges, politicians and academics who seek to draw on its unvarnished portrayal of lynching in the South to make a statement about contemporary social issues" (quotation omitted)).

Ms. Lanier's proposed rule would virtually eliminate—or at the very least significantly deter—these important forms of expression, by not only undermining photographers', museums', and news organizations' First Amendment rights, but also vitiating the public interest in viewing historically significant images, including images of true historical evils such as slavery. Photojournalists and newspapers, knowing for certain that they could only keep the negatives and hard drives of images taken under provably non-tortious circumstances, would limit their coverage to the most anodyne subject matter. Museums, faced with

uncertainty over the ownership of photographs depicting historical violence and injustice, would avoid investing curatorial resources into those exhibits. In short, under Ms. Lanier's proposed rule, the "engine of free expression" would sputter, *Harper & Row Publishers, Inc*, 471 U.S. at 558, and the end result would not just be less speech—it would be less speech that educates the public about the past and present and drives social change in a way that no other medium can.

(c) Ms. Lanier's proposed rule would be impossible to administer.

Finally, the practical difficulties associated with administering Ms. Lanier's proposed "tortious circumstances" rule would be insurmountable. *Juliano v. Simpson*, 461 Mass. 527, 535-36 (2012) (considering "practical difficulties" of implementation in deciding whether to craft new common law rule (quotation omitted)). Imagine, for example, a photograph depicting multiple people. How does a court or a jury decide which subject has a superior property interest in the photograph? Is it the individual who first asserts such an interest? The individual who is most prominently featured in the photograph? Relatedly, how will courts assess competing property interests if the subjects of the photograph have multiple ancestors? Do rules of succession and intestate apply or should other rules govern?

Limiting the rule to circumstances where a tort is committed in the creation of the photograph raises still more questions. How close in time do the tort and the capturing of the photograph need to be? Procedurally, does the subject have to

prove the underlying tort in order to succeed on the property claim? Must the tort which transfers ownership of the photograph have been recognized by the law when the photograph was taken, or may it be recognized later? And will all torts create a property interest in a photograph, or are some torts insufficient to transfer ownership of a photograph from the photographer to the subject?

Contrary to Ms. Lanier's suggestion, courts need not navigate these administrative challenges to afford a remedy to the individuals whose images are captured during the commission of torts like kidnapping, false imprisonment, trespass, assault and battery, invasion of privacy, infliction of emotional distress, slander, libel, and defamation. *See* OB33-38 (describing how Renty and Delia's rights were violated during the creation of the daguerreotypes); OB42 (urging court to recognize property interest based on principle that "where there is a right, there is a remedy"). Obviously, among the many tragedies of slavery was the fact that enslaved people had no legal remedy for such torts. But the rule the Court crafts today will apply tomorrow, and individuals subject to tortious conduct now can bring claims against their assailants to recover damages they suffer as a result of those torts. Indeed, where the publication or distribution of a photograph itself is at issue, suit can be brought to enjoin that conduct. *See, e.g.*, *Donoghue v. IBC USA (Publications), Inc.*, 70 F.3d 206, 208, 212 (1st Cir. 1995) (affirming preliminary injunction prohibiting use of plaintiff's name and likeness in

promotional materials). But this does not confer, or rely upon, possession of an ownership interest in the photograph itself; the common law rule that no such ownership interest exists safeguards the crucial First Amendment and public interests described above without preventing anyone from obtaining meaningful relief in tort.

B. The Property-Related Claims Are Time-Barred.

Each of Ms. Lanier's property-related claims is governed by the statute of limitations set forth in Massachusetts General Law, chapter 260, § 2A.[9] That statute provides that actions for "tort" or "replevin, shall be commenced only within three years . . . after the cause of action accrues." M. G. L. c. 260, § 2A. And under the discovery rule, a cause of action accrues on "the date when a plaintiff discovers, or any earlier date when she should reasonably have discovered, that she has been harmed or may have been harmed by defendant's conduct." *Bowen v. Eli Lilly & Co.*, 408 Mass. 204, 205-06 (1990). A claim is time-barred under § 2A, in other words, if the plaintiff discovered or reasonably

[9] *See MacCleave v. Merch.*, 2002 Mass. Super. LEXIS 392, at *4 (Oct. 1, 2002) (applying § 2A to claim for replevin); *Elms v. Osgood*, 1998 WL 1284174, at *4 (Mass. Super. Ct. May 13, 1998) (same for conversion claim); *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 333 (1982) (same for negligent infliction of emotional distress claim); *AA & D Masonry, LLC v. S. St. Bus. Park, LLC*, 93 Mass. App. Ct. 693, 698-700 (2018) (same for unjust enrichment claim, the basis for remedy of equitable restitution). Intentional harm to a property interest has not been recognized in Massachusetts, *see infra* at 50-52, but it is a tort action and so is subject to § 2A under the plain terms of the statute.

should have discovered that she was harmed by the defendant's conduct more than three years before she filed suit.

Applying these principles, the Superior Court agreed with Harvard that three of Ms. Lanier's property-related claims are time-barred. That conclusion was correct. Ms. Lanier's own allegations confirm that the statute of limitations began to run by 2011, when Ms. Lanier wrote to Harvard about the daguerreotypes and stated she was one of Renty and Delia's descendants. At that point, she knew everything she needed to know to file this lawsuit, and yet she waited more than eight years before doing so. Although the Superior Court disagreed with Harvard as to Ms. Lanier's two remaining property-related claims—for replevin and conversion—those claims are time-barred for the same reasons.

1. The Superior Court Correctly Concluded That Three Of Ms. Lanier's Property-Related Claims Are Time-Barred.

The Superior Court correctly concluded that Ms. Lanier's claims for intentional harm to a property interest, negligent infliction of emotional distress, and equitable restitution are time-barred. Ms. Lanier's "own admissions" confirm that by 2011 "she unequivocally was aware that Renty and Delia were her ancestors and that Harvard was in possession of the photographs." AV2-022. In March of that year, Ms. Lanier wrote a letter to Harvard's then-president, stating that Harvard possessed "piercing and poignant images of the evils of slavery" that originally had been commissioned "to capture evidence . . . [of] racial superiority."

AV1-093. She explained that "she believed she was a direct descendant of Renty and Delia," AV1-051 (¶ 169), and asked Harvard to review her documentation and "reaffirm that Renty and Delia Taylor are indeed [her] ancestors," AV1-093. Her claim at that time to knowledge of Harvard's possession of the daguerreotypes, the circumstances of their creation, and her purported ancestry reflects that she had sufficient information to assert each of her property-related claims, which are based on the assertion that Harvard wrongfully possesses the daguerreotypes despite the fact that Ms. Lanier, as a purported descendant of Renty and Delia, rightfully owns them. *See supra* at 26-28. Because Ms. Lanier discovered that she "may have been harmed" by Harvard in 2011, *Bowen*, 408 Mass. at 205-06, her claims—filed far more than three years later—are time-barred.

Ms. Lanier argues that the Superior Court erred in reaching this conclusion for three reasons, but each is meritless.

First, Ms. Lanier contends that the Superior Court erred by deciding on a motion to dismiss issues of fact that should have been left to a jury. OB51-52. But courts routinely hold that claims are time-barred based solely on the pleadings when the facts alleged cannot permit an inference that the plaintiff lacked knowledge of his or her injury. *See, e.g.*, *Harrington v. Costello*, 467 Mass. 720, 731 (2014) (affirming grant of motion to dismiss after applying discovery rule to facts alleged in complaint); *AA & D Masonry, LLC*, 93 Mass. App. Ct. at 698-700

(same). As the Superior Court recognized, "where the facts are clear and would not permit a reasonable jury to find in favor of the claimant, disposition is appropriate." AV2-020.

Ms. Lanier suggests that the facts here were not clear, citing an affidavit she submitted along with her opposition to Harvard's motion to dismiss, in which she stated that she believed Harvard would voluntarily cooperate with her until 2017. OB51-52; *see* AV1-129-31. But "consideration" of factual assertions in an affidavit is "not . . . proper . . . under rule 12(b)(6)." *Wrightson v. Spaulding*, 20 Mass. App. Ct. 70, 73 n.4 (1985). In any event, the Complaint itself contradicts those assertions, noting that Harvard *publicly* rejected Ms. Lanier's claim of ancestry in 2014 when a Peabody Museum official said "of Ms. Lanier: 'She's given us nothing that directly connects her ancestor to the person in our photograph.'" AV1-052 (¶ 176); *see also* AV1-140 (article noting that Peabody Museum officials "don't agree" with Ms. Lanier's ancestry claim). That statement would put any reasonable person on notice—as of 2014, not 2017—that in Harvard's view Ms. Lanier was not entitled to the daguerreotypes. *See Bowen*, 408 Mass. at 210.[10]

[10] Ms. Lanier has previously suggested that Harvard's 2014 statement did not start the limitations period because she "continued to cordially correspond" with Harvard thereafter. AV1-121. This does not change the fact that a "reasonable person in her position would have known" that Harvard would not accede to her

Second, Ms. Lanier contends that the Superior Court erred in failing to apply several tolling doctrines—*viz.*, the continuing tort theory, fraudulent concealment, unknowable injury, and breach of fiduciary duty. OB52. But Ms. Lanier never alleged in her Complaint, nor argued below, that these doctrines apply. This Court should not consider them for the first time on appeal. *Commonwealth v. Bettencourt*, 447 Mass. 631, 633 (2006) ("It has long been our rule that we need not consider an argument that urges reversal of a trial court's ruling when that argument is raised for the first time on appeal.").

Besides, Ms. Lanier does not (and cannot) offer any basis for applying these doctrines. The "continuing tort" theory in Massachusetts is confined to "actions in nuisance and trespass." *John Beaudette, Inc. v. Sentry Ins. A Mut. Co.*, 94 F. Supp. 2d 77, 107 (D. Mass. 1999). Fraudulent concealment cannot be relevant here, when Ms. Lanier admits that she knew that Harvard possessed the daguerreotypes and would not accept her claim of ownership. *See* M. G. L. c. 260, § 12 (statute of limitations tolled where "person liable to a personal action fraudulently conceals the cause of such action"). All an "inherently unknowable" wrong does is trigger the discovery rule—it does not in any way alter the application of that rule. *See Harrington*, 467 Mass. at 725. Ms. Lanier has never asserted a claim for breach of

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claim of ownership as of 2014. *Bowen*, 408 Mass. at 210.

fiduciary duty or pled facts suggesting the existence of a fiduciary relationship between the parties.[11]

Third, Ms. Lanier argues that the doctrine of laches should save her claim. OB52-53. Again, Ms. Lanier did not raise that argument below and cannot do so for the first time on appeal. *See supra* at 45. The argument is also meritless. As the cases Ms. Lanier cites recognize (*see* OB53), laches is an *affirmative defense* to an equitable claim that is timely filed; it cannot save claims that are barred by an otherwise applicable statute of limitations. *Srebnick v. Lo-Law Transit Mgmt., Inc.*, 29 Mass. App. Ct. 45, 49-50 (1990) ("Laches is available, if affirmatively pleaded, as a defense to a claim that is equitable in nature."); *see also Moseley v. Briggs Realty Co.*, 320 Mass. 278, 282-84 (1946) (barring expired claims under statute of limitations and considering application of laches to claims that accrued within statute of limitations).

2. Ms. Lanier's Conversion And Replevin Claims Are Also Time-Barred.

Despite recognizing that Ms. Lanier's conversion and replevin claims—like Ms. Lanier's other property-related claims—are subject to a three-year statute of limitations and the discovery rule, AV2-018, the Superior Court concluded that they were timely raised. According to the Superior Court, because "demand and

[11] Even if she had, that claim, too, would be time-barred under § 2A's three-year statute of limitations. *Houle v. Low*, 407 Mass. 810, 812-13 (1990).

refusal" is "an essential element" of Ms. Lanier's conversion and replevin claims, those causes of action did not accrue until 2017 when Ms. Lanier sent Harvard a formal letter demanding the daguerreotypes and Harvard refused to return them. AV2-020. That reasoning, which Ms. Lanier did not actually present to the Superior Court in her briefing below, is flawed.

"A demand is a necessary preliminary to an action for conversion where the defendant's possession is not wrongful in its inception and demand and refusal are required to put him in the position of a wrongdoer." *Abington Nat'l Bank v. Ashwood Homes, Inc.*, 19 Mass. App. Ct. 503, 506-07 (1985) (quoting *Atl. Fin. Corp. v. Galvam*, 311 Mass. 49, 50-51 (1942)). Where, in contrast, the plaintiff alleges that "the defendant's assumption of dominion over the property was wrongful from the beginning, . . . the conversion [is] complete without the demand." *Atl. Fin. Corp.*, 311 Mass. at 51.

That is precisely the case here. The entire basis of Ms. Lanier's more than 200-paragraph Complaint is her assertion that Harvard never rightfully owned the daguerreotypes because they were commissioned to perpetuate repugnant theories about racial superiority and captured without Renty and Delia's consent. *See, e.g.*, AV1-055 (¶ 204) ("The daguerreotypes were taken without the consent of the subjects and were never lawfully possessed by Louis Agassiz or his son, Alexander Agassiz); *id.* (¶ 205) ("Good title never passed to Harvard"). Ms. Lanier has also

maintained throughout her briefing both below and on appeal that Harvard's conduct was wrongful from the start. *See, e.g.*, AV1-103 ("The daguerreotypes of Renty and Delia, and the tortious, inhumane, and undoubtedly criminal conduct visited upon them by Harvard—the very circumstances of their creation—are at the center of this case."). Indeed, the sole basis for her proposed exception to the common law rule regarding property interests is that the daguerreotypes were captured in "tortious circumstances." OB38 ("Bundled together, the multiple tortious and criminal violations of Renty's rights by Agassiz, culminating in the creation and later use of the images, give Renty, not Harvard, a possessory interest in the daguerreotypes.").

Given those allegations, all that was required to trigger the statute of limitations was "the happening of an event likely to put [Ms. Lanier] on notice" of Harvard's "wrongful exercise of ownership or control." *MacCleave*, at *6-7; *see also Hendrickson v. Sears*, 365 Mass. 83, 89-90 (1974). That event plainly had occurred by 2011 when Ms. Lanier wrote to Harvard, acknowledging that she was aware that Harvard possessed the daguerreotypes and that she was an ancestor of Renty and Delia. And it certainly occurred no later than 2014, when a Peabody Museum representative made clear in an article about Ms. Lanier in her hometown newspaper that it did not accept her claim of ancestry. Ms. Lanier did not file suit

until 2019. Thus, her conversion and replevin claims—like her three other property-related claims—are time-barred.

C. Several Of Ms. Lanier's Property-Related Claims Fail For Additional Reasons.

Several of Ms. Lanier's property-related claims fail for additional reasons.

First, even if this Court concludes, contrary to the established common law rule, *see supra* Part I.A, that Ms. Lanier possessed some property interest in the daguerreotypes, that is not enough to state claims for replevin, conversion, or equitable restitution.

To prevail on a replevin claim, Ms. Lanier must either demonstrate that she is "the sole owner of the property replevied," *Bray v. Raymond*, 166 Mass. 146, 150-51 (1896), or join the co-owners of the property, *see Corcoran v. White*, 146 Mass. 329, 330 (1888) (finding trial court erred in instructing jury that plaintiff need not join co-owners of a chattel to bring a replevin claim). Conversion likewise requires a showing that the plaintiff is the "rightful owner" of the property, *In re Hilson*, 448 Mass. 603, 611 (2007), with an "immediate right to its possession," *Mazeikis v. Sidlauskas*, 346 Mass. 539, 544 (1963); *see also Ring v. Neale*, 114 Mass. 111, 112 (1873). Equitable restitution requires a similar showing: "that the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff." *Santagate*, 64 Mass. App. Ct. at 335-36.

Assuming for purposes of this appeal that Ms. Lanier is a lineal descendant of Renty and Delia, and assuming that she thus derives some property interest in the daguerreotypes, *but see supra* at 28-41, Ms. Lanier still cannot show that she owns the daguerreotypes outright. Ms. Lanier does not allege that she has a property interest superior to any other relatives of Renty, including any still-living members of earlier generations. *See* M. G. L. c. 190B, §§ 2-102, 2-103 (upon death of decedent's surviving spouse, entirety of intestate's property passes to all decedent's lineal descendants); G. S. 1860 c. 91, § 1 (similar statute in effect at the time of Renty's death). In other words, Ms. Lanier does not (and cannot) allege Renty has no other surviving relatives, and thus does not (and cannot) allege that she is the sole or rightful owner of the daguerreotypes. This Court could affirm dismissal of Ms. Lanier's replevin, conversion, and equitable restitution claims on that basis alone.

Second, Ms. Lanier's claim for intentional harm to a property interest—or "prima facie tort"—also fails for a separate reason. As the Superior Court recognized—and Ms. Lanier appears to concede, *see* OB43—Massachusetts courts have never recognized such a cause of action or adopted Restatement (Second) of Torts § 871 from which it derives. AV2-018 n.8 ("a claim for intentional interference with property rights has never been recognized in Massachusetts");

AV2-20 n.9 (same); *accord Ostroff v. F.D.I.C.*, 847 F. Supp. 270, 279 n.3 (D.R.I. 1994).

Nor is there any reason for this Court to do so in the circumstances of this case. The Restatement defines the tort as giving rise to liability where "[o]ne . . . intentionally deprives another of his legally protected property interest or causes injury to the interest . . . if his conduct is generally culpable and not justifiable under the circumstances." Restatement (Second) of Torts § 871. The tort is intended to cover circumstances where the defendant is culpable but its "conduct does not come within a traditional category of tort liability." *Liberty Nat'l Life Ins. Co. v. Univ. of Ala. Health Servs. Found., P.C.*, 881 So. 2d 1013, 1024 (Ala. 2003) (quotation omitted)); *see also Socialist Workers Party v. Att'y Gen.*, 642 F. Supp. 1357, 1418 (S.D.N.Y. 1986).

That is not this case. According to Ms. Lanier, Harvard violated Ms. Lanier's property rights by refusing to return the daguerreotypes that rightly belong to her. Such allegations clearly give rise to causes of action for replevin and conversion, both of which protect against private deprivation of property interests and both of which Ms. Lanier asserts in this case. *See supra* at 19-20 & n.7. Even if Ms. Lanier were correct that Massachusetts courts would "approve[] of the concept that there exists a residue of general tort law from which can be formulated remedies for wrongs not previously encountered," OB43, that concept

does not apply where, as here, the wrongs purportedly at issue are fully addressed by well-established torts. *See Liberty Nat'l Life Ins. Co.*, 881 So. 2d at 1025 (declining to recognize prima facie tort theory where allegations "coincide[d] more or less" with cognizable tort of wrongful interference with business (quotation omitted)); *Price v. Viking Press, Inc.*, 625 F. Supp. 641, 651 (D. Minn. 1985) (prima facie tort "only applicable when the factual basis of the complaint does not fall within the parameters of an established tort"); *Tufts v. Madesco Inv. Corp.*, 524 F. Supp. 484, 486 (E.D. Mo. 1981) (similar).

II. The Superior Court Correctly Concluded That Ms. Lanier's Civil Rights Act Claim Is Legally Invalid.

Finally, the Superior Court correctly dismissed Ms. Lanier's remaining claim under the Massachusetts Civil Rights Act. That Act allows any person "whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or . . . of the commonwealth, has been interfered with" to sue "in his own name and on his own behalf" to obtain damages or equitable relief. M. G. L. c. 12, § 11i. In her Complaint, Ms. Lanier appeared to assert her claim on Renty and Delia's behalf, alleging that in the mid-nineteenth century, Harvard "advoca[ted] in favor of a slave-based economy," AV1-058 (¶ 210)—despite an explicit judicial prohibition on slavery—including by commissioning and using the daguerreotypes in the 1840s and 1850s. *Id.* (¶ 211).

That claim fails for at least two reasons. First, it is time-barred. A three-

year statute of limitations applies to claims under the Act, *see Flynn v. Associated Press*, 401 Mass. 776, 782 (1988), and the claim Ms. Lanier pleads is based on "alleged conduct that took place in the middle of the nineteenth century"—"well beyond the three-year statute of limitations period," AV2-026. Second, Ms. Lanier has no standing to bring a claim on Renty and Delia's behalf, as the Act authorizes a plaintiff to bring a claim only "in his own name and on his own behalf." M. G. L. c. 12, § 11i.

Ms. Lanier does not dispute any of these conclusions on appeal. *Travenol Labs*, 394 Mass. at 97 (issue not raised in principal brief need not be considered). Instead, Ms. Lanier suggests that she is asserting her Civil Rights Act claim on her own behalf as a challenge to Harvard's failure to recognize her "superior possessory rights" in the daguerreotypes. OB46. That is not the assertion in her Complaint, however, and she cannot now recharacterize her claims. AV2-26-27 ("[U]pon review of the complaint, it is clear that Lanier has not asserted a claim on her own behalf.").

In any event, that claim fails for the same reasons as her property-related claims: Ms. Lanier does not have a property interest in the daguerreotypes because Renty and Delia did not have such an interest. *See supra* at 28-41.

Moreover, as the Superior Court recognized, a plaintiff asserting a claim under the Civil Rights Act must establish that her rights were interfered with "by

threats, intimidation or coercion." AV2-027 (quoting *Brum*, 428 Mass. at 707); *see also Buster v. George W. Moore, Inc.*, 438 Mass. 635, 644 (2003). Ms. Lanier has never alleged that Harvard—in declining to give her the daguerreotypes without first receiving additional information about her ancestry—"exert[ed] . . . pressure to make [her] fearful or apprehensive of injury or harm," "put[] [her] in fear for the purpose of compelling or deterring conduct," or applied "force [to her] to constrain [her] to do [something] against [her] will." AV2-027 (quoting *Mancuso v. Mass. Interscholastic Athletic Ass'n, Inc.*, 453 Mass. 116, 131 (2009)).

Ms. Lanier's underlying constitutional claim is also baseless. Ms. Lanier suggests that Harvard violated her "substantive due process right[s]" by depriving her of the daguerreotypes. OB45. But if that were true, it would mean that every ordinary property-related tort claim can be constitutionalized and transformed into a Civil Rights Act violation. The Legislature clearly did not intend that result. *See Buster*, 438 Mass. at 645 (Civil Rights Act is "not intended to create, nor may it be construed to establish, a vast constitutional tort" (quotation omitted)).

CONCLUSION

For all of these reasons, Harvard respectfully requests that this Court affirm the judgment of the Superior Court.

Dated: September 20, 2021

Respectfully Submitted,

By: */s/Victoria L. Steinberg*

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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1981CV00784

TAMARA LANIER

vs.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, a/k/a Harvard Corporation, Harvard Board of Overseers, Harvard University, The Peabody Museum of Archaeology and Ethnology

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

The plaintiff, Tamara Lanier ("Lanier"), filed this action against the defendants, President and Fellows of Harvard College, also known as Harvard Corporation, Harvard Board of Overseers, Harvard University, and the Peabody Museum of Archaeology and Ethnology ("Peabody Museum" or "Peabody") (collectively, "Harvard"),[1] concerning photographs that a Harvard professor commissioned in 1850 depicting two slaves, Lanier's alleged ancestors. The matter is presently before the court on Harvard's motion to dismiss Lanier's Second Amended Complaint.[2] After hearing and careful review, for the following reasons, the motion to dismiss is **ALLOWED**.

BACKGROUND

The following is a brief recitation of the well-pleaded factual allegations in the complaint, which the court accepts as true. See Sisson v. Lhowe, 460 Mass. 705, 707 (2011). Certain additional facts are reserved for discussion below.

[1] Harvard contends that The President and Fellows of Harvard College is the legal entity that comprises the various named defendants and is the only proper party to this action. This distinction, however, is not relevant.
[2] The procedural history of this case and whether the operative complaint is Lanier's First or Second Amended Complaint is not relevant to the disposition of the motion.

Harvard is a private educational institution based in Cambridge, Massachusetts. It was founded in 1636. From 1847 until his death in 1873, Harvard employed Swiss natural scientist Louis Agassiz ("Agassiz"). Agassiz primarily studied comparative zoology, which entails grouping living things together based on anatomical characteristics and placing them in hierarchical order. Agassiz also supported polygenism, which is the theory that racial groups do not share a common origin and thus are fundamentally and categorically distinct. At a time when slavery was hotly debated in the United States, Agassiz believed that white and black people had different origins. Agassiz's views purportedly gave scientific legitimacy to the myth of white racial superiority and the importance of the separation of races.[3]

In an effort to legitimize polygenism, Agassiz focused on his perception of physical differences between white and black people. To prove that black people were biologically inferior to whites, Agassiz embarked on a tour of South Carolina plantations in search of subjects – racially "pure" slaves born in Africa – to collect empirical data. Agassiz was taken to the B.F. Taylor plantation in Columbia, South Carolina, where he selected several enslaved men and women to be photographed, including an older man Renty Taylor ("Renty"), also known as Papa Renty, and his daughter Delia. Lanier is a direct descendant of Renty and Delia[4]. Renty and Delia were stripped naked to the waist and photographed from the front, side, and back without their consent or compensation.[5] Shortly thereafter, Agassiz published his photographs and "research" in an article entitled *The Diversity of Origin of the Human Races*, which claimed to offer a scientific defense of racial inequality based on immutable physical characteristics.

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[3] During the American Civil War, polygenism was cited as evidence that slavery did not violate the spirit of the Declaration of Independence because Jefferson's reference to "all men" did not scientifically include black men.
[4] For the purpose of the present motion, Harvard does not dispute Lanier's claim of ancestry.
[5] The images captured are known as daguerreotypes, which is a type of photographic process that predated modern photography. For ease of reference, the court refers to the images as photographs.

In the years that followed, Agassiz continued his crusade of spreading polygenism by giving lectures and publishing additional papers; all the while, he remained employed by Harvard as the leader of Harvard's Lawrence Scientific School. Lanier alleges that Harvard steadfastly supported Agassiz and did not challenge or disavow his display of racist pseudoscience even after polygenism had been definitively disproven. She further claims that by supporting Agassiz and elevating him to the highest echelons of academia, Harvard promoted and legitimized white superiority.

Agassiz retained his professorship and served as director of the Harvard's Museum of Comparative Zoology until his death in 1873. However, even after his death, Agassiz's legacy at Harvard remained. As of March 20, 2019, Harvard's website continued to support and praise Agassiz as a "renowned teacher of natural history."

It was in 1976 that Harvard discovered that Agassiz's photographs of Renty and Delia were stored on its campus. This discovery made national headlines, as they were the earliest known photographs of American slaves. Lanier alleges that following the discovery, Harvard commenced a decades-long campaign to sanitize the history behind the images and exploit them for prestige and profit by displaying the photographs at the Peabody Museum.

Lanier asked Harvard to relinquish the photographs to her in a letter to then Harvard President Drew Faust ("President Faust") in October 2017, but, Harvard declined. Lanier claims that by denying her possession of the photographs, Harvard is perpetuating the systematic subversion of black property rights that began during slavery and continued for a century thereafter and is sanitizing its own historical involvement and association with slavery by exploiting and profiting from the photographs.

DISCUSSION

Lanier filed this action on March 20, 2019, alleging that the photographs were taken without Renty's and Delia's consent and thereafter unlawfully retained by Harvard. Lanier asserts seven claims. Count 1 asserts a writ of replevin, seeking to reclaim possession of the photographs as Renty's and Delia's next of kin. Count 2 asserts a claim for conversion. Count 3 asserts a claim for unauthorized use of name, picture, and/or portrait in violation of G. L. c. 214, § 3A. Count 4 asserts a Massachusetts Civil Rights claim, alleging that Harvard unlawfully advocated in favor of slavery in the nineteenth century. Count 5 alleges that Harvard's ownership and/or control over the photographs intentionally interferes with Lanier's property interest and rights. Count 6 asserts a claim for negligent infliction of emotional distress. Finally, Count 7 asserts a claim for equitable restitution, alleging that Harvard has been unjustly enriched through its possession of the photographs.

Harvard moves to dismiss these claims. With respect to Counts 1, 2, 5, 6, and 7 (hereinafter, "property-related claims"), Harvard contends that the claims are time-barred and that Lanier does not have a property interest in the photographs. As for Count 3, Harvard argues that this claim fails because the right to sue does not survive the death of the subject of an image. Finally, Harvard argues that Count 4 fails because the claim is time-barred and Lanier lacks standing to bring such a claim. Each of these arguments is addressed separately below.

A. Standard of Review

To withstand a motion to dismiss pursuant to Rule 12(b)(6), a claim must allege facts plausibly suggesting an entitlement to relief. Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). Rule 12(b)(6) imposes a relatively low standard for surviving a motion to dismiss. Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 (2004). Nevertheless, a plaintiff is

obligated to provide more than mere labels and conclusions. Iannacchino, 451 Mass. at 636. When considering a claim, the court accepts as true the allegations set forth in the complaint and draws any reasonable inferences in the plaintiff's favor. Sisson, 460 Mass. at 707.

B. Property-Related Claims: (Counts 1, 2, 5, 6 and 7)[6]

In support of its motion to dismiss, Harvard argues that the property-related claims fail because: (1) they are barred by the statute of limitations; and (2) Lanier does not have a property interest in the photographs. Each argument is addressed in turn below.

(1) Statute of Limitations

General Laws c. 260, § 2A provides that tort and replevin actions "shall be commenced only within three years next after the cause of action accrues." Each of the five property-related claims is subject to this three-year statute of limitations period.[7] See Cimino v. Milford Keg, Inc., 385 Mass. 323, 333 (1982); Clark v. First Resolution Inv. Corp., 2016 Mass. Super. LEXIS 22 at *3-*4 (Mass. Super. 2016) (unjust enrichment as basis for equitable restitution); Elms v. Osgood, 1998 Mass. Super. LEXIS 132 at *10-*11 (Mass. Super. 1998) (conversion).[8]

Generally, under what has become known as the "discovery rule," "a cause of action accrues when 'an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury.'" Donovan v. Phillip Morris USA, Inc., 455 Mass. 215, 228 (2009), quoting Bowen v. Eli Lilly & Co., 408 Mass. 204, 207 (1990). The law

[6] As discussed in more detail below, Lanier's property-related claims are premised on the notion that Renty and Delia had a property interest in the photographs and that Lanier, as a descendant of Renty and Delia, now holds such property interest. For the sake of brevity, the court analyzes these claims together in this section.

[7] Reading the complaint in the light most favorable to Lanier, the negligent infliction of emotional distress claim (Count 6) appears to be based, in part, on conduct that occurred subsequent to Lanier's demand for the photographs. Therefore, the court excludes that portion of the allegations from the discussion regarding the statute of limitations.

[8] Although a claim for intentional interference with property rights has never been recognized in Massachusetts, it is based on the tort outlined in the Restatement (Second) of Torts §§ 870-871. See Ostroff v. FDIC, 1994 U.S. Dist. LEXIS 3608 at *27 n.3 (D. R.I. 1994). As such, it is subject to the three-year limitations period for tort actions set forth in G. L. c. 260, § 2A.

does not require the discovery of each of the elements of the cause of action; rather, the limitations period begins to run when a reasonably prudent person, reacting to any suspicious circumstances of which she might have been aware, should have discovered that she had been harmed. Id. A plaintiff "seeking the benefit of the discovery rule has the burden of showing (1) that she lacked actual knowledge of the basis for her claim and (2) that her lack of knowledge was objectively reasonable." Museum of Fine Arts v. Seger-Thomschitz, 623 F.3d 1, 7 (1st Cir. 2010) (hereinafter "Seger-Thomschitz"), cert. denied sub nom. Seger-Thomschitz v. Museum of Fine Arts, 562 U.S. 1271 (2011), citing Koe v. Mercer, 450 Mass. 97, 101 (2007).

In regards to Lanier's conversion and replevin claims (Counts 1, and 2), Lanier was put on "notice that someone may have caused her injury," Donovan, 455 Mass. at 228, when she demanded the return of the photographs and Harvard declined. Techbuilt Homes v. Framingham Sav. Bank, 1995 Mass. Super. LEXIS 184 at *14-16 (Mass. Super. 1995). See Aimtek, Inc. v. Norton Co., 69 Mass. App. 660, 663-664 (2007) (declaring conversion and replevin claims subject to same statute of limitations); MacCleave v. Merchant, 2002 Mass. Super. LEXIS 392 at *6 (Mass. Super. 2002) (same).

Conversion occurs when a defendant "intentionally or wrongfully exercises acts of ownership, control or dominion over personal property to which he has no right of possession at the time" (citation omitted). Bleicken v. Stark, 61 Mass. App. Ct. 619, 622 n.2 (2004). Where a defendant's possession is not wrongful at its inception, conversion occurs where there is a demand for the return of the property and the defendant refuses, which then puts the defendant in the position of a wrongdoer. Atlantic Fin. Corp. v. Galvam, 311 Mass. 49, 50-51 (1942). See Eunkyung Yoon v. Shin, 2016 Mass. App. Unpub. LEXIS 871 at *5 (Mass. App. 2016) (holding demand for return of property was necessary element to claim of conversion).

Here, reading the complaint in the light most favorable to Lanier, she does not allege nor do the allegations suggest that Harvard's original possession of the photographs was unlawful; therefore, Lanier's claims began to accrue when she demanded the return of the photographs and Harvard refused. See Surabian v. Billings, 2013 Mass. App. Unpub. LEXIS 870 at *1-3 (Mass. App. 2013) (where defendant's refusal occurred on same day complaint was filed, conversion claim was timely). Lanier demanded the return of the photographs in her October 27, 2017 letter to President Faust, and Harvard responded to her demand via email on November 13, 2017. Although Harvard did not expressly refuse to turn over the photographs to Lanier, its nonresponsive communication can be interpreted as such. Accordingly, Lanier's conversion and replevin claims began to accrue on November 13, 2017, and thus, these claims, which she filed on March 20, 2019, are timely.

Because demand and refusal is not an essential element of Lanier's three remaining property-related claims, these claims stand on different footing.[9] In missing art cases, which is akin to the circumstances here, courts applying the discovery rule "have tested the reasonableness of the claimant's lack of knowledge by asking whether the claimant acted with due diligence in pursuing his or her property" (quotations and citations omitted). Seger-Thomschitz, 623 F.3d at 7. Although the question of what a party knew or should have known is often a question of fact to be submitted to the jury, where the facts are clear and would not permit a reasonable jury to find in favor of the claimant, disposition is appropriate. Id. at 9.

[9] Because Massachusetts has never recognized a claim for intentional interference with property rights (Count 5), see *supra* note 7, it is unclear what elements comprise said cause of action. Nevertheless, the Restatement (Second) of Torts § 871, cmt. d, suggests that under certain circumstances, demand for the return of property may be an element to such a claim. Therefore, to the extent that the cause of action exists in this Commonwealth and demand for the return of photographs is a necessary element of the claim, the foregoing discussion regarding demand and refusal would apply.

In Seger-Thomschitz the plaintiff was the sole surviving heir of an Austrian-Jewish art collector and was seeking to recover possession of a valuable painting that the art collector formerly owned but was being held by the Museum of Fine Arts, Boston ("MFA"). 623 F.3d at 2. The subject painting was one of several that the art collector had to sell due to his persecution as a Jewish person under Nazi rule. Id. at 4. One central issue before the court was whether Seger-Thomschitz's claims were time-barred. Id. at 6-9. The court held that her claims were untimely. Id. at 9. Unlike many missing art cases, the location of the painting was not secret and it had been on public display at the MFA and was listed on two public databases;[10] therefore, the MFA's possession of the painting was long discoverable with minimal diligence. Id. at 7-8. Also, there was ample evidence that the art collector's family knew about the existence of the painting and that it was given up under conditions that may have amounted to duress, and by her own admission, Seger-Thomschitz learned, in the fall of 2003, that the Nazis had confiscated the art collector's works. Id. at 8. The court held that such information put Seger-Thomschitz on notice that she might have a claim to other artworks previously owned by the collector that may have been lost due to Nazi persecution; however, she did not demand the return of the painting from the MFA until 2007, well over three years later. Id. at 8-9. The court ultimately concluded that any reasonable jury confronted with this information would conclude that Seger-Thomschitz's cause of action accrued no later than the fall of 2003, when she learned that the Nazis confiscated artwork from the art collector and could then with reasonable diligence have discovered her claim to the painting. Id. at 9.

[10] Information about the painting, including the art collector's prior ownership of it, also was available on the MFA's website, on another art index, in several catalogues, and in a book published in Vienna with a transcription of a 1938 property declaration by the art collector listing the painting.

Here, as evidenced by Lanier's March 2011 letter to President Faust, Lanier knew that Harvard was in possession of the photographs.[11] She wrote that a Harvard associate discovered the photographs approximately thirty-seven years ago. She also stated, "I have historical and US Census information confirming that the two of these slaves [in the photographs] are, in fact, my ancestors," and that she wanted to "reaffirm" that Renty and Delia are her ancestors. Per Lanier's own admissions, she unequivocally was aware that Renty and Delia were her ancestors and that Harvard was in possession of the photographs. Therefore, as was the case in Seger-Thomschitz, Harvard's possession of the photographs was discoverable, and in fact, Lanier discovered such information.

The next question then is whether Lanier should have known about the circumstances in which they were taken, namely, without Renty's and Delia's consent, which is the legal basis for her property-related claims. In her March 2011 letter, Lanier acknowledged that Agassiz commissioned the photographs as evidence of the inferiority of black people, which now depict the "piercing and poignant images of the evils of the slavery." She further stated, "The slaves depicted in these daguerreotypes have touched the hearts and conscience of people worldwide." A few years later in 2014, Lanier was quoted in an article in her local newspaper stating, "I know [the photographs] are horrific pictures. There are some things that are very tragic about this story, but I'm grateful to have the images, so I can see my family." Lanier also discussed with the local news outlet tales of Renty's courage and strength while enslaved. These documents taken together show that Lanier was aware of the circumstances surrounding the creation of the photographs and that she believed she had an interest in such images. Therefore, although she

[11] The court may consider documents attached to the pleadings without converting the motion to one for summary judgment if the plaintiff had notice of these documents and relied on them in framing the complaint. Marram, 442 Mass. at 45 n.4.

did not expressly demand the return of the photographs from Harvard until October 2017, Lanier's statements in her March 2011 letter and the 2014 newspaper article indicate that after much diligence, she, in fact, discovered her claim to the photographs as late as 2014, which is outside the three-year statute of limitations period. See id. at 8-9 (where plaintiff demanded return of the painting well over three years after becoming aware of the existence of other works, the delay in demand for painting was not excused). Accordingly, Counts 5 through 7 are barred by the statute of limitations.

(2) Lanier's Property Interest in the Photographs

Notwithstanding the foregoing discussion, even if all of Lanier's property-related claims were timely filed, her claims, including the conversion and replevin claims, fail as a matter of law. As briefly mentioned above, Lanier's property-related claims are based on the legal assertion that Renty and Delia had a property interest in the photographs and that Lanier, as a descendant of Renty and Delia, currently holds such property interest.[12] The existence of a property interest is a necessary element of each of these property-related claims, without which the claims fail as a matter of law. The central question before the court then is whether Renty and Delia had a property interest in the photographs. This is a question of first impression.

[12] Specifically, Count 1 (replevin) and Count 2 (conversion) expressly allege that Lanier's right to possess the photographs is superior to Harvard's. See Portfolioscope, Inc. v. I-Flex Solutions Ltd., 473 F. Supp. 2d 252, 256 (D. Mass. 2007) ("[C]onversion and replevin . . . . claims require an allegation of wrongful possession of tangible property."). Count 5 (intentional interference) expressly alleges that Lanier "has a legally protected interest" in the photographs and that Harvard's ownership/control over the photographs interferes with Lanier's property interest and rights. Count 6 (negligent infliction of emotional distress) alleges that Harvard's appropriation of the photographs and denial of Lanier's claim of lineage inflicted emotional distress on her. Harvard argues and the court agrees that these actions cannot constitute a violation of a duty owed to Lanier unless she possesses a legally protected interest in the photographs. See Jupin v. Kask, 447 Mass. 141, 147 (2006) (stating every actor owes a duty to exercise reasonable care to avoid foreseeable danger to another). Finally, to prevail on Count 7 (equitable restitution), Lanier must show that "the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff." Santagate v. Tower, 64 Mass. App. Ct. 324, 336 (2005).

However, for the following reasons, the court finds that Renty and Delia did not possess an interest in the photographs, and as a result, Lanier has no such interest.

It is a basic tenet of common law that the subject of a photograph has no interest in the negative or any photographs printed from the negative, see Thayer v. Worcester Post Co., 284 Mass. 160, 163-164 (1933); rather, the negative and any photographs are the property of the photographer. Ault v. Hustler Magazine, 860 F.2d 877, 883 (9th Cir. 1988). This principle is true even where an image is taken without the subject's consent. See United States v. Jiles, 658 F.2d 194, 200 (3rd Cir. 1981) (holding juvenile did not show he was deprived of property interest when photograph was taken while in custody); Berger v. Hanlon, 1996 U.S. Dist. LEXIS 225 at *30-*32 (D. Mont. 1996) (rejecting conversion claim against CNN for images taken without consent on property raided by FBI); Zacchini v. Scripps-Howard Broad. Co., 47 Ohio St. 2d 224, 227 (1976), rev'd on other ground, 433 U.S. 562 (1977) ("[I]t has never been held that one's countenance or image is 'converted' by being photographed.").

Nevertheless, Lanier asks the court to recognize a possessory interest in light of the horrific circumstances in which the photographs of Renty and Delia were taken. Fully acknowledging the continuing impact slavery has had in the United States, the law, as it currently stands, does not confer a property interest to the subject of a photograph regardless of how objectionable the photograph's origins may be. See, e.g., Brunette v. Humane Soc'y, 40 Fed. Appx. 594, 597 (9th Cir. 2002) (unpublished decision) (rejecting conversion claim even if photographic image was serious or offensive invasion of privacy). Unfortunately, this Court is constrained by current legal principles, as it is the role of the Legislature or Massachusetts Appellate Courts to determine whether or not to recognize causes of action and to provide the

redress Lanier now seeks. Accordingly, because Renty and Delia did not possess a property interest in the photographs, Lanier, likewise, does not have a possessory interest in them.

For these reasons, Harvard's motion to dismiss the property-related claims is **ALLOWED**.

C. Unauthorized Use of an Image (Count 3)

Count 3 asserts a violation of G. L. c. 214, § 3A, which states, "Any person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action . . . to prevent and restrain the use thereof; and may recover damages for any injuries sustained by . . . such use." Harvard argues that Lanier's claim fails because the right recognized in Section 3A does not survive the subject's death. The court agrees.

Nothing contained in Section 3A states that the right provided therein survives death. As Harvard notes in its memorandum, there are several states that have extended the statutory right against the unauthorized use of an image, but these states have done so expressly via statute. (See Harvard's Memorandum at 16 n.17). Moreover, those states also have never extended that right for as long a period as Lanier would require for her claim to survive (e.g., over 100 years). Additionally, although not binding precedent, it is noteworthy that the only Massachusetts case that has considered whether Section 3A applies after the subject's death held that it does not. See Hanna v. Ken's Foods, Inc., 2007 Mass. App. Unpub. LEXIS 591 at *1-*2 n.4 (Mass. App. Ct. 2007) (Rule 1:28 decision). Accordingly, Harvard's motion to dismiss Count 3 (unauthorized use of an image) is **ALLOWED**.

D. Massachusetts Civil Rights (Count 4)

Count 4 asserts a claim under the Massachusetts Civil Rights Act, which states, in pertinent part:

> "Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States . . . or of the commonwealth, has been interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief . . . including the award of compensatory money damages."

G. L. c. 12, § 11I.

In support of her claim, Lanier alleges that although slavery was abolished in Massachusetts in 1781, Harvard continued to advocate in favor of slavery from 1846 to1861, through its overseers and administrators, including Agassiz. Lanier alleges that this conduct was unlawful and unconstitutional.

Harvard moves to dismiss this claim, arguing that the claim is barred by the statute of limitations. The court agrees. Civil rights claims are governed by the general three-year statute of limitations for tort actions set forth in G. L. c. 260, § 2A. Flynn v. Associated Press, 401 Mass. 776, 782 (1988); Pagulica v. Boston, 35 Mass. App. Ct. 820, 823 (1994). Here, the alleged conduct took place in the nineteenth century, which is well beyond the three-year statute of limitations period. Therefore, the claim is time barred.

Harvard also argues that Lanier lacks standing to assert this claim on Renty's and Delia's behalf. As quoted in full above, a person can assert a civil rights claim only "in his own name and on his own behalf." Pursuant to the plain language, Lanier cannot bring this claim on behalf of Renty and Delia.

Nevertheless, in her memorandum in opposition to the motion, Lanier contends that she asserts this claim on her own behalf as well. However, upon review of the complaint, it is clear

that Lanier has not asserted a claim on her own behalf, but even if she does, the claim fails because the allegations are not sufficient to state a plausible claim for relief.

To state a civil rights claim under Section 11I, which incorporates by reference G. L. c. 12, § 11H, Lanier must prove that Harvard used "threats, intimidation or coercion" to interfere with or attempt to interfere with her rights secured by the Constitution or laws of the United States or the Commonwealth of Massachusetts. Brum v. Dartmouth, 428 Mass. 684, 707 (1999). "A threat is the intentional exertion of pressure to make another fearful or apprehensive of injury or harm" (quotations and citation omitted). Mancuso v. Massachusetts Interscholastic Athletic Ass'n, Inc., 453 Mass. 116, 131 (2009). "A threat to use lawful means to reach an intended result is not actionable under [Section] 11I." Id. at 132. "Intimidation involves putting one in fear for the purpose of compelling or deterring conduct," and "[c]oercion is the application to another of force to constrain him to do against his will something he would not otherwise have done" (quotations and citations omitted). Id. at 131. Although the Massachusetts Civil Rights Act is "entitled to liberal construction of its terms," Batchelder v. Allied Stores Corp., 393 Mass. 819, 822 (1985), it is "not intended to create, nor may it be construed to establish, a 'vast constitutional tort.'" Buster v. George M. Moore, Inc., 438 Mass. 635, 645 (2003), quoting Bell v. Mazza, 394 Mass. 176, 182 (1985).

Here, even construing the allegations in the light most favorable to Lanier, the complaint fails to allege any threats, intimidation, or coercion by Harvard against Lanier, an essential element of the claim. Accordingly, Harvard's motion to dismiss Count 4 (Massachusetts Civil Rights claim) is **ALLOWED**.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Harvard's motion to dismiss the Second Amended Complaint is **ALLOWED**.

Camille F. Sarrouf, Jr., Justice
Superior Court

March 1, 2021

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 12. Department of the Attorney General, and the District Attorneys (Refs & Annos)

M.G.L.A. 12 § 11I

§ 11*I*. Violations of constitutional rights; civil actions by aggrieved persons; costs and fees

Currentness

Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

Credits
Added by St.1979, c. 801, § 1.

Notes of Decisions (660)

M.G.L.A. 12 § 11I, MA ST 12 § 11I
Current through Chapter 29 of the 2021 1st Annual Session

End of Document

Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206)
Chapter 190B. Massachusetts Uniform Probate Code (Refs & Annos)
Article II. Intestacy, Wills and Donative Transfers
Part 1. Intestate Succession

M.G.L.A. 190B § 2-102

§ 2-102. Share of spouse

Effective: March 31, 2012
Currentness

[Share of Spouse.]

The intestate share of a decedent's surviving spouse is:

(1) the entire intestate estate if:

(i) no descendant or parent of the decedent survives the decedent; or

(ii) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) the first $200,000, plus ¾ of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first $100,000 plus ½ of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has 1 or more surviving descendants who are not descendants of the decedent;

(4) the first $100,000 plus ½ of any balance of the intestate estate, if 1 or more of the decedent's surviving descendants are not descendants of the surviving spouse.

Credits
Added by St.2008, c. 521, § 9, eff. Mar. 31, 2012.

Editors' Notes

UNIFORM PROBATE CODE COMMENT

Purpose and Scope of 1990 Revisions. This section was revised in 1990 to give the surviving spouse a larger share than the pre-1990 UPC. If the decedent leaves no surviving descendants and no surviving parent or if the decedent does leave surviving descendants but neither the decedent nor the surviving spouse has other descendants, the surviving spouse is entitled to all of the decedent's intestate estate.

If the decedent leaves no surviving descendants but does leave a surviving parent, the decedent's surviving spouse receives the first $300,000 plus three-fourths of the balance of the intestate estate.

If the decedent leaves surviving descendants and if the surviving spouse (but not the decedent) has other descendants, and thus the decedent's descendants are unlikely to be the exclusive beneficiaries of the surviving spouse's estate, the surviving spouse receives the first $225,000 plus one-half of the balance of the intestate estate. The purpose is to assure the decedent's own descendants of a share in the decedent's intestate estate when the estate exceeds $225,000.

If the decedent has other descendants, the surviving spouse receives $150,000 plus one-half of the balance. In this type of case, the decedent's descendants who are not descendants of the surviving spouse are not natural objects of the bounty of the surviving spouse.

Note that in all the cases where the surviving spouse receives a lump sum plus a fraction of the balance, the lump sums must be understood to be in addition to the probate exemptions and allowances to which the surviving spouse is entitled under Part 4. These can add up to a minimum of $64,500.

Under the pre-1990 Code, the decedent's surviving spouse received the entire intestate estate only if there were neither surviving descendants nor parents. If there were surviving descendants, the descendants to one-half of the balance of the estate in excess of $50,000 (for example, $25,000 in a $100,000 estate). If there were no surviving descendants, but there was a surviving parent or parents, the parent or parents took that one-half of the balance in excess of $50,000.

2008 Cost-of-Living Adjustments. As revised in 1990, the dollar amount in paragraph (2) was $200,000, in paragraph (3) was $150,000, and in paragraph (4) was $100,000. To adjust for inflation, these amounts were increased in 2008 to $300,000, $225,000, and $150,000 respectively. The dollar amounts in these paragraphs are subject to annual cost-of-living adjustments under Section 1-109.

References. The theory of this section is discussed in Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code", 76 Iowa L. Rev. 223, 229-35 (1991).

Empirical studies support the increase in the surviving spouse's intestate share, reflected in the revisions of this section. The studies have shown that testators in smaller estates (which intestate estates overwhelmingly tend to be) tend to devise their entire estates to their surviving spouses, even when the couple has children. See C. Shammas, M. Salmon & M. Bahlin, Inheritance in America from Colonial Times to the Present 184-85 (1987); M. Sussman, J. Cates & D. Smith, The Family and Inheritance (1970); Browder, "Recent Patterns of Testate Succession in the United States and England", 67 Mich. L. Rev. 1303, 1307-08 (1969); Dunham, "The Method, Process and Frequency of Wealth Transmission at Death", 30 U. Chi. L. Rev. 241, 252 (1963); Gibson, "Inheritance of Community Property in Texas--A Need for Reform", 47 Texas L. Rev. 359, 364-66 (1969); Price, "The Transmission of Wealth at Death in a Community Property Jurisdiction", 50 Wash. L. Rev. 277, 283, 311-17 (1975). See also Fellows, Simon & Rau, "Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States", 1978 Am. B. F. Research J. 319, 355-68; Note, "A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes", 63 Iowa L. Rev. 1041, 1091-92 (1978).

Cross Reference. See Section 2-802 for the definition of spouse, which controls for purposes of intestate succession.

Historical Note. This Comment was revised in 2008.

Notes of Decisions (39)

M.G.L.A. 190B § 2-102, MA ST 190B § 2-102
Current through Chapter 29 of the 2021 1st Annual Session

End of Document

Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206)
Chapter 190B. Massachusetts Uniform Probate Code (Refs & Annos)
Article II. Intestacy, Wills and Donative Transfers
Part 1. Intestate Succession

M.G.L.A. 190B § 2-103

§ 2-103. Share of heirs other than surviving spouse

Effective: March 31, 2012
Currentness

[Share of Heirs Other Than Surviving Spouse.]

Any part of the intestate estate not passing to the decedent's surviving spouse under section 2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

(1) to the decedent's descendants per capita at each generation;

(2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;

(3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them per capita at each generation;

(4) if there is no surviving descendant, parent, or descendant of a parent, then equally to the decedent's next of kin in equal degree; but if there are 2 or more descendants of deceased ancestors in equal degree claiming through different ancestors, those claiming through the nearest ancestor shall be preferred to those claiming through an ancestor more remote. Degrees of kindred shall be computed according to the rules of civil law.

Credits
Added by St.2008, c. 521, § 9, eff. Mar. 31, 2012.

Editors' Notes

UNIFORM PROBATE CODE COMMENT

This section provides for inheritance by descendants of the decedent, parents and their descendants, and grandparents and collateral relatives descended from grandparents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents.

1990 Revisions. The 1990 revisions were stylistic and clarifying, not substantive. The pre-1990 version of this section contained the phrase "if they are all of the same degree of kinship to the decedent they take equally (etc.)." That language was removed. It was unnecessary and confusing because the system of representation in Section 2-106 gives equal shares if the decedent's descendants are all of the same degree of kinship to the decedent.

The word "descendants" replaced the word "issue" in this section and throughout the 1990 revisions of Article II. The term issue is a term of art having a biological connotation. Now that inheritance rights, in certain cases, are extended to adopted children, the term descendants is a more appropriate term.

2008 Revisions. In addition to making a few stylistic changes, which were not intended to change meaning, the 2008 revisions divided this section into two subsections. New subsection (b) grants inheritance rights to descendants of the intestate's deceased spouse(s) who are not also descendants of the intestate. The term deceased spouse refers to an individual to whom the intestate was married at the individual's death.

Historical Note. This Comment was revised in 2008.

Notes of Decisions (79)

M.G.L.A. 190B § 2-103, MA ST 190B § 2-103
Current through Chapter 29 of the 2021 1st Annual Session

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Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title I. Courts and Judicial Officers (Ch. 211-222)
Chapter 214. Equity Jurisdiction (Refs & Annos)

M.G.L.A. 214 § 3A

§ 3A. Unauthorized use of name, portrait or picture of a person; injunctive relief; damages; exceptions

Currentness

Any person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action in the superior court against the person so using his name, portrait or picture, to prevent and restrain the use thereof; and may recover damages for any injuries sustained by reason of such use. If the defendant shall have knowingly used such person's name, portrait or picture in such manner as is prohibited or unlawful, the court, in its discretion, may award the plaintiff treble the amount of the damages sustained by him. Nothing in this section shall be so construed as to prevent any person practicing the profession of photography from exhibiting in or about his or its establishment specimens of the work of such person or establishment, unless the exhibiting of any such specimen is continued after written notice objecting thereto has been given by the person portrayed; and nothing in this section shall be so construed as to prevent any person from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by such manufacturer or dealer which such person has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with any literary, musical or artistic production of such author, composer or artist which such person has sold or disposed of with such name, portrait or picture used in connection therewith.

Credits
Added by St.1973, c. 1114, § 62.

Notes of Decisions (20)

M.G.L.A. 214 § 3A, MA ST 214 § 3A
Current through Chapter 29 of the 2021 1st Annual Session

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 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title V. Statutes of Frauds and Limitations (Ch. 259-260)
Chapter 260. Limitation of Actions (Refs & Annos)

M.G.L.A. 260 § 2A

§ 2A. Tort, contract to recover for personal injuries, and replevin actions

Currentness

Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.

Credits
Added by St.1948, c. 274, § 2. Amended by St.1973, c. 777, § 1.

Notes of Decisions (618)

M.G.L.A. 260 § 2A, MA ST 260 § 2A
Current through Chapter 29 of the 2021 1st Annual Session

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Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title V. Statutes of Frauds and Limitations (Ch. 259-260)
Chapter 260. Limitation of Actions (Refs & Annos)

M.G.L.A. 260 § 12

§ 12. Fraudulent concealment; commencement of limitations

Currentness

If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action.

Notes of Decisions (255)

M.G.L.A. 260 § 12, MA ST 260 § 12
Current through Chapter 29 of the 2021 1st Annual Session

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in case of his death before the happening of the contingency the estate would descend to his heirs in fee simple, such person may, before the happening of the contingency, sell, assign, or devise, the premises, subject to the contingency.

Aliens may take, &c., real estate, &c. 1852, 29, 86. 15 Pick. 349.

SECT. 38. Aliens may take, hold, transmit, and convey, real estate; and no title to real estate shall be invalid on account of the alienage of any former owner; but nothing contained in this section shall defeat the title to any real estate heretofore released or conveyed by the commonwealth or by authority thereof.

S. J. C. may allow tenant for life to cut grown trees. R. S. 60, § 33. R. S. act of amend. § 7.

SECT. 39. When woodland is held by one person for life, with remainder or reversion to another in fee simple or fee tail, and the trees thereon have come to an age and growth fit to be felled, and are in such a state that they will probably become of less value by standing, the supreme judicial court may, on the petition of a party interested therein, order the trees or any part thereof to be felled and sold.

Commissioners to superintend, &c. R. S. 60, § 34. R. S. act of amend. § 7.

SECT. 40. The court in such case shall appoint one or more commissioners to superintend and direct the felling and sale of the trees, and to account to the court for the proceeds thereof.

Proceeds may be invested, and trustees appointed. R. S. 60, § 35. R. S. act of amend. § 7.

SECT. 41. The court may cause the proceeds of such sale, after deducting therefrom all necessary expenses and charges, to be invested in other real estate, or in public stocks, or other stocks or funds, as shall appear most for the interest of all concerned therein; and may appoint one or more trustees to take and hold such estate or stocks, and to dispose of the same and of the interest or income thereof, under the direction of the court, to and for the use of the persons entitled to the land.

Income to be paid to tenant for life; principal to owner in fee. R. S. 60, § 36. R. S. act of amend. § 7.

SECT. 42. The interest and income of the proceeds shall be paid to the tenant for life, so long as he is entitled to the profits of the land, and upon the determination of his estate, the principal shall belong to the person who is entitled to the land in fee simple or fee tail; and the real estate, stocks, or funds, in which the proceeds are invested, shall be conveyed and transferred to such person accordingly.

Trustees may be removed; shall give bond. R. S. 60, § 37 R. S. act of amend. § 7.

SECT. 43. The court may from time to time remove the trustees and appoint others in their stead; and every trustee shall give bond with sufficient sureties to the clerk of the court, or to such other person as the court shall designate, for the use and benefit of the persons interested in the proceeds, with condition for the faithful discharge of the trust.

TITLE II.

CHAPTER 91.

OF TITLE TO REAL PROPERTY BY DESCENT.

General rules of descent. R. S. 61, § 1. 1857, 298. 7 Met. 303. 9 Met. 28. 4 Gray, 245.

SECTION 1. When a person dies seised of land, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, (except as provided in chapter one hundred and four,) in manner following: —

First. In equal shares to his children and the issue of any deceased child by right of representation; and if there is no child of the intestate living at his death, then to all his other lineal descendants; if all the descendants are in the same degree of kindred to the intestate, they shall share the estate equally; otherwise they shall take according to the right of representation:

Second. If he leaves no issue, then to his father:

Third. If he leaves no issue nor father, then in equal shares to his mother, brothers, and sisters, and to the children of any deceased brother or sister by right of representation:

Fourth. If he leaves no issue, nor father, and no brother nor sister, living at his death, then to his mother, to the exclusion of the issue, if any, of deceased brothers or sisters:

6 Cush. 156.

Fifth. If he leaves no issue, and no father, mother, brother, nor sister, then to his next of kin in equal degree; except that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor who is more remote: *provided*,

Sixth. If a person dies leaving several children, or leaving one child and the issue of one or more others, and any such surviving child dies under age and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent, shall descend in equal shares to the other children of the same parent, and to the issue of any such other children who have died, by right of representation:

12 Mass. 490.

Seventh. If at the death of such child who shall have died under age and not having been married, all the other children of his said parent are also dead, and any of them have left issue, the estate that came to such child by inheritance from his said parent shall descend to all the issue of the other children of the same parent; and if all the issue are in the same degree of kindred to the child, they shall share the estate equally; otherwise they shall take according to the right of representation:

1849, 87.

Eighth. If the intestate leaves a widow and no kindred, his estate shall descend to his widow; and if the intestate is a married woman and leaves no kindred, her estate shall descend to her husband:

R. S. 61, § 1. 1849, 87.

Ninth. If the intestate leaves no kindred, and no widow or husband, his or her estate shall escheat to the commonwealth.

Illegitimate child to inherit from mother, &c. R. S. 61, § 2. 1851, 211. 11 Met. 294. 2 Gray, 535.

SECT. 2. An illegitimate child shall be heir of his mother and any maternal ancestor, and the lawful issue of an illegitimate person shall represent such person and take by descent any estate which the parent would have taken if living.

mother heir to. R. S. 61, § 3. 4 Pick. 93.

SECT. 3. If an illegitimate child dies intestate, without lawful issue, his estate shall descend to his mother.

whose parents intermarry, &c. 1853, 253, § 1.

SECT. 4. An illegitimate child whose parents have intermarried and whose father has acknowledged him as his child, shall be considered legitimate.

Degrees of kindred, how computed. Half blood to inherit. R. S. 61, § 5.

SECT. 5. The degrees of kindred shall be computed according to the rules of the civil law; and the kindred of the half blood shall inherit equally with those of the whole blood in the same degree.

Advancement

SECT. 6. Any estate, real or personal, given by the intestate in his lifetime as an advancement to any child or other lineal descendant, shall be considered as part of the intestate's estate, so far as it regards

1996 WL 376364
United States District Court, D. Montana, Billings Division.

Paul W. BERGER and Erma R. Berger, Plaintiffs,
v.
Rodney HANLON, Joel Scrafford, Richard C. Branzell, Robert Prieksat, Kris A. McLean, Turner Broadcasting Systems, Inc., a Georgia corporation, Robert Rainey, Donald Hooper, and United States of America, Defendants.

No. CV–95–46–BLG–JDS.
|
Feb. 26, 1996.

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William A. Forsythe, Sidney R. Thomas, Moulton, Bellingham, Longo & Mather, PC, Billings, MT, for Robert Rainey, Donald Hooper.

MEMORANDUM AND ORDER

SHANSTROM, Chief Judge.

***1** Pending before this Court is the federal defendants' motion to dismiss or, in the alternative, for summary judgment. The "federal defendants" as referred to in this order are United States Department of Interior's Fish and Wildlife Service (FWS) Special Agents Hanlon, Scrafford, Branzell, and Prieksat, and Assistant United States Attorney (AUSA) McLean. Incorporated in the federal defendants' motion is a request that this Court take judicial notice of the information filed May 5, 1993 in *United States v. Paul W. Berger,* and of excerpts from testimony given by Special Agent Joel Scrafford in the matter. Also pending is the motion for summary judgment filed by defendants Turner Broadcasting Systems, Inc. (TBS), Robert Rainey (Rainey), and Donald Hooper (Hooper). Rainey and Hooper were members of the Cable News Network (CNN) camera crew which filmed the execution of the search warrant. After hearing oral arguments and reviewing the briefs, this Court is prepared to rule on the motions.

BACKGROUND

The plaintiffs in this case are Garfield County ranchers Paul W. Berger (Berger) and his wife Erma R. Berger (Mrs. Berger). An investigation was initiated after former employees of Berger contacted Montana Fish and Game Service officials alleging that Berger used poisons to kill predators on his ranch, including eagles. In connection with the investigation of Berger, the FWS obtained a search warrant for the Berger ranch. This action arises from the March 24, 1993 execution of that federal search warrant by FWS agents.

Sometime prior to the execution of the warrant, CNN was given permission to accompany the government while agents executed the search warrant. The CNN crew accompanied federal and state agents during the execution of the search warrant. CNN later broadcast a news story about ranchers killing predators. The investigation and prosecution of Berger were featured in the story. On March 21, 1995, this lawsuit was filed. The Bergers allege that in executing the search warrant, federal defendants and defendants TBS, Rainey, and Hooper violated their Fourth Amendment right to be

free from unreasonable searches and seizures. Additionally, the Bergers allege trespass against TBS, Rainey, Hooper and AUSA McLean; conversion against TBS, Rainey and Hooper; intentional infliction of emotional distress against TBS, Rainey, and Hooper; and a violation of the federal wiretapping statute, 18 U.S.C. § 2511, against TBS, Rainey and Hooper.

I. *The federal defendants' Motion to Dismiss or, in the alternative, for Summary Judgment.*

Standard of Review

When deciding a motion for summary judgment, the Court generally looks to whether material issues of fact are in dispute. Fed.R.Civ.P. 56(e). However, when the summary judgment motion is based on qualified immunity, a court must consider the law as it was established at the time of the incident. *Romero v. Kitsap County,* 931 F.2d 624, 628 (9th Cir.1991).

***2** The defense of qualified immunity applies to government officials and protects all "but the plainly incompetent or those who knowingly violate the law." *Schroeder v. McDonald,* 55 F.3d 454, 461 (1995) (citations omitted). Even officials who violate the Constitution are to be accorded qualified immunity and, therefore, escape money damages if, in their performance of discretionary duties, their actions do not violate "clearly established constitutional or statutory rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *see also Elder v. Holloway,* 114 S.Ct. 1019, 1021 (1994). Under the summary judgment standard for qualified immunity, the Court must determine if the plaintiff has alleged a violation of law that was clearly established at the time of the alleged violation. *See Romero,* 931 F.2d at 627–28. If the law was not clearly established, then the official is immune from suit as a matter of law, any factual disputes are rendered immaterial, and summary judgment is appropriate. *See Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985); *Romero,* 931 F.2d at 628. The determination of whether an asserted federal right was clearly established at a particular time is a question of law. *Elder,* 114 S.Ct. at 1023.

Therefore, the qualified immunity test essentially requires the following three steps: 1) the identification of the specific right allegedly violated; 2) the determination of whether that right was so "clearly established" that a reasonable officer would have been aware of it; and 3) the determination of whether a reasonable officer could have believed that the conduct at issue was lawful. *Romero,* 931 F.2d at 627.

The question to be answered in this case is whether on March 24, 1993 it was clearly established that the Bergers' Fourth Amendment freedom from unreasonable searches and seizures was violated when government agents executing a valid search warrant allowed representatives of the news media to observe and document the search. The contours of the right must have been sufficiently clear in 1993 that a reasonable official would have understood that what he was doing violated that right. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). In light of pre-existing law, the unlawfulness of the act must have been apparent. *Id.* If the law was not clearly established, then summary judgment must be granted.

Discussion

A. *Motion for Summary Judgment*

In their motion, defendants ask the Court for an order finding that federal law enforcement agents who allowed a news media camera crew to accompany them during the execution of a valid search warrant did not violate any clearly established Fourth Amendment rights and that, therefore, they are entitled to qualified immunity. *See Harlow,* 457 U.S. at 818 (if law was not "clearly established" at time of incident, then summary judgment is proper). The Bergers contend that it was clearly established at the time of the search that it is a violation of the Fourth Amendment to allow a media camera crew at the execution of a search warrant for reasons other than a legitimate law enforcement purpose.

***3** The operation of the *Harlow* qualified immunity standard greatly depends upon the level of generality in which the relevant "legal rule" is identified. *Anderson,* 483 U.S. at 639; *Camarillo v. McCarthy,* 998 F.2d 638, 640 (9th Cir.1993). A plaintiff who has a suit based upon a constitutional tort cannot circumvent the plainly established rule of qualified immunity simply by alleging violations of extremely abstract rights. *Anderson,* 483 U.S. at 639. The *Anderson* Court noted as an example of abstract rights that "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Anderson,* 483 U.S. at 639. The right referred to by the *Harlow* test is not a general constitutional guarantee, but

rather it is the application in a particular context. *See Todd v. United States,* 849 F.2d 365, 370 (9th Cir.1988).

The *Harlow* standard is an objective inquiry. *Kirkpatrick v. Los Angeles,* 803 F.2d 485, 490 (9th Cir.1986). A plaintiff seeking damages from a government official bears the threshold burden of demonstrating that the constitutional rights at issue were clearly established at the time of the officer's allegedly unlawful act. *See e.g., Shoshone–Bannock Tribes v. Fish & Game Comm'n of Idaho,* 42 F.3d 1278, 1285 (9th Cir.1994); *Davis v. Scherer,* 468 U.S. 183, 197 (1984). In deciding whether the law was clearly established at the relevant time, the court must "survey the legal landscape" as it existed at the time of the conduct in question. *Figueroa v. United States,* 7 F.3d 1405, 1409 (9th Cir.1993), *cert. denied,* 114 S.Ct. 1537 (1994); *Wood v. Ostrander,* 879 F.2d 583, 591 (9th Cir.1989), *cert. denied* 498 U.S. 938 (1990).

The survey of the legal landscape begins by examining the binding Supreme Court and Ninth Circuit decisions. *Kirkpatrick,* 803 F.2d at 490. In the absence of binding Supreme Court or Ninth Circuit precedent, courts in this circuit reviewing a qualified immunity defense must look to all available decisional law, including cases from other state, circuit, and district courts. *Figueroa,* 7 F.3d at 1409; *Wood,* 879 F.2d at 591. The analysis begins by examining those cases that are "most like" the instant case. *Figueroa,* 7 F.3d at 1409. Finally, because the question is whether the relevant law was so clearly established at the time of the conduct at issue that a reasonable officer could be said to "know" his conduct was unlawful, post-incident decisions may not be considered. *See Harlow,* 457 U.S. at 818–19; *Baker v. Racansky,* 887 F.2d 183, 187 (9th Cir.1989).

The Bergers attempt to satisfy their burden of demonstrating that the constitutional rights at issue were clearly established by relying on *United States v. Sanusi,* 813 F.Supp. 149, 157–59 (E.D.N.Y.1992), and *Ayeni v. CBS, Inc.,* 848 F.Supp. 362, 368 (E.D.N.Y.1994). The *Ayeni* case arose from the search underlying the *Sanusi* case. Both cases, however, can be distinguished.

***4** The *Sanusi* case involved the news-gathering privileges of the media and whether the media had to turn over to the defendant a videotape taken at the execution of a search warrant. The case did not involve the question of qualified immunity.

The district court in *Ayeni* was affirmed by the Second Circuit in *Ayeni v. Mottola,* 35 F.3d 680 (1994), *cert. denied,* 115 S.Ct. 1689 (1995). The *Ayeni* case is distinguishable because the Second Circuit Court allowed the plaintiff to defeat the rule of qualified immunity by addressing and analyzing the alleged violation of an extremely abstract right. Unlike the search in the case at bar, the *Ayeni* case involved the search of a home, where privacy interests are at their greatest. The *Ayeni* Court addressed the general Fourth Amendment right of privacy and held that the right had been violated when a news crew entered the house during the execution of a search warrant. *Ayeni,* 35 F.3d at 686. [1] The Sixth Circuit and this Court recognize the error made by the Second Circuit. *See Bills v. Aseltine,* 52 F.3d 596 (6th Cir.1995) (criticizing the *Ayeni* Court for describing the violation in abstract and general terms, contrary to the Supreme Court's instructions in *Anderson*).

1 In analyzing the general Fourth Amendment right instead of the specific application of that right, the *Ayeni* Court stated that it has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties. The court concluded that a special agent exceeded those well-established principles when he brought into the plaintiff's home a television news crew that was neither authorized by the warrant nor serving any legitimate law enforcement purpose. *Ayeni,* 35 F.3d at 686.

Additionally, the *Ayeni* case was decided subsequent to the Berger search. Therefore, the holding in the case should not be considered in determining whether the law was clearly established at the time the events at issue occurred. *See Baker,* 887 F.2d at 187 (post-incident decisions cannot clearly establish the law at the time of the conduct in question).

Furthermore, citing to *United States v. Wright,* 667 F.2d 793 (9th Cir.1982), and *United States v. Clouston,* 623 F.2d 485 (6th Cir.1980), the Bergers assert that existing case law establishes that it is unconstitutional for officers to delegate their authority or to bring private persons along to execute warrants unless the private persons are necessary to provide reasonable assistance in the execution of the warrant. Both of these cases, however, involved persons who actively participated with the officers in a search for evidence. These cases demonstrate only that at the time of the Berger search the Fourth Amendment did not prohibit the use of a third party at a search if that party was aiding the officer in searching

for items either specified in the warrant or within plain view of those items specified. *See Wright,* 667 F.2d at 797 (officer executing a warrant that authorized seizure of driver's license may utilize assistance of law enforcement officer involved in separate narcotics conspiracy investigation involving same people); *Clouston,* 623 F.2d at 486–87 (presence of telephone company employee, who was used to identify equipment reasonably believed to be found near equipment specified in warrant, did not render search unconstitutional). The cases did not involve the question of the lawfulness of allowing media representatives to observe and document the searching officers' own execution of a warrant. In fact, the media was not involved in either case.

***5** Finally, in a supplemental filing, the plaintiffs presented the case of *Buonocore v. Harris,* 65 F.3d 347 (4th Cir.1995) in support of their position. The *Buonocore* decision is distinguishable because the case involved law enforcement officers inviting a private person to engage in an independent general search of the home for items never mentioned in the warrant. *Buonocore,* 65 F.3d at 350. Furthermore, although the search in *Buonocore* took place late in 1992, the decision was rendered years after the 1993 Berger search.

The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.

No case at the time of the search directly stated the proposition that allowing media observers to attend the execution of an otherwise valid search violated the constitutional rights of one whose property was the subject of the search. To the contrary, the case law at the time suggested that the presence of media observers did not violate constitutional rights.

The federal defendants cite to several cases to demonstrate that decisional law did not "clearly establish" the proposition that government agents executing a warrant violated constitutional rights by allowing media representatives to attend and observe. For example, in *Avenson v. Zegart,* 577 F.Supp. 958 (D.Minn.1984), the Court found that officers did not violate the Fourth Amendment when they told the media what time the search would be executed and then refused to make the media leave during the execution of the warrant, even though the property owner asked that they be removed. The federal defendants also cite two unpublished district court cases, *Higbee v. Times–Advocate,* 5 Med.L.Rptr. 2372 (S.D.Cal. Jan. 9, 1980) and *Moncrief v. Hanton,* 10 Med.L.Rptr. 1620 (N.D.Ohio Jan. 6, 1984). In both cases, summary judgment was entered in favor of defendants who allowed media coverage at the execution of a search warrant.

Another case cited by the federal defendants, *Prahl v. Brosamle,* 295 N.W.2d 768 (Wis.Ct.App.1980), was dismissed when police allowed a reporter, who learned about the search on the police scanner, to observe the search. The court stated that it was unwilling to accept the proposition that an otherwise reasonable search would be made unreasonable by the filming and television broadcast of the search. *Id.* at 774.

The Bergers attack these cases because two are unpublished, the other is a state court case, and none are authoritative. But, the cases cited by the federal defendants help demonstrate that courts (and officers) were lacking clear authority on this issue at the time of the Berger search.

***6** In addition to case law, the Bergers also rely on 18 U.S.C. § 3105, which identifies who may serve search warrants. The Bergers argue that the statute provides guidance on the constitutional issue of what constitutes "reasonableness" under the Fourth Amendment. The statute provides:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. § 3105 (1985).

The case at bar does not involve a situation in which CNN was helping to serve or execute the warrant. CNN was simply observing the agents who were serving the warrant. The statute prevents officers who obtain a warrant from using the warrant themselves or allowing others to use the warrant as a means of expanding an otherwise valid and judicially-

approved search into a general search for things not specified in the warrant. Neither 18 U.S.C. § 3105 on its face nor pre-March 1993 case law interpreting the statute clearly establish that the presence of a news crew, or any other third person observer not actively participating in a search or seizure, violates the Fourth Amendment.

The mere fact that later cases may have extended pre-existing legal principles in a way that makes the defendants' conduct unlawful does not mean that the unlawfulness of that conduct was "clearly established" at the time of the search. *See Mitchell v. Forsyth,* 472 U.S. 511, 530–35 (1985). When "all available decisional law" at the relevant time is considered, the most that can be said of the legal landscape as it stood in March 1993 is that the law was perhaps beginning to evolve toward the view that the Fourth Amendment may prohibit the presence of media observers during the execution of a valid search warrant. This Court finds that the law was not clearly established in March 1993 and, therefore, the FWS agents and AUSA McLean are entitled to qualified immunity.

II. *Motions for Judicial Notice*

In addition to their brief and statement of uncontroverted facts in support of their motion, the federal defendants rely on the Certification of Scope of Employment as prepared by Helene M. Goldberg, Director of the Torts Branch, Civil Division, United States Department of Justice. The Bergers do not oppose the defendants' motion that this Court take judicial notice of the certification. The Court grants the defendants' request for certification.

The federal defendants also ask this Court to take judicial notice of certain materials from the proceedings in the matter of *United States v. Paul W. Berger,* No. CR 93–46–BLG–RWA (D.Mont.). Specifically, they ask that notice be taken of the information filed May 5, 1993, and of excerpts from testimony given August 11, 1993 by Special Agent Joel Scrafford in the same matter. The defendants hardily contest the motion. The Court did not rely on the material in determining whether the law at issue was clearly established at the time of the Berger search. However, the Court did not consider the motion for judicial notice on its merits. The motion is moot.

III. *The defendants' (TBS, Rainey, and Hooper) motion for summary judgment.*

***7** The defendants TBS, Rainey, and Hooper are moving this Court for summary judgment. TBS is engaged in the business of broadcasting entertainment, news and information programs. Rainey and Hooper are agents of CNN and served on the camera crew during filming of the execution of the Berger search.

Standard of Review

First, the Court finds it instructive to review the standards applicable to motions for summary judgment. Fed.R.Civ.P. 56(c) states summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party must initially identify those portions of the record before the Court which it believes establish an absence of material fact. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n.,* 809 F.2d 626, 630 (9th Cir.1987). If the moving party adequately carries its burden, the party opposing summary judgment must then "set forth specific facts showing that there is a genuine issue for trial." *Kaiser Cement Corp. v. Fischbach & Moore, Inc.,* 793 F.2d 1100, 1103–04 (9th Cir.), *cert. denied,* 479 U.S. 949 (1986).

All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). Nevertheless, "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv.,* 809 F.2d at 630 (*citing, Liberty Lobby,* 477 U.S. at 248). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." *Id.*

If a rational trier of fact might resolve disputes raised during summary judgment proceedings in favor of the nonmoving party, summary judgment must be denied. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Thus, the Court's ultimate inquiry is whether the "specific facts" set forth by the nonmoving party, viewed along with the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence. *Id.* at 631. Having so stated, the Court now turns to the merits of the pending motion.

Discussion

The defendants TBS, Rainey, and Hooper (the media defendants) move for summary judgment on four grounds. First, the media defendants claim that the Bergers' constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. Second, they argue that as a matter of law, there is no constitutional, statutory or common law liability for recording voluntary conversations with law enforcement officers or videotaping areas outside the family residence. Third, they allege that the Bergers have failed to plead or otherwise satisfy the standards required under the First Amendment for the requested injunction. Finally, the media defendants allege that the Bergers cannot fulfill the requirements for their common law theories.

A. *Collateral Estoppel*

***8** The media defendants claim that the Bergers' constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. The Bergers, however, argue that the action is not barred because the issues in the two cases are different. Specifically, the plaintiffs assert that the Fourth Amendment was not previously adjudicated, that TBS's involvement was not considered, and that Mrs. Berger was not a party.

The Bergers' arguments are not persuasive. CNN and TBS shared the same role in the search; they were essentially one in the same. Consideration of CNN's involvement in the prior suit is essentially consideration of TBS's involvement. The same argument holds true for Mrs. Berger. She is in privity with Mr. Berger. She held the same position as Mr. Berger and went through the same experience. If his rights were not violated, her rights were not violated.

In the criminal case against Berger, the defendant sought to suppress evidence obtained in the search on the basis that his Fourth Amendment rights had been violated. *United States v. Paul W. Berger,* CR 93–46–BLG–RWA (D.Mont.1993). Berger argued that the search was illegal. Magistrate Judge Anderson held a full hearing on these issues. Because the search conducted at the ranch did not violate the Fourth Amendment, Magistrate Judge Richard W. Anderson denied the suppression motion. In the case at bar, the plaintiffs are again arguing that their Fourth Amendment rights were violated by the search.

Magistrate Judge Anderson's holding in the criminal case, however, bars a *Bivens* action in this case. *See Matthews v. Macanas,* 990 F.2d 467, 468 (9th Cir.1993) (if a court in a criminal case holds that a search warrant is supported by probable cause and constitutional rights were not violated, a subsequent *Bivens* civil action is barred by collateral estoppel); *Bagley v. CMC Real Estate Corp.,* 923 F.2d 758, 762 (9th Cir.1991) (plaintiff estopped from bringing a civil action because issue determined in criminal case), *cert. denied,* 502 U.S. 1091 (1992). A *Bivens* action authorizes a cause of action against persons, acting under color of federal law, for violations of constitutional rights. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics,* 403 U.S. 388 (1971). Because the constitutionality of the search has already been litigated, the causes of action based on the constitutionality of the search are barred by collateral estoppel. [2]

2 The videotaping of an execution of a valid search and seizure warrant does not render an otherwise reasonable search and seizure unreasonable. *Prahl v. Brosamle,* 295 N.W.2d 768, 774 (Wis.Ct.App.1980).

The Bergers' Fourth Amendment claims against the media defendants arising from the videotaping of various places on the ranch also fail because the media defendants were not acting under color of law when they filmed the execution of the search. When a private party, such as TBS, is present during a search as a means of furthering its own interests, it is not acting under color of federal law and is not liable under *Bivens*. *See United States v. Miller,* 688 F.2d 652, 657–58 (9th Cir.1982); *United States v. Jennings,* 653 F.2d 107, 110 (4th Cir.1981). In this case, the defendants were not acting under the color of federal law. [3]

3 To establish a *Bivens* action, the Bergers must prove that the media defendants (1) acted under the color of federal law and (2) deprived them of constitutionally protected rights. Because this Court determined that one prong was not met, this Court need not analyze the second prong.

B. *Federal wiretap statutes*

***9** The Bergers claim that the media defendants "intercepted" their communications with the federal officers in violation of the Wiretap Act. The media defendants are

entitled to summary judgment on the wiretap claims because the federal agents consented to the recording.

The Wiretap Act prohibits the intentional interception of certain communications, but expressly allows persons to intercept and record communications under certain other conditions. Section 2511(2)(d) of the Act provides in pertinent part that:

> [i]t shall not be unlawful ... for a person not acting under color of law to intercept a[n] ... oral ... communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.
>
> 18 U.S.C. § 2511(2)(d) (1970 & Supp.1995).

The statute specifically provides that it is not unlawful to intercept oral communication where one of the parties has given prior consent. In the case at bar, law enforcement consented to TBS recording the conversations. The exception to this statute does not apply because this Court does not find that the media defendants made the recordings for the purpose of committing a crime or tortious act. Instead, the recordings were made for the purpose of producing a news story and for the defendants' commercial gain. Since the Act provides that there is no liability to a third party if one party to the conversation consents to the third party recording and since the exception does not apply, the media defendants did not violate the Wiretap Act. *See, e.g., Desnick v. American Broadcasting Co., Inc.,* 44 F.3d 1345, 1353 (7th Cir.1995) (wiretap statutes allow one party to have conversation recorded unless his purpose is to commit a crime or tort); *United States v. Mullins,* 992 F.2d 1472, 1478 (9th Cir.1993) (no violation of Fourth Amendment where one party consented to the monitoring of wire communications), *cert. denied* 114 S.Ct 556 (1993).

C. *Request for Injunction*

The Bergers seek an injunction preventing TBS, Rainey, and Hooper from broadcasting or selling all or part of the videotape and recordings gathered during the search. They make this request though the segment has already been broadcast several times and has not aired in more than a year. The request is essentially a request for a prior restraint, which carries a "heavy presumption against its constitutional validity." *CBS, Inc. v. Davis,* 114 S.Ct. 912, 914 (1994) (citations omitted). The term "prior restraint" is used to describe administrative and judicial orders issued in advance of the time that communications are to occur and forbidding that those communications occur. *Alexander v. United States,* 113 S.Ct. 2766, 2771 (1993). While the prohibition against prior restraints is not absolute, the gagging of publication has been considered acceptable only in "exceptional cases." *CBS,* 114 S.Ct. at 914.

***10** The plaintiffs have not shown that this case is an exceptional case that would justify the imposition of a prior restraint.

D. *Common law Claims*

The Bergers have pled several state law claims against TBS, Rainey and Hooper, including conversion, trespass, and intentional infliction of emotional distress. [4]

[4] The amended complaint also pled a claim of trespass against AUSA McLean. The United States was later substituted as the sole defendant for the claim of trespass against AUSA McLean pursuant to the Federal Employees Liability Reform and Tort Compensation Act. The claim against the United States for trespass was recently dismissed without prejudice by this Court in its December 15, 1995 and December 20, 1995 Orders.

1. *Conversion*

In their conversion count, the plaintiffs allege that the media defendants intentionally and wrongfully entered the Berger Ranch and wrongfully seized and appropriated both statements and private images of the Bergers, their premises, and possessions. The media defendants contend that the images and voices cannot be the subject of a conversion action.

The elements necessary for a conversion action in Montana include ownership of property, a right of possession, unauthorized dominion over that property by another, and damages that result. *Eatinger v. Johnson,* 887 P.2d 231, 234 (Mont.1995). The Ninth Circuit has held that three criteria must be met before the law will recognize a property right. First, there must be an interest capable of precise definition. Second, that interest must be capable of exclusive possession

or control. Finally, the putative owner must have established a legitimate claim to exclusivity. *Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.,* 958 F.2d 896, 903 (9th Cir.1992), *cert. denied* 113 S.Ct 2927 (1993).

The Montana Supreme Court has never held that recorded sounds and images can be the subject of a conversion action. Other courts however have concluded that they cannot. *See, e.g., Ault v. Hustler Magazine, Inc.,* 860 F.2d 877, 883 (9th Cir.1988) (use of one's photographic image is not proper grounds for conversion action), *cert. denied* 489 U.S. 1080 (1989); *Zacchinin v. Scripps–Howard Broadcasting Co.,* 351 N.E.2d 454, 457 (Ohio 1976) (one's image is not converted by being photographed), *rev'd on other grounds,* 433 U.S. 562 (1977); *Ippolito v. Lennon,* 542 N.Y.S.2d 3, 6 (N.Y.App.Div.1989) (any possible interest by musician in his performance contained on video and sound recording is intangible and not actionable as conversion). *See also, FMC Corp. v. Capital Cities/ABC,* 915 F.2d 300, 303 (7th Cir.1990) (retaining copies of documents not sufficient to constitute conversion). This Court agrees with those courts that have found that the use of photographed or videotaped images and sound recordings does not give rise to a cause of action for conversion.

Conversion requires the intentional exercise of dominion and control over a chattel. *Ault v. Hustler Magazine, Inc.,* 860 F.2d at 883. The Bergers assert that the twenty-two tapes containing the images and statements of the Bergers are tangible chattel giving rise to the conversion action. The plaintiffs' argument was rejected by the Ninth Circuit in *Ault.* The *Ault* Court held that the photographs were the property of the photographer, not of the person photographed. *Id.* While the tapes may be viewed as tangible chattel, it is the chattel of the defendants, not of the Bergers. Therefore, there was no conversion of Berger's chattels. *Id.*

2. *Trespass*

***11** The Bergers also allege that the media defendants trespassed when they entered the Berger ranch to observe the execution of the search warrant. Consent of the owner, possessor, or another authorized to consent, however, is an absolute defense to trespass. *See Salisbury Livestock Co. v. Credit Union,* 793 P.2d 470, 475 (Wyo.1990).

In this case, the federal government had temporary control and possession of the property while executing the search warrant. CNN had the permission of the federal government to be present during the execution of the search warrant. [5] The plaintiffs' amended complaint acknowledges that permission was given by the government. The letter from CNN to AUSA McLean dated March 11, 1993 was sent to confirm that permission. (Pl.'s Statement of Facts, Exhibit A).

5 This Court has already ruled that the government agents have qualified immunity for their actions in allowing the media to accompany them. The media's reliance on that permission was not unreasonable.

Furthermore, the media defendants did not invade the property interests protected by the tort of trespass. *See Desnick,* 44 F.3d at 1352. The execution of the warrant was not disrupted by the presence of the media. The media was present for the purpose of news coverage only. In this case, the recorded transcript from CNN submitted by the plaintiffs, along with their attorney's affidavit in response to this motion, does not reveal that the crew was asked to leave, even though Mr. Berger apparently acknowledged that his picture was being taken. (Lansing's Aff., Ex. 8 at tape 08 page 13). Furthermore, any argument that the Bergers did not know the crew was a news crew is not dispositive. "[C]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent." *Desnick,* 44 F.3d at 1351.

This Court finds that the media defendants are not liable under a cause of action for trespass.

3. *Intentional Infliction of Emotional Distress*

Finally, the Bergers allege a cause of action for intentional infliction of emotion distress. Montana allows a separate cause of action alleging intentional infliction of emotional distress. *Sacco v. High Country Indep. Press, Inc.,* 896 P.2d 411 (1995). This independent cause of action may arise if there was serious or severe emotional distress to the plaintiff which was a reasonably foreseeable consequence of the defendant's negligent or intentional act or omission. *Sacco,* 896 P.2d at 429. It is a question of law whether a plaintiff has introduced sufficient evidence to support a prima facie case for intentional infliction of emotional distress. *Sacco,* 896 P.2d at 427.

This Court has already found that the media defendants did not trespass when they accompanied the government

during the execution of the search warrant. They are also not liable for recording conversations during the search or for capturing videotaped images of plaintiffs. Furthermore, the media defendants are not liable for broadcasting a truthful, newsworthy story. Since no tortious conduct took place, emotional distress was not a reasonably foreseeable consequence of their actions. The Bergers' intentional infliction of emotion distress claim fails.

E. Declaratory Judgment

***12** The Bergers are asking for declaratory judgment declaring essentially that the federal agents and the media defendants violated the Bergers' constitutional rights. The declaratory relief sought is redundant of the claims already addressed in this opinion.

Courts generally recognize two criteria for determining whether declaratory relief is appropriate: "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Eureka Fed. Sav. and Loan Ass'n v. American Cas. Co. of Reading, Pa.,* 873 F.2d 228, 231 (9th Cir.1989) (citations omitted). In light of this opinion, the declaratory judgment requested by the Bergers is not warranted.

Accordingly,

IT IS ORDERED:

1. The federal defendants' motion for summary judgment is granted.

2. The federal defendants' request for judicial notice of the Certification of Scope of Employment is granted.

3. The federal defendants' request for judicial notice is moot.

4. The media defendants' motion for summary judgment is granted.

5. In light of these rulings, the plaintiffs' motion to set preliminary pretrial conference is denied as moot.

6. The Clerk of Court shall forthwith enter summary judgment in favor of the defendants and against the plaintiffs.

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

All Citations

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40 Fed.Appx. 594
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals,
Ninth Circuit.

Glenda BRUNETTE, Plaintiff—Appellant,
v.
HUMANE SOCIETY OF VENTURA COUNTY, a non-profit corporation; the Ojai Publishing Company, Inc., d/b/a the Ojai Valley News, a corporation; Tim Dewar; Jolene Hoffman; Robert Jeffrey Hoffman; Shawna Boatman; Tim Cozatt, Defendants—Appellees.

No. 00–56730.
|
D.C. No. CV–96–04557–DT.
|
Argued and Submitted Feb. 6, 2002.
|
Decided June 28, 2002.

Synopsis

Ranch owner who operated cat-breeding business brought action against newspaper and its reporter, asserting claims for, inter alia, trespass, invasion of privacy, conspiracy, and conversion, arising when the reporter, at the invitation of state Humane Society, photographed and videotaped the Society's execution of a search warrant at the ranch. The United States District Court for the Central District of California, Dickran M. Tevrizian, J., dismissed the complaint, and ranch owner appealed. The Court of Appeals held that: (1) ranch owner stated state law claims for trespass and invasion of privacy, but failed to state claims for conspiracy and conversion; (2) damages sought for emotional distress would be duplicative of those she could obtain under trespass claim; (3) ranch owner could not seek emotional distress damages as an independent cause of action; (4) ranch owner was not entitled to declaratory relief; and (5) ranch owner was not entitled to injunction restraining newspaper and its reporter from further publication of images taken at her property.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (8)

[1] **Trespass** Exercise of authority or duty

Ranch owner stated a claim for trespass against newspaper and its reporter under California law by alleging that the reporter entered her property at the invitation of state Humane Society while the Society executed invalid search warrant and that the reporter's presence was neither authorized by the warrant nor necessary to the investigation of the Humane Society, which photographed and videotaped the scene independently.

[2] **Torts** Particular cases in general

Ranch owner stated a claim for invasion of privacy against newspaper and its reporter under California law by alleging that the reporter entered her property at the invitation of state Humane Society while the Society executed invalid search warrant.

[3] **Conspiracy** Particular Subjects of Conspiracy

Ranch owner failed to state a claim for conspiracy under California law against state Humane Society, newspaper, and newspaper's reporter, by alleging that the reporter entered her property at the invitation of state Humane Society while the Society executed invalid search warrant; ranch owner did not sufficiently allege any particular actions by the defendants in furtherance of a conspiracy to violate her rights, or the existence of any agreement to violate her rights.

[4] **Conversion and Civil Theft** Property Subject of Conversion or Theft

Ranch owner's claim that newspaper and its reporter converted images of her property

through photography failed to state claim for conversion under California law.

[5] **Damages** Nature and theory of compensation

Ranch owner bringing trespass action against newspaper and its reporter could recover damages for discomfort and annoyance that would naturally ensue therefrom, but could not seek duplicative recovery under the guise of an action for emotional distress.

1 Cases that cite this headnote

[6] **Damages** Particular cases in general

Under California law, although emotional distress could be considered as damage in a properly stated defamation action, it could not form the basis of an independent infliction of emotional distress action on the same facts.

2 Cases that cite this headnote

[7] **Declaratory Judgment** Existence and effect in general

District court properly denied plaintiff's request for declaratory relief in state law tort action in which such relief served no purpose beyond the remedies plaintiff sought on her claims at law.

5 Cases that cite this headnote

[8] **Civil Rights** Injunction

Ranch owner was not entitled to injunction restraining newspaper and its reporter from further publication of images taken when the reporter, at the invitation of state Humane Society, photographed and videotaped Society's execution of search warrant at the ranch; such an injunction would, in essence, be a prior restraint, a heavily disfavored remedy, and post-publication remedies would adequately compensate her for any injury. U.S.C.A. Const.Amend. 1.

***596** Appeal from the United States District Court for the Central District of California Dickran M. Tevrizian, District Judge, Presiding.

Before TROTT, THOMAS and WARDLAW, Circuit Judges.

MEMORANDUM [*]

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36–3.

****1** Glenda Brunette ("Brunette") appeals the district court's dismissal of her complaint against Tim Dewar and the Ojai Valley News ("collectively "the Media"). We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's dismissal of a complaint for failure to state a claim. *TwoRivers v. Lewis,* 174 F.3d 987, 991 (9th Cir.1999). All factual allegations in the complaint must be accepted as true, and all reasonable inferences drawn in favor of Brunette. *Id.*

We hold that Brunette has alleged facts sufficient to state claims for trespass and invasion of privacy, and we reverse and remand those causes of action. We affirm the district court's dismissal of Brunette's other causes of action. [1]

[1] In a separate, published opinion filed simultaneously with this memorandum, we recount the facts of Brunette's case in some detail. There, we affirm the district court's dismissal of Brunette's § 1983 claim against the Media for violation of her Fourth Amendment rights because she did not allege facts sufficient to demonstrate the Media was a state actor.

DISCUSSION

I Trespass

[1] Under California law, the Media is subject to trespass liability, irrespective of whether it caused harm, if it intentionally entered land in possession of another. *Miller v. Nat'l Broad. Co.,* 187 Cal.App.3d 1463, 232 Cal.Rptr. 668, 677 (Cal.Ct.App.1986). The First Amendment is not a license to trespass. *See Shulman v. Group W Prods. Inc.,* 18 Cal.4th

200, 74 Cal.Rptr.2d 843, 955 P.2d 469, 496 (Cal.1998). However, a peaceable entry onto land with the consent of a person in lawful possession or control of the property is not actionable. *See* 5 Witkin, Summary of California Law § 607 (9th ed.1988).

The Media claims the invitation and consent of the Humane Society absolved its entry onto Brunette's ranch of the taint of trespass. However, the Humane Society entered Brunette's ranch pursuant to an ***597** invalid search warrant and thus, never gained lawful control of the premises. It appears the Humane Society had no authority to enter the property itself, much less grant lawful entry to the Media.

Brunette alleged that the Media's presence was neither authorized by the warrant nor necessary to the Humane Society's investigation. Even if the Humane Society's presence was permissible, the Media performed no law enforcement related activity during the search. In fact, Brunette alleged that the Media's presence was superfluous, as the Humane Society photographed and videotaped the scene independently. If proven, Brunette's allegations may demonstrate that the Media's entry onto her ranch constituted a trespass. Consequently, we reverse and remand the district court's dismissal of this cause of action.

II Invasion of Privacy

[2] Brunette alleged a sufficient privacy interest in her home and property as well as a reasonable expectation of privacy in those items. Nevertheless, the district court determined that the Media committed no serious or offensive invasion of privacy because it entered Brunette's ranch legally, upon receiving consent from the Humane Society. As discussed above, Brunette alleged that the Media, in fact, entered her ranch illegally. Any illegal entry would be sufficiently serious and offensive to state a claim for invasion of privacy. *See Dietemann v. Time, Inc.,* 449 F.2d 245, 247–49 (9th Cir.1971) (applying California law) (finding invasion of privacy where reporter entered and photographed the plaintiff at home without authorization). Thus, we reverse and remand the district court's dismissal of this cause of action.

III Conspiracy

****2** **[3]** Finding no underlying trespass or invasion of privacy, the district court dismissed Brunette's conspiracy claim. In the alternative, the district court dismissed this claim because Brunette failed to allege with particularity any behavior in furtherance of a conspiracy. We agree with the district court's alternative rationale. Brunette did not sufficiently allege any particular actions by the Humane Society or the Media in furtherance of a conspiracy to violate her rights. Instead the record reflects that the Humane Society unilaterally invited the Media to accompany its search of Brunette's ranch, and that the Humane Society and the Media never discussed how the search would be performed. There was no agreement to violate Brunette's rights; thus her conspiracy cause of action fails.

IV Conversion

[4] The district court dismissed Brunette's claim that the Media converted images of her property through photography. Although a claim of conversion may exist even if the allegedly converted property is intangible, *see A & M Records, Inc. v. Heilman,* 75 Cal.App.3d 554, 142 Cal.Rptr. 390, 400 (Cal.Ct.App.1977), not all intangible property is the proper subject of conversion. Courts have traditionally refused to recognize conversion of intangible assets that are not merged with something tangible. *See Thrifty–Tel, Inc. v. Bezenek,* 46 Cal.App.4th 1559, 54 Cal.Rptr.2d 468, 472 (Cal.Ct.App.1996).

A photographic image is not generally an intangible property right protected by a conversion claim, *see Ault v. Hustler Magazine, Inc.,* 860 F.2d 877, 883 (9th Cir.1988), and Brunette points to no California case in which a photographic image was the subject of a conversion. The district court properly dismissed this claim.

***598 V Infliction of Emotional Distress**

[5] **[6]** Brunette alleged that she suffered emotional distress due to the Media's trespass on her ranch. As a part of Brunette's trespass action, she may recover damages for "discomfort and annoyance that would naturally ensue therefrom." *Kornoff v. Kingsburg Cotton Oil Co.,* 45 Cal.2d 265, 288 P.2d 507, 511 (Cal.1955) (internal citations and quotations omitted). She may not, however, seek duplicative recovery under the guise of an action for emotional distress. *Billmeyer v. Plaza Bank of Commerce,* 42 Cal.App.4th 1086, 50 Cal.Rptr.2d 119, 126 (Cal.Ct.App.1995) (finding no authority that a trespass gives rise to an action for emotional distress). Brunette also alleged infliction of emotional distress stemming from the Media's publication of the photographs taken during the search. Although emotional distress may be considered as damage in a properly stated defamation action, it cannot form the basis of an independent infliction of emotion distress action on the same facts. *See Grimes*

v. Carter, 241 Cal.App.2d 694, 50 Cal.Rptr. 808, 813 (Cal.Ct.App.1966). Therefore, the district court properly dismissed these claims.

VI Declaratory Relief

[7] The district court denied Brunette's request for declaratory relief. Declaratory relief is appropriate when (1) the judgment will serve a useful purpose in clarifying and settling legal relations; and (2) when it will terminate and afford relief from uncertainty, insecurity, and controversy giving rise to the proceeding. *Bilbrey v. Brown,* 738 F.2d 1462, 1470 (9th Cir.1984). The district court's decision to deny declaratory relief is reviewed for an abuse of discretion. *Wilton v. Seven Falls Co.,* 515 U.S. 277, 289, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995). In this case, declaratory relief served no purpose beyond the remedies Brunette sought on her claims at law. Therefore, the district court properly denied Brunette's request for declaratory relief.

VII Injunction

****3** **[8]** Finally, Brunette sought an injunction restraining the Media from further publication of the images taken during the objectionable search. In essence, Brunette asked us to impose a prior restraint—a heavily disfavored remedy. *See CBS, Inc. v. Davis,* 510 U.S. 1315, 1317, 114 S.Ct. 912, 127 L.Ed.2d 358 (1994). Because post-publication remedies will adequately compensate Brunette for any injury, *see id.,* the district court properly denied Brunette's request for injunctive relief.

VIII Statute of Limitation

The district court found that Brunette alleged facts in her complaint which sufficed to toll the statute of limitations for one day. Cal.Civ.Proc.Code § 357. The Media takes no appeal from this decision.

CONCLUSION

We reverse and remand Brunette's claims for trespass and invasion of privacy. The district court properly decided all other issues.

AFFIRMED in part, REVERSED in part, and REMANDED.

All Citations

40 Fed.Appx. 594, 2002 WL 1421540, 30 Media L. Rep. 2181

End of Document

1998 WL 1284174
Only the Westlaw citation is currently available.
Superior Court of Massachusetts.

[1] Mary F. Elms.

Robert ELMS et al., [1]
v.
Peter N. OSGOOD et al. [2]

[2] Douglas W. Anderson and Diamond Engineering and Technology, Inc.

No. 961431A.
|
May 13, 1998.

MEMORANDUM OF DECISION AND ORDER ON REGINALD FISK'S MOTION FOR SUMMARY JUDGMENT ON CLAIMS MADE BY DEFENDANTS PETER OSGOOD AND DOUGLAS ANDERSON

DONOHUE.

INTRODUCTION

***1** Reginald Fisk, a defendant to the counterclaim, moved for summary judgment on January 8, 1998. The Plaintiffs-in-Counterclaim, Peter Osgood and Douglas Anderson, opposed the motion. A hearing was held on April 24, 1998, at which time the parties presented arguments in support of their positions. For the following reasons, Reginald Fisk's Motion for Summary Judgment is allowed.

BACKGROUND

Briefly, the undisputed facts are as follows. The plaintiff, Robert Elms, and Fisk, were the sole stockholders and owners of E & F Diamond Engineering, Inc. (”E & F). On or about July 1, 1991, Elms and Fisk (in their corporate capacities) entered into a contract with the defendant, Diamond Engineering and Technology, Inc. (“DETI”), for the sale of the assets of E & F (“Agreement”). Under the Agreement, DETI executed promissory notes in favor of Elms and Fisk, and agreed to make payments consistent with the terms of these promissory notes and other terms of the Agreement. In addition, the individual defendants, Osgood and Anderson, guaranteed two notes executed by Elms and the Plaintiff Mary Elms, in favor of the Worcester County Institute for Savings.

Osgood and Anderson submitted uncontroverted evidence that prior to the execution of the agreement, Elms and Fisk made statements to Osgood and Anderson regarding the business. Such statements included representations regarding the potential sales revenues, account sources, workmanship of technology, and business costs. In addition, there is some evidence that Elms provided false market potentials, and failed to disclose important information regarding E & F.

Osgood, Anderson and DETI made payments according to the terms of the Agreement from August 1991 through May 1992. No further payments were made by Osgood, Anderson or DETI after May 1992. DETI ceased operations in mid-1992.

DISCUSSION

A. Procedural History

On May 31, 1996, R. Elms and M. Elms commenced the primary action against the Defendants. Fisk was not a party to the primary action. The complaint in the primary action sought to recover the amount owed under a promissory note in the amount of $100,000.00 to Elms from DETI, and the amount owed under the terms of the Guaranty. Summary judgment was granted in Elms's favor on the promissory note, and summary judgment was granted in favor of R. Elms and M. Elms in the amount of $10,545.43 on the Guaranty. See order of this Court dated May 13, 1998.

Through their answer filed on July 6, 1996, the individual defendants presented a counterclaim against Elms, and sought to join Fisk as a defendant-in-counterclaim as well. The motion to join Fisk as a defendant-in-counterclaim was allowed by this Court (Fecteau, J.) on August 6, 1996. The counterclaim sets forth the following counts, all originating from the terms of the Agreement: intentional misrepresentation, fraudulent inducement, breach of contract breach of fiduciary duty, conversion, and violations of G.L .c. 93A.

***2** Fisk seeks summary judgment on the counterclaim. In support of his motion Fisk argues that he is a third-party defendant to the counterclaim, and not a defendant-in-counterclaim. The effect of this status, so the argument continues, is that the rules regarding statutes of limitations applies without exception, and thus the counterclaim is untimely and filed outside the applicable statute of limitations

period. The Defendants/Plaintiffs-in-Counterclaim contend that Fisk is a defendant-in-counterclaim, and cite G.L.c. 260, § 36 to defend the vitality of the counterclaim.

B. Summary Judgment Standard

Summary judgment will be granted where there are no genuine issues of material fact and where the record presented entitles the moving party to judgment as a matter of law. See *Cassesso v. Comm'r of Correction,* 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes,* 369 Mass. 550, 553 (1976); Mass.R.Civ.P. 56(c) (1997). The moving party bears "the burden of demonstrating that there is no genuine issue of material fact on every relevant issue." *Pederson v. Time, Inc.,* 404 Mass. 14, 17 (1989). The parties agree on the above facts for the purpose of this motion for summary judgment.

C. Fisk's Status As A Party

The Massachusetts Rules of Civil Procedure permit Osgood and Anderson to file a counterclaim against Elms as a plaintiff to the original action. See Mass.R.Civ.P. 13. A counterclaim is an action against an opposing party. See *id.* at (a) and (b). A person who is not a party to the original action may be made a party to a counterclaim through Rules 19 or 20. See Mass.R.Civ.P. 13(h). Osgood and Anderson moved to join Fisk as a defendant to the counterclaim, which motion was allowed. Although the motion sought to make Fisk a defendant-in-counterclaim, the effect of this motion instead made Fisk a defendant to the counterclaim. This is the necessary result because prior to the filing of the counterclaim and the joinder of Fisk as a defendant to the counterclaim, Fisk was not an "opposing party" as required by the Rules. Any claim filed against Fisk by Osgood and Anderson was an original claim, not a claim against Fisk as an opposing party. [3] Thus, although the motion sought to join Fisk to the action as a de fendant-in-counterclaim, this effort could not be achieved unless the Court ordered Fisk to be joined as a plaintiff to the original action. As Fisk has not been made a plaintiff on the original complaint, he is not an opposing party and Osgood's and Anderson's claim is not a counterclaim as it applies to Fisk. Fisk is a defendant to the counterclaim.

3 The action against Fisk is not a third-party complaint, as third-party complaints are utilized for indemnification and contribution actions. See Mass.R.Civ.P. 14.

D. The Merits of the Motion for Summary Judgment

Because the counterclaim, as it applies to Fisk, is technically an original complaint, the statutes of limitations apply as if it were not a counterclaim. Thus, Osgood and Anderson are not entitled to the protection of G.L.c. 260, § 36.

1. Counts I and II

Count I of the action against Fisk (and R. Elms) alleges that R. Elms and Fisk made intentional misrepresentations to Osgood and Anderson. Osgood and Anderson allegedly relied upon these representations to their detriment, causing them damages. The second count of the Osgood-Anderson claim against Fisk alleges that Elms and Fisk made fraudulent misrepresentations to Osgood and Anderson for the purpose of inducing Osgood and Anderson to purchase the assets of E & F and to make substantial investments into the business. These allegations constitute claims in tort for fraudulent misrepresentation and inducement or deceit. Actions alleging misrepresentation must be commenced within three years after the time that the injured party learns of the misrepresentation. See *McEneaney v. Chestnut Hill Realty Corp.,* 38 Mass.App.Ct. 573, 576-77 (1995), rev. denied 420 Mass. 1107. See also G.L.c. 260, § 2A. Allegations of deceit likewise carry a three year statute of limitations. See *Town of Mansfield v. GAF Corp.,* 5 Mass.App.Ct. 551, 554-55 (1977); G.L.c. 260, § 2A.

***3** In mid-1992, Osgood and Anderson ceased operations at DETI. Although Osgood's and Anderson's answers to interrogatories both indicate that they knew of the misrepresentations as early as November 1991, this Court makes the reasonable inference in favor of the Plaintiffs-in-Counterclaim that the earliest they were aware of the alleged misrepresentations and actions which constitute the alleged deceit was at the time that DETI ceased doing business. See *Beal v. Board of Selectmen of Hingham,* 419 Mass. 535, 539 (1995) and cases cited; 10A C.A. Wright, A.R. Miller, & M.K. Kane, Federal Practice and Procedure, § 2727, at 124-25 (2d ed.1983). If DETI's business operations ceased in June 1992, the statute of limitations on the instant action for fraudulent misrepresentation and inducement or deceit commenced running at that time, and expired three years thereafter, in June 1995. Based upon this analysis, Counts I and II of Osgood's and Anderson's claim, as it applies to Fisk, are barred by the statute of limitations, as the claim was not filed until July 1996.

2. Count III

Under the Agreement, Elms and Fisk agreed to manufacture new products for DETI using new technology possessed by E & F. Count III alleges that Elms and Fisk breached their contractual obligations by manufacturing inferior products. Alleging breach of the terms of the Agreement, Count III enjoys a six-year statute of limitations. See G.L.c. 260, § 2. Again, for purpose of this motion the Court makes the reasonable inference in Osgood's and Anderson's favor that the latest time that the Agreement was breached by Elms and Fisk was at the time DETI ceased operations, or June 1992. Thus, the statute of limitations applicable to Count III will not expire until June 1998, or six years after the cause of action accrued.

However, summary judgment must enter against Osgood and Anderson, as they lack the ability to recover for the alleged breach of contract. Fisk correctly notes that Osgood and Anderson did not execute the Agreement in their individual capacities, but rather in their corporate capacities. It is a well established principle in Massachusetts contract law that only the parties to the contract, or its beneficiaries, may recover for breach of the contract. See *Saunders v. Saunders,* 154 Mass. 337, 338 (1891), and cases cited; *Choate, Hall and Stewart v. SCA Services, Inc.,* 379 Mass. 535, 542-45 (1979) (discussing action by creditor beneficiary). See also *Bonan v. United Pac. Ins. Co.,* 462 F.Sup. 869, 872 (1978) (citing *Saunders*). Because Osgood and Anderson did not execute the Agreement in their individual capacities, and there being no evidence that Osgood and Anderson were beneficiaries of the contract, they are not entitled to recover for a breach of that contract. Similarly, Elms and Fisk could not, for example, bring a cause of action to require Osgood and Anderson in their individual capacities to make payments due from DETI.

3. Count IV

***4** Through their complaint, Osgood and Anderson allege that Elms and Fisk breached their fiduciary duties to Osgood and Anderson when they breached the terms of the Agreement and converted property. As noted above, Osgood and Anderson cannot recover for damages for breach of contract. In addition, a claim for breach of fiduciary duty sounding in tort must be brought within three years of its accrual. See *Demoulas v. Demoulas Super Markets, Inc.,* 424 Mass. 501, 517-18 (1997); *Locicero v. Leslie,* 948 F.Sup. 10 (1996); G . L.c. 260, § 2A. Such a claim accrued when Osgood and Anderson knew or reasonably should have known of the harm caused by Elms and Fisk. See *Locicero,* 948 F.Supp. at 12, citing *Riley v. Presnell,* 409 Mass. 239, 243 (1991). Using June 1992 as the latest possible time that Osgood and Anderson should have known about the alleged breach of fiduciary duty, the claim set forth in Count IV is barred by the statute of limitations.

4. Count V

Count V of Osgood's and Anderson's claim alleges that Elms and Fisk committed acts amounting to conversion of property. Tortious conversion of property is governed by G.L.c. 260, § 2A, which imposes a three year statute of limitations. See G.L.c. 260, § 2A, *Megna v. Marriott Hotel,* 1995 WL 808632, 3 (Superior Court, 1995); *Lindstrom v. Baybank,* 1993 WL 818593, 1 (Superior Ct.1993). Upon discovery of the conversion, which would have been no later than June 1992, Osgood and Anderson had three years in which to commence this action. The claim against Fisk is untimely, and barred by the statute of limitations.

5. Count VI

The last count of Osgood's and Anderson's claim alleges that Elms and Fisk violated the terms of G.L.c. 93A. G.L.c. 260, § 5A requires that actions alleging violations of chapter 93A be brought within four years of their accrual. The latest possible time that the cause of action would have accrued, as set forth above, was June 1992. Osgood and Anderson did not file their claim (nor did they seek to add Fisk as a defendant) until July 1996. Because Osgood and Anderson did not file this action prior to June 1996, the action is barred by the statute of limitations.

ORDER

For the foregoing reasons, it is hereby ORDERED that Reginald Fisk's Motion for Summary Judgment on Claims Made by defendants Peter Osgood and Douglas Anderson is ALLOWED.

All Citations

Not Reported in N.E.2d, 1998 WL 1284174

MacCleave v. Merchant

Superior Court of Massachusetts, At Middlesex

September 30, 2002, Decided ; October 1, 2002, Filed

01-0859

Reporter
2002 Mass. Super. LEXIS 392 *; 15 Mass. L. Rep. 315

Jeffrey P. MacCleave v. Linda M. Merchant

Disposition: [*1] Defendant's motion to dismiss allowed in part and denied in part.

Core Terms

statute of limitations, deed, marry, breach of contract, cause of action, accrues, parties, Counts, tolled, defense motion, concealment, equitable, one-half

Case Summary

Procedural Posture
Plaintiff original homeowner brought an action alleging fraud, breach of contract, equitable trust, and conversion by defendant former girlfriend. The former girlfriend moved to dismiss.

Overview
The original homeowner purchased a home. Ten years later he began dating his girlfriend. They agreed to marry. The original homeowner then executed a deed adding the girlfriend as a joint tenant, conveying to her a one-half interest in the home. The couple's relationship ended and the girlfriend moved out. However, she remained co-obligor on the mortgage, as well as retained her one-half interest as joint tenant to the property. Additionally, she retained his car. The court held the parties knew, or should have known that the proposed marriage would not take place when the girlfriend moved out. Thus, the statute of limitations began to run at that point. As all of the tort actions were brought after the three year allowable period, they were barred. A breach of contract action for failure to marry was not allowed. There was consideration for adding the girlfriend's name to the mortgage. However, the equitable trust action was commenced within that allowable six year time period. Since no such marriage took place, the equity claims seeking to prevent unjust enrichment were allowed.

Outcome
The former girlfriend's motion to dismiss was allowed as to all counts except for the claim regarding an equitable trust.

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

HN1[] **Statute of Limitations, Time Limitations**

See *Mass. Gen. Laws ch. 260, § 2A*.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN2[] **Fraud & Misrepresentation, Nondisclosure**

See *Mass. Gen. Laws ch. 260, § 12*.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN3[] **Fraud & Misrepresentation, Nondisclosure**

"Fraudulent concealment" means that the defendant took some positive step to hide plaintiff's cause of

action. A cause of action is not concealed from one having personal knowledge of the facts creating it.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > General Overview

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN4[] Tolling of Statute of Limitations, Discovery Rule

A plaintiff's discussion with a defendant ordinarily does not postpone accrual of a cause of action. Additionally, if a plaintiff is deemed to know the facts on which his claim rests, there can be no fraudulent concealment tolling the running of the statute of limitations. Moreover, the statute of limitations is not tolled on a basis that the defendant concealed wrongdoing if the plaintiff has actual knowledge of the facts giving rise to his cause of action. The time limited by statute begins to run at the time the facts were or should have been discovered.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Intentional Torts > Conversion > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN5[] Statute of Limitations, Time Limitations

Conversion is the intentionally or wrongfully exercising ownership, control or dominion over personal property to which he has no right of possession at the time.

Governments > Legislation > Statute of Limitations > General Overview

Torts > Intentional Torts > Conversion > Defenses

Torts > Intentional Torts > Conversion > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

HN6[] Legislation, Statute of Limitations

All that is required for a cause of action for conversion to accrue is the wrongful exercise of ownership or control. A cause of action accrues on the happening of an event likely to put the plaintiff on notice.

Contracts Law > Types of Contracts > General Overview

Torts > ... > Interference With Personal Relationships > Alienation of Affection & Criminal Conversation > General Overview

HN7[] Contracts Law, Types of Contracts

See *Mass. Gen. Laws ch. 207, § 47A*.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Adequate Consideration

Real Property Law > Deeds > Construction & Interpretation

HN8[] Consideration, Adequate Consideration

Even if a deed does not recite full consideration for property, it does not affect the validity of the deed.

Governments > Legislation > Statute of Limitations > General Overview

HN9[] Legislation, Statute of Limitations

See Mass. Gen. Laws ch. 260, § 2.

Business & Corporate Compliance > ... > Contracts Law > Breach > Nonperformance

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN10[] **Breach, Nonperformance**

Pursuant to Mass. Gen. Laws ch. 260, § 2, an action seeking the declaration of a trust based on an implied contract must be brought within six years from the time the contract is repudiated or otherwise terminated to the knowledge of the other party.

Judges: Christopher J. Muse, Justice of the Superior Court.

Opinion by: Christopher J. Muse

Opinion

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

Plaintiff Jeffrey P. MacCleave ("plaintiff") brought this action alleging fraud, breach of contract, equitable trust and conversion by the defendant Linda M. Merchant ("defendant"). This matter is now before the court on the defendant's motion to dismiss. For the reasons set forth below, the defendant's motion to dismiss is *ALLOWED* in part and *DENIED* in part.

BACKGROUND

In December 1980, the plaintiff purchased a single-family home in Wayland, Massachusetts. [1] Sometime in 1990, the plaintiff began dating the defendant. In 1991, the defendant moved into the Wayland residence with the plaintiff. In 1993, the parties agreed to marry. [2] On July 15, 1993, the plaintiff executed a deed adding the defendant as a joint tenant, conveying to her a one-half interest in the Wayland home. As the plaintiff admits, this was done in contemplation of marriage. On the same date, a mortgage was executed **[*2]** on the residence wherein both parties became co-obligors in the amount of $ 115,650.00. Sometime in late 1997, the couple's relationship ended and the defendant moved out. [3]

Following the break up, the defendant remained co-obligor on the mortgage, as well as retained her one-half interest as joint tenant to the property. Additionally, she retained and continued to use a motor vehicle that was owned by the plaintiff. Throughout the course of the next three years, the parties discussed the defendant's return of the motor vehicle as well as the re-conveying of her interest in the Wayland property. No agreement ever came to fruition.

On February 26, 2001, the plaintiff filed **[*3]** the Complaint.

DISCUSSION

I. Statute of Limitations--Actions in Tort

A. Count I (Fraud/Cancellation); Count II (Fraud/Rescission)

Pursuant to G.L.c. 260, § 2A, **HN1**[] "except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues."

The parties' relationship ended on December 31, 1997, thereafter, the defendant moved out of the residence. It was at this time, when both parties knew, or should have known that the proposed marriage would not take place. For purposes of the statute of limitations, December 31, 1997 is the date when the plaintiff's causes of actions as to counts I and II accrued. The plaintiff was obligated to file such claims on or before December 31, 2000. Having failed to do so, this Court finds Counts I and II are barred by the applicable three-year statute of limitations provided by G.L.c. 260, § 2A. [4]

[1] The Court is considering the facts in the light most favorable to the non-moving party, as presented by the pleadings, affidavits and as revealed by the record.

[2] No wedding date was ever set nor were the parties ever married.

[3] For purposes of this motion, the most generous date of December 31, 1997 will be presumed.

[4] Complaint filed February 26, 2001.

[*4] The plaintiff mistakenly contends that the statute of limitations is extended in this case because there was fraudulent concealment. [5] The plaintiff alleges that, subsequent to the defendant moving out, the parties engaged in discussions as to the return of the motor vehicle and the reconveyance of her interest in the residence back to the plaintiff. However, no agreement was ever finalized, hence this suit.

HN3[] "Fraudulent concealment" means that the defendant took some positive step to hide plaintiff's cause of action. Tagliente v. Himmer, 949 F.2d 1 (Mass. 1991). A cause of action is not concealed from one having personal **[*5]** knowledge of the facts creating it. Maloney v. Brackett, 275 Mass. 479, 176 N.E. 604 (1931). Here, the plaintiff knew of the facts on which he now brings suit. Namely, on December 31, 1997, he was aware that the defendant's name still appeared on the deed.

The plaintiff argues that the defendant, at some point, agreed to reconvey her interest in the residence and these discussions toll the running of G.L.c. 260, § 2A. Such an argument is not supported by case law. HN4[] A plaintiff's discussion with a defendant ordinarily does not postpone accrual of a cause of action. Burns v. M.I.T., 394 F.2d 416 (Mass. 1968). Additionally, if a plaintiff is deemed to know the facts on which his claim rests, there can be no fraudulent concealment tolling the running of the statute of limitations. Malapanis v. Shirazi, 21 Mass.App.Ct. 378, 487 N.E.2d 533 (1986). Moreover, the statute of limitations is not tolled on a basis that the defendant concealed wrongdoing if the plaintiff has actual knowledge of the facts giving rise to his cause of action. Stark v. Advanced Magnetics, Inc., 50 Mass.App.Ct. 226, 736 N.E.2d 434 (2000). **[*6]** The time limited by statute begins to run at the time the facts were or should have been discovered. Old Dominion Copper Mining and Smelting Co. v. Bigelow, 203 Mass. 159, 89 N.E. 193 (1909). As stated earlier, this action accrued when the defendant moved out, at which time the plaintiff was clearly aware that the defendant remained on the deed. This Court finds that the statute of limitations was not tolled during the parties' discussions.

Therefore, the statute of limitations as to Counts I and II expired at the time the plaintiff's Complaint was filed.

B. Count VI (Conversion)

HN5[] Conversion is the "intentionally or wrongfully exercising ownership, control or dominion over personal property to which he has no right of possession at the time." See generally Nolan, Tort Law § 35 (1979). As the instant case is a replevin action, this claim is also subject to the three-year statute of limitations.

The plaintiff argues that the statute of limitation is again tolled until such time when the plaintiff knew the defendant would not return his vehicle. However, HN6[] all that is required for a cause of action for conversion to accrue is the wrongful exercise of **[*7]** ownership or control. A cause of action accrues on the happening of an event likely to put the plaintiff on notice. Hendrickson v. Sears, 365 Mass. 83, 89-90, 310 N.E.2d 131 (1974). The plaintiff admits that in 1997, the defendant was in wrongful possession and control over the subject motor vehicle. This actual knowledge, not merely likely notice as is the threshold in *Hendrickson*, starts the running of the statute.

For the same reasons for counts I and II, this Court finds the statute was not tolled during any alleged discussions with the defendant. Therefore, the statute of limitations as to Count VI had also expired at the time the plaintiff's Complaint was filed and he is thus barred from now asserting the claim.

II. Statute of Limitations--Actions in Contract

A. Count III (Breach of Contract/Failure of Consideration)

1. Breach of Contract

G.L.c. 207, § 47A states HN7[] "breach of contract to marry shall not constitute an injury or wrong recognized by law, and no action, suit or proceeding shall be maintained therefor."

The record is clear that the plaintiff conveyed one-half of his interest in the residence **[*8]** to the defendant as a result of their agreement to marry. He now brings a breach of contract action as a result of her breach of the agreement to marry him. Such an action cannot be maintained as set forth expressly in the statute.

2. Failure of Consideration

Interestingly, the plaintiff includes in this count a second

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[5] G.L.c. 260, § 12 provides: HN2[] "If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action."

theory completely unrelated to the breach of contract claim. [6] The plaintiff claims the defendant failed to provide any consideration for the receipt of the one-half beneficial interest in the residence. This Court finds otherwise. The record evidences that the defendant became an obligor on a mortgage note on the same day in which she received her interest in the residence. Furthermore, as the deed itself indicated, her interest was conveyed to her "in consideration of One ($ 1.00) Dollar and 00/100," upon which the plaintiff's signature appears. ***HN8***[⬆] Even if a deed does not recite full consideration for property, it does not affect the validity of the deed. *Hahn v. Planning Bd. of Stoughton, 24 Mass.App.Ct. 553, 511 N.E.2d 20 (1987)*. This Court finds that there is no basis for the claim of lack of consideration.

[*9] 3. Statute of Limitations

G.L.c. 260, § 2 states:

HN9[⬆] Actions of contract, other than those to recover for personal injuries, founded upon contracts or liabilities, express or implied, except actions limited by section one or actions upon judgment or decrees of courts of record of the United States or of this or of any other state of the United States shall, except as otherwise provided, be commenced only within six years next after the cause of action accrues.

Assuming for the purpose of argument, that the breach of contract claim falls outside *§ 47A*, an analysis of the time limit in which to file any alleged contract action to reform a deed is problematic. A review of case law reveals facts very much on point. *Meng v. Yan, 12 Mass. L. Rep. 219, 2000 WL 1511555 (Mass.Super. 2000)*. In 1991, plaintiff purchased a house with his own funds to which Yan (his then girlfriend) did not contribute. *Id. at 1*. During the closing, plaintiff was out of the country. *Id.* When he received the deed in the mail shortly after closing, he learned that title in the home was in both his and the defendant's name. *Id.* Sometime around **[*10]** 1995, the couple began experiencing difficulties in their relationship. *Id. at 2*. In 1999, the plaintiff filed suit requesting that the deed be reformed to remove the defendant's name. *Id.* The Court concluded that because plaintiff knew, soon after closing in 1991, that defendant's name appeared on the deed, plaintiff's claim for reformation of the deed was time barred as it had been eight years since defendant's name first appeared there. *Id.*

As stated earlier, the defendant's interest was conveyed to her in July 1993 by the plaintiff himself. Now, in 2001, he seeks to bring an action for breach of contract. Such actions are barred by the six-year limitation period. Therefore, this Court must dismiss Count III as well.

B. Count IV (Resulting Trust) & Count V (Constructive Trust) [7]

1. Statute of Limitations

The parties agree that both trusts **[*11]** are subject to the six-year statute of limitations pursuant to *G.L. 260, § 2*. The defendant argues that the statute began to run in 1993 when the promise to marry was made. However, ***HN10***[⬆] pursuant to *G.L.c. 260, § 2*, an action seeking the declaration of a trust based on an implied contract must be brought within six years from the time the contract is repudiated [8] or otherwise terminated to the knowledge of the other party. *Lufkin v. Jakeman, 188 Mass. 528, 530-31, 74 N.E. 933 (1905)*; *Boston & Northern State Ry. v. Goodell, 233 Mass. 428, 438, 124 N.E. 260 (1919)*; *Quinn v. Quinn, 260 Mass. 494, 497, 157 N.E. 641 (1927)*; *Epstein v. Epstein, 287 Mass. 248, 191 N.E. 418 (1934)*; *Hanrihan v. Hanrihan, 342 Mass. 559, 567, 174 N.E.2d 449 (1961)*; *Radford v. Lovett, 1 Mass.App.Ct. 874, 875, 307 N.E.2d 584 (1974)*; *Sanguinetti v. Nantucket Const. Co., Inc., 5 Mass.App.Ct. 227, 361 N.E.2d 954 (1977)*. On December 31, 1997, the defendant moved out. It was at this time that the plaintiff is deemed to have received knowledge of her intent **[*12]** not to marry him. This Court finds that there was no repudiation until that date. [9] Accordingly, the statute of limitations began to run on December 31, 1997.

The expiration of the time to file an action for equitable trust is therefore December 31, 2003. This action was commenced within that time period. The plaintiff is, therefore, not barred from asserting that the real estate is subject to a trust.

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[6] It appears as though the plaintiff has included two separate causes of action under one heading. This Court will therefore treat them as one but analyze them separately for simplicity and clarity.

[7] Both parties have combined these two counts for argument purposes. Therefore, this Court will rule as to both under a single heading.

[8] Repudiation is defined as "a contracting party's words or actions that indicate an intention not to perform the contract in the future." Black's Law Dictionary (rev. 9th ed. 1999).

[9] Neither party offered evidence to the contrary.

2. Equitable Trust Is Independent from G.L.c. 207, § 47A

The defendant contends that the plaintiff's cause of action for an equitable trust is barred pursuant to § 47A on the grounds that it originates in the breach of a promise to marry. Thibault v. Lalumiere, 318 Mass. 72, 75-76, 60 N.E.2d 349 (1945). This Court does **[*13]** not agree. In De Cicco v. Barker, 339 Mass. 457, 159 N.E.2d 534 (1959), the plaintiff sued the defendant in equity for the return of a six-carat engagement ring which was given on the condition that the defendant marry him. The court ordered the return of the ring to the plaintiff, holding that the proceeding was not to recover damages either directly or indirectly for the breach of the contract to marry but to obtain on established equitable principles restitution of property held on a condition that the defendant was unwilling to fulfill. Id. at 459. The court later stated that § 47A was "too inclusive and that a proceeding may be maintained, which although occasioned by breach of a contract to marry, and in a sense based upon the breach, is not as was the action in the *Thibault* case brought to recover for the breach itself." *Id.*

In this case, considering the facts in the light most favorable to the plaintiff, the purpose of the transfer of the one-half interest in the home to the defendant was for both parties' benefit, use and enjoyment of the residence as a couple upon marriage. No such marriage ever took place. These equity claims **[*14]** are not actions to recover for the breach itself, but rather seek to prevent unjust enrichment. They survive, if even by the slimmest of threads, independently and therefore, for the purposes of summary judgment are not barred.

ORDER

For the foregoing reasons, it is hereby *ORDERED* that defendant's motion to dismiss is *ALLOWED* as to Counts I, II, III, and VI. Further, defendant's motion to dismiss is *DENIED* as to Counts IV and V.

Christopher J. Muse

Justice of the Superior Court

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2013 WL 1412096 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Kenneth Tyler SCOTT and Clifton Powell, Petitioners,
v.
SAINT JOHN'S CHURCH IN THE WILDERNESS, Charles I. Thompson, and Charles W. Berberich, Respondents.

No. 12-1077.
April 4, 2013.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

Brief Amici Curiae of Historians of Art and Photography in Support of the Petitioners

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***1** INTERESTS OF THE *AMICI* [1]

[1] No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to fund its preparation or submission. Both parties were given 10-day notice of intent to file this brief under Rule 37.2(a) and have provided written consent to its filing.

The *amici* are professors of art history and visual culture in universities around the United States. They have a particularly keen interest in the preservation of free expression, especially through visual media.

The *amici* are:

Dora Apel, Associate Professor and W. Hawkins Ferry Endowed Chair in Modern and Contemporary Art History, Wayne State University;

Stephen F. Eisenman, Professor of Art History, Northwestern University;

Renée C. Hoogland, Associate Professor of English at Wayne State University and Editor of *Criticism: A Quarterly for Literature and the Arts;*

Paul Jaskot, Professor, History of Art and Architecture, DePaul University;

William J. Thomas Mitchell, Professor of English and Art History, University of Chicago;

Terence E. Smith, Andrew W. Mellon Professor of Contemporary Art History and Theory, University of Pittsburgh;

***2** John Tagg, Professor of Art History and Comparative Literature, Binghamton University; and

Rebecca Zorach, Professor of Art History, Romance Languages, and the College, University of Chicago.

SUMMARY OF THE ARGUMENT

Photographs, especially gruesome photographs, can speak with a power that text often cannot. Since the Civil War, people have used the photograph's ability to stir emotion and engender visceral understanding to provoke debate about some of the most important issues our nation has faced, namely, issues of war. Unsurprisingly, many of the most important war images have been "gruesome." Yet under the Colorado Court of Appeals' interpretation the First Amendment, these photos would be subject to ban from public display precisely because they are evocative. Because the Colorado Court of Appeals' opinion presents a threat to an historically-grounded method of expression that lends itself naturally to vibrant debate, this Court should grant *certiorari* and reverse.

ARGUMENT

Saint John's Church in the Wilderness v. Scott, 2012 COA 72, 2012 WL 1435945 (Co. App. Ct. 2012), *cert denied sub nom. Scott v. Saint John's Church in the Wilderness,* 2013 WL 119791 (Jan. 7, 2013) is a case about government censorship of the expression of ideas, purportedly to protect children. The case ***3** presents an issue of exceptional importance: whether gruesome pictures, which have historically had a profound effect on political debate in this country, may be banned by the government simply because a court finds that the message may upset some children. If allowed to stand, the Colorado court's interpretation of the First Amendment threatens to cut out a vital part of American political debate by limiting one of the most effective and compelling means of conveying messages on matters of extreme import. Historically, gruesome photographs have played a key role in influencing the great debates of the time, especially debates about war. Yet the most compelling photographs, those that had the greatest effect on debate, would be precisely those opened to censorship under the Colorado court's ruling. As such, granting review here would prevent the denuding of American political debate.

I. Gruesome Images Have Shifted the National Debate During Times of War

War is one of the most horrific features of the human experience. Unsurprisingly, then, debates surrounding war have often been colored by the dissemination of gruesome images. In three wars in particular - the Civil War, the Second World War, and the Vietnam War - gruesome images played a vital role in informing the national understanding of war and its costs. Under the Colorado Court of Appeals' understanding of the First Amendment, a person who wished to show the images that shaped the national debate about these wars could be enjoined from doing so if children were reasonably likely to be in the vicinity.

***4** A. The Civil War

Although photography during the Civil War was still in its infancy - too nascent even to capture action shots of the battles themselves - the result nonetheless transformed American's perception of war and the debate that surrounded it. Serena Covkin, *Photography and History: The American Civil War,* US History Scene (Sept. 26, 2012), http://www.ushistoryscene.com/uncategorized/ civilwarphotography/.

Several different photographers trailed the warpath capturing photo evidence of the realities of war, but two enjoy the most notoriety and historical importance: Matthew Brady and his assistant, Alexander Gardner. *See id.* The two worked together to photograph the war-torn landscape. *See id.* American society, for the first time, experienced the grisly realities of war in the public exhibits Brady opened in New York City and Gardner opened in Washington, D.C. Vaughn Wallace, *150 Years Later: Picturing the Bloody Battle of Antietam,* Time Lightbox (Sept. 17, 2012), http://lightbox.time.com/2012/09/17/150-years-later-picturing-the-battle-of-antietam/. Gardner's photographs of the Battle of Antietam were the first ever photographs of an American battlefield on which the dead had yet to be buried. Nat'l Parks Serv., *Historic Photographs by Alexander Gardner,* http://www.nps.gov/anti/photosmultimedia/gardnerphotos.htm (last visited Apr. 2, 2013).

Photographs like those from the Battle of Antietam transformed the public debate surrounding the Civil War and shattered long held ideals and perceptions. Alan Trachtenberg, *Albums of War: On* ***5** *Reading Civil War Photographs,* 9 Representations 1 (Special Issue), 2-12 (Winter, 1985). Victorian attitudes had romanticized war as a noble endeavor for a gentleman and the aristocracy. "Just as the Civil War modernized the economy, it modernized culture, even if its effects took time to manifest themselves. It eroded Victorian habits of feeling and sentimentality." Covkin, *supra.*

The photographs offered something unattainable in written descriptions - a visceral, graphic representation of the gruesome truth of the Civil War. *See id.* "Photographic images became the connective tissue binding the home front to the combat zone." *See id.* Imagery reflecting reality offers an immutability not found in written descriptions, and these images reflected the horrors of war that could not be sentimentalized and romanticized through the fluid motions of the author. *See id.*

The popularity and presence in the public of both Gardner and Brady's photographs is evidenced by the wave of attention they carried in media and public at large. *See* Bob Zeller, The Blue and Gray in Black and White: A History of Civil War

Photography 2-4 (2005). *Harper's Weekly* printed Gardner's sketches and woodcut illustrations of the Antietam battlefields, fueling the demand for his work and bringing the depictions into the homes of Americans for the first time. Doug Perry, *Teaching with Documents: The Civil War as Photographed by Mathew Brady,* Nat'l Archives, http:// www.archives.gov/education/lessons/brady-photos/ (last visited Mar. 29, 2013). Large crowds gathered at the exhibitions in New York and ***6** Washington, entranced by the images the two photographers captured from the war. *See* Wallace, *supra.*

The New York Times recorded the power these photographs had over their viewers. *See id. The Times* opined that it was as if the photographer "had brought the bodies and laid them in our dooryards and along the streets." *See id.* Catalogues were made from which other galleries purchased copies of the photos for public display at their own locations across the country. *See id.* Public debate ensued discussing the harsh and brutal realities of war, but the photographs also stirred up something within the American public seeking a better understanding of the war and the death it brought. *See id.*

It is fair to say that the photos changed America's understanding of the realities of the Civil War. *See* Zeller, *supra* at xi. They left a distinct impression on their viewers that mere descriptions of the battles had not been able to conjure. *See* Covkin, *supra.* And they were gruesome, depicting battlefields full of corpses lying in contorted positions with exposed wounds. *See, e.g.*, Alexander Gardner, *Bloody Lane Carnage,* Nat'l Parks Serv., http://www.nps.gov/common/uploads/photogallery/ncr/park/anti/2473AA6F-1DD8-B71C-07E4B3233A117CAD/2473AA6F-1DD8-B71C-07E4B3233A117CAD-large.jpg (last visited Apr. 2, 2013). Yet under the Colorado Court of Appeals' logic, these pictures could be banned from public places if a court believed that children were reasonably likely to be exposed to photos that might upset them - such as in public museums or articles available to the public.

***7 B. The Second World War**

Gruesome depictions of death also had a profound effect on American debate surrounding the Second World War. Initially, the federal government, through the Office of War Information, sharply curtailed Americans' access to pictures of dead soldiers. *See* George H. Roeder, The Censored War: American Visual Experience During World War Two, 8-10 (1993). The government feared that pictures of the war's true cost would undermine public support for the war, which the government perceived to be a particularly dangerous possibility when nearly a third of the American public supported a negotiated peace with Germany. *See id.* Starting in 1943, however, the government changed its tack: it was now worried that the American public, invigorated by recent victories, might begin to grow impatient with the war as it dragged on. *See id.* at 11. The Office of War Information released a number of photos that it had previously kept from the public in a classified "Chamber of Horrors," including particularly gruesome pictures of dead and mutilated soldiers. *See id.* at 10-12. Some of these photos, in turn, were published by the press. *See id.* at 14.

Soon the government itself began capitalizing directly on shocking photos. One poster exhorting American civilians to work harder featured a dead American soldier, slumped face down over a berm, his back flecked with what might be blood. The caption reads "This Happens Every 3 Minutes: Stay On the Job and *Get It Over." See* U.S. Army Signal Corps., *A Dead American Soldier Shown Where He Fell* (1945) (emphasis in the original), *available at* ***8** http:// cdn.calisphere.org/data/28722/73/bk0007s9773/ files/bk0007s9773-FID4.jpg. The government often used these photos to guard against war weariness among the civilian public, believing that display of the photos would discourage worker absenteeism and strikes. *See* Roeder, *supra* at 15. The release of the photographs shifted the political debate in World War II America: Shaken from the exultant feeling of impending victory, Americans now realized the true cost of the war and thus came to understand that the war was far from over. *See id.* at 14.

The pictures also proved to be beneficial for the government in other ways. An organization involved in raising war bonds telegraphed the Office of War Information to "please rush air-mail gruesome photos of dead American soldiers for plant promotion Third War Loan." *See id.* Presumably, if the writer of that telegram did not believe pictures to be more effective than text alone, he would not have been so vehement in his request of them.

The fact that gruesome photographs were evocative and politically salient during the Second World War is further reinforced by the government's censorship priorities during that time. During the War, the government focused a large portion of its censorship efforts on pictures rather than text. *See id.* at 17. Perhaps recognizing that pictures could be evocative in a way that text could not, the government was significantly stricter in limiting battlefield images than it was in censoring similar text accounts. *See id.*

When the government speaks, it is not constrained by the limits of the First Amendment. *See* ***9** *Pleasant Grove City v. Summum,* 129 S. Ct. 1125, 1131 (2009). As such, the government could likely continue to print and display gruesome posters like the ones described above, despite the Colorado Court of Appeals' understanding of the First Amendment. But individuals could not: A court could enjoin them from displaying the same gruesome pictures in public so long as the court believed that children were likely to see the pictures and to become upset by them. This means that the government could continue to use the most salient images for its own purposes, while citizens, even when engaging in political speech in a traditional public forum, could be subject to censure for doing the same.

C. The Vietnam War

Disturbing images of graphic violence played a pivotal role in shaping public perception of the war in Vietnam. Several images that came to represent the horror of war in Southeast Asia were displayed to Americans of all ages in the pages of national newspapers and periodicals like *TIME Magazine* and *Newsweek.*

Among the first and most widely cited images was Malcolm Browne's photograph of the self-immolation of the Buddhist monk Thich Quang Due, taken on June 11, 1963. *Diem Pleads for Calm After Torch Suicide*, L.A. Times, June 12, 1963, at 2, *image available at* http://www.nydailynews.com/news/world/malcolm-browne-vietnam-war- correspondent-snapped-iconic-burning-monk-photo-dies-81-article1.1145989. The shocking image shows the elderly monk seated calmly in the lotus position while engulfed in flames. *Id.* Thich Quang Due set himself ***10** on fire in the center of a busy Saigon intersection to protest alleged repressive policies of the U.S.-backed Diem regime in South Vietnam. Annette Kuhn & Kirsten Emiko McAllister, Locating Memory: Photographic Acts 211 (2006). The image appeared in newspapers around the world. *Id.* at 210. The photo, which won Browne a Pulitzer Prize, had a strong impact on the American public, dramatically raising questions about the nations alliance with the South Vietnamese and "set[ting] the stage for a reconsideration of the United States' support for Diem." *Id.* at 211.

Four years later, during the Tet offensive of 1968, Associated Press reporter Eddie Adams captured another image that became an iconic representation of the war to American viewers. This photograph showed South Vietnamese Brigadier General Nguyen Ngoc Loan pointing a gun at the head of a terrified Viet Cong prisoner moments before executing him. *Execution*, Wash. Post, Feb. 2, 1968, at 1, *image available at* http://digitaljournalist.org/ issue0309/lm12.html. Like Browne's photo, this image appeared shortly afterward in newspapers around the world, including on the front pages of the *Washington Post* and the *New York Times. See id.; Guerrilla Dies,* N.Y. Times, Feb. 2, 1968, at A1. As with Thich Quang Duc's self-immolation, Adam's photo served to raise doubts among the American people about the government's alliance with the South Vietnamese. Kuhn, *supra*, at 212. One historian, Alan Brinkley, said that, "[n]o single event did more to undermine support in the United States for the war." *Id.*

On March 16, 1968, Army photographer Ron ***11** Haeberle captured a series of horrifying images in the village of My Lai, where U.S. troops massacred hundreds of Vietnamese men, women, and children. Jo Ellen Corrigan, *Plain Dealer Exclusive in 1969: My Lai massacre photos by Ronald Haeberle*, Plain Dealer Library (last updated June 6, 2010), http://www.cleveland.com/plain-dealer-library/ index.ssf/2009/11/plain_dealer_exclusive_my_lai_ma ssacre_ photos_by_ronald_haeberle.html. The photos included an image of a large pile of dead bodies, mostly women and children, lying in the middle of a dirt road. *Id.* Another photo showed the corpse of a small child lying next to a ditch that contained the body of an adult man. *Id.* These images were published in the November 20, 1968 edition of the Cleveland, Ohio newspaper *The Plain Dealer. Id.* The front page prominently displayed the image of the pile of dead villagers. *Id.* These images were subsequently picked up by news outlets around the world and greatly impacted the American discourse concerning the conflict,

fueling anti-war sentiment for some and inspiring denials and pro-military backlash from others. Claude Cookman, *The My Lai Massacre Concretized in a Victim's Face*, 94 J. Am. Hist. 1 (2007), 154-62, http:// www.journalofamericanhistory.org/projects/ am ericanfaces/cookman.html.

Yet another jarring photograph is AP photographer Nick Ut's image of a young Vietnamese girl running naked from a napalm explosion that seriously burned her arms and back. Fox Butterfield, *South Vietnamese Drop Napalm on Own Troops,* N.Y. Times, June 9, 1972, at A9 (image on A1); for photo, see Richard Hartley-Parkinson, *My Vietnam War: Forty Years On, Photographer Who Took Iconic* ***12** *"Napalm Girl" Image Shares His Other Incredible Images,* Daily Mail (U.K.), June 4, 2012, http://www.dailymail.co.uk/news/article-2154400/Napalm-Girl-photographer-Nick-Ut-releases-work-Vietnam-war.html (eighth photo in article). Like the other iconic images of the war, Ut's photograph made the front pages of newspapers around the world and later appeared in Life and Newsweek. Robert Hariman & John Louis Lucaites, No Caption Needed: Iconic Photographs, Public Culture, and Liberal Democracy 173 (2007). The photo came to be one of the most recognizable images of the Vietnam conflict and, like the images that came before it, influenced public perception of the horrors of the war. *Id.*

Back on the home front, on May 4, 1970, Ohio National Guard troops opened fire on a group of students at Kent State University who had gathered to protest U.S. troop incursions into Cambodia. John Kifner, *4 Kent State Students Killed By Troops,* N.Y. Times, May 5, 1970, at A1, *available at* http:// www.nytimes.com/learning/general/onthisday/ big/0504.html. After the shooting, which left four students dead, student photographer John Filo captured an image of a young woman kneeling over the body of a dead student and screaming in despair. *Id.* That afternoon, the image appeared on the front page of the *New York Times*. *Id.* Outrage followed the publication of the story and led to national student protests that temporarily closed over 450 college campuses and inspired a demonstration at the White House of 75,000 and 100,000 protestors. Tim Stenovec, *Kent State University Shootings Anniversary: Pictures from Historic Day,* The Huffington Post (last updated July 4, 2011), ***13** http:// www.huffingtonpost.com/2011/05/04/ kent-state-university-shootings_n_ 857544.html#s273976.

As unabashedly gruesome images displayed in public, virtually every single one of the aforementioned pictures would be subject to government ban under the Colorado court's reasoning. Newspapers are displayed prominently in newsstands, grocery stores, libraries, and book stores. These are all places that children frequent, and so in all of these places a parent could sue to enjoin continued display of these pictures.

Some of the abovementioned photos also had lives beyond display in newspapers. Ron Haeberle's most memorable photo, of a number of Vietnamese men, women, and children who had been gunned down in a ditch at My Lai, soon found new life as an anti-war propaganda poster. *See* Francis Frascina, Art, Politics, and Dissent: Aspects of the Art Left in Sixties America 111-12 (1999). The poster, which displayed the photograph along with text stating, "Q. And babies? A. And babies," was carried by anti-war protestors at protests. *See id.* at 184, *image available at* http://www3.amherst.edu/magazine/issues/ 05winter/images/ haeberle_brandt.jpg. Its use as a tool of protest spread around the world. *See* Spencer C. Tucker, The Encyclopedia of the Vietnam War: A Political, Social, and Military History 68 (2d ed. 2011). To this day, it is remembered as one of the most effective anti-war propaganda posters in the history of the Vietnam War. *See id.* Under the Colorado court's formulation of the First Amendment, its display, especially as a poster at protests, could be banned.

***14 D. Iraq**

Photography has retained its great power to stir public debate in America's most recent armed conflicts. In April 2004, the television show 60 Minutes II released to the public pictures of prisoners who had been severely mistreated at Abu Ghraib prison in Iraq. *See Chronology of Abu Ghraib,* Wash. Post, http:// www.washingtonpost.com/ wpsrv/world/iraq/abughraib/ timeline.html (last updated Feb. 16, 2006). Those pictures, and others released by *The New Yorker* in May 2004, *see* Slide Show, *Abu Ghraib Pictures,* New Yorker, http:// www.newyorker.com/archive/2004/05/03/slides how_040503?slide=1 (last visited Apr. 1, 2013), sparked a national debate on the treatment of prisoners in the war on terrorism. *See* Arwa Damon et al., *Questions of Torture, Abuse Rooted in Bushera Decisions,* http://www.cnn.com/2009/US/05/19/ detainee.abuse.overview/ (July 30, 2009). In the United States, the vast majority of Americans were appalled, and President Bush's approval rating, as well as approval

for the Iraq War in general, fell precipitously. *See* Wayne Drash, *Abu Ghraib Photos Were 'Big Shock,' Undermined U.S. Ideals*, CNN, http:// www.cnn.com/2009/WORLD/meast/05/18/ detainee.abuse.lookback/index.html (May 20, 2009). *The Economist* neatly summarized the international fallout from the photographs when its May 6, 2004 edition featured - on its cover - the now-iconic photograph of a hooded Abu Ghraib prisoner with electrical wires attached to both of his hands, below a headline reading simply, "Rumsfeld, Resign." *See Rumsfeld, Resign,* The Economist, May 6, 2004, *available at* http:// www.economist.com/ node/ 2647493.

***15** "The photos did what print could not do. They showed front and center what human rights groups had been saying for months: that the Bush administration [sic] was abusing prisoners within U.S. custody." *See* Damon, *supra.* Under the Colorado Court of Appeal's ruling, however, it is likely that the photos would never have been broadcast. The photos are incontrovertibly gruesome. To say that they would be disturbing to children is an understatement. The Government would therefore have a compelling interest in blocking their dissemination if children were reasonably likely to see them. *60 Minutes II*, which broadcasts in the early evening, could have been enjoined from showing them.

E. Afghanistan

On August 9, 2010, *TIME Magazine* ran an incontrovertibly brutal picture as its front cover. The picture, of a young woman with her nose cut off, bore the title, "What Happens if We Leave Afghanistan," pointedly without a question mark. *See* Magazine Cover, TIME Magazine, Aug. 9, 2010, *available at* http:// www.time.com/time/covers/0,16641,20100809,00.html. The cover sparked widespread and impassioned debate about the need for continuing the Afghan War and America's reasons for doing so. *See* Rod Norland, *Portrait of Pain Ignites Debate Over Afghan War,* N.Y. Times, Aug. 4, 2010 at A6, *available at* http:// www.nytimes.com/2010/08/05/ world/asia/05afghan.html. Some viewed the cover as a reminder that humanitarian reasons for war might justify the Afghan War's continued existence, while others spoke strongly against this view. *See* Michael Crowley, *What Happens if We Leave Afghanistan,* ***16** *Cont'd,* TIME Swampland (Apr. 4, 2011), http:// swampland.time.com/2011/04/04/ what-happens-if-we-leave-afghanistan-contd-2/. The picture was alternately lauded and decried, but was undoubtedly effective in stirring public engagement with a question of extreme importance. *See Framing the Afghan Debate with a Magazine Cover*, N.Y. Times At War Blog, (Aug. 4, 2010), http://atwar.blogs.nytimes.com/2010/08/04/framing-the-afghan-war-debate-with-a-magazine-cover/.

Yet as a patently gruesome image, which was undoubtedly disturbing to many adults, let alone children, under the Colorado Court of Appeals' formulation of the First Amendment, the *TIME Magazine* cover would come under the ambit of the courts. A court could enjoin stores from displaying the cover if they reasonably believed that children might see it. This would provide stores a strong incentive not to display such images, which in turn would provide newspapers and magazines an incentive not to print them, or at least not to display them on the front cover. But the power of the *TIME Magazine* cover in stirring debate was related at least in part to its visibility: more people saw it and were shocked by it, so more people talked about it. To allow *Saint John's Church in the Wilderness* to stand, then, would be to impoverish American political debate.

II. The Colorado Court Reads into the First Amendment a Broad Government Power to Censor Political Speech

In *Saint John's Church in the Wilderness*, the Colorado Court of Appeals declared the protection of ***17** children to be so compelling an interest that it could justify even a content-based ban on political speech in a traditional public forum. While acknowledging that it was banning the photographs because of their content, *see Saint John's Church in the Wilderness,* 2012 COA at ¶¶ 48-49, the court nevertheless held that the banning of the pictures was justified because it was narrowly tailored to effectuate a compelling government interest, *see id.* at ¶¶ 48-57.

To appreciate the breadth of the Colorado court's ruling, it is important to have a full picture of the context in which the petitioners' posters were displayed. The displaying of photographs qualifies as speech. *See* *Madsen v. Women's Health Center, Inc.,* 114 S. Ct. 2516, 2528 (1994) (injunction of "images observable" outside an abortion clinic violates the First Amendment).

Here, the petitioners displayed their posters on the street, the "archetype of a traditional public forum, for the purposes of First Amendment protection of speech" which "time out of mind … ha[s] been used for public assembly and debate." *Snyder v. Phelps,* 131 S. Ct. 1207, 1218 (2011) (internal quotation marks and bracketing omitted). The photographs were not obscene. *See* *Brown v. Entertainment Merchants Assoc.,* 131 S. Ct. 2729, 2735 (2011). Nor was the speech targeted at an individual inside his home. *Cf.* *Frisby v. Schultz,* 108 S. Ct. 2495, 2501 (1988) (municipal ordinance against picketing in front of houses upheld). Nor does anything in the record paint the petitioners as repeat offenders of a pre-existing injunction, such that a subsequent injunction would have to be broader to curtail already illegal acts. *Cf.* *Madsen*, 114 S. Ct. at 2523-2524 (protestors' persistent violation of previous injunction justified a widening of ***18** restrictions to encompass picketing in front of abortion clinic).

Rather, the petitioners' photographs were used for a political purpose, as the Colorado Court of Appeals acknowledged. *See Saint John's Church in the Wilderness*, 2012 COA at ¶ 46 ("[F]or many anti-abortion demonstrators, the gruesomeness of the images *is* the message, and necessary to express their viewpoint.") (emphasis in the original). The injunction, then, was "a *content-based* restriction on *political speech* in *a public forum,*" *Boos v. Barry,* 108 S. Ct. 1157, 1164 (1988) (emphasis in the original), the type of speech for which restrictions "must be subjected to the most exacting scrutiny," *id.* Yet because the speech was upsetting to children, *see* *Saint John's Church in the Wilderness*, 2012 COA at ¶¶ 50-51, and because the injunction was geographically limited in scope, *see id.* at ¶ 54, the Colorado court held that it passed even the strictest scrutiny.

Because the Colorado court finds the protection of children from upsetting speech to be compelling enough to justify banning political speech in a traditional public forum, *see id.* at ¶ 51, the court's reading of the First Amendment opens the door for the government to regulate a broad swath of speech, especially photographic speech. It is true that the injunction at issue in *Saint John's Church in the Wilderness* applies only to "large" photographs. *See id.* at ¶ 54. But there is no reason to think that a large photograph should have more of an emotional impact on a child than a small one. Indeed, the image, mentioned above, of terrified naked children running from a napalm explosion would likely have ***19** been disturbing to a child no matter the size of the photo. Perhaps more importantly, the application of the First Amendment has never been held to be dependent on the size of the photo. Nor could it be. To be logically coherent, then, the principle established by the court below would have to apply to photographs displayed elsewhere, for example, on the front pages of newspapers or magazines.

Strangely, the Colorado court attempts to bolster the constitutionality of the injunction by stating that it only applies in a buffer zone around the church. *See id.* The court states that the petitioners may display their posters elsewhere, even if those posters are seen by children who then become upset. *See id.* But this logic makes the court's opinion worse, not better. An image that is harmful to a child inside a buffer zone cannot become less harmful simply because it has been walked a few feet beyond it. *See* *Brown v. Entertainment Merchants Assoc.,* 131 S. Ct. 2729, 2740 (California statute underinclusive when it made illegal the sale of "dangerous, mind-altering" video games to minors without parental consent, but permitted sale of the same with parental consent). Though the Court has previously upheld the constitutionality of certain buffer zones, in cases where the zones have been found constitutional, the Court has pointed to the zones' content-neutral nature as their saving grace. *See, e.g.,* *Hill v. Colorado,* 120 S. Ct. 2480, 2494 (2000); *Schenck v. Pro-Choice Network of Western New York,* 117 S. Ct. 855, 863 (1997); *Madsen*, 114 S. Ct. at 2523. Here, the Colorado court acknowledges that it is targeting the petitioners' message based on its content. *Saint John's Church in the Wilderness*, 2012 COA at ¶ 44. ***20** This makes the current case unlike those cases in which buffer zones have been upheld.

Thus, to avoid underinclusiveness, the precedent set by the Colorado Court of Appeals would have to apply everywhere that children were exposed to a gruesome image that upset them. *Cf.* *Brown*, 131 S. Ct. at 2740. Presumably, then, though the court stresses that the petitioners have a right to display their images elsewhere, the petitioners only have this right because nobody has yet sued them there. Under the core of the Colorado court's logic - that gruesome images are harmful to children and

that the state has a compelling interest in protecting children from such speech - the petitioners' rights to display their posters would evaporate each time they are sued in a new place.

Because the ban in the case at bar works by judicial decree, it presents a unique danger to the First Amendment. *See* *Madsen,* 114 S. Ct. at 2524. For example, under the Colorado court's logic, a newspaper stand that was sued could be enjoined from selling newspapers with gruesome images (even if it were displaying those images for a political purpose), but the newspaper stand next to it, which has not yet been sued, could display those same images until the point that it, too, is dragged into court. The Colorado court's formulation of First Amendment jurisprudence allows courts to be the arbiters of taste under the guise of protecting children. This is too dangerous a precedent to let stand.

***21 III. Conclusion**

Our country has enjoyed vibrant political debate since its inception. Photographs, including - or perhaps especially - disturbing photographs, have been an essential part of that debate. From the Civil War to the Vietnam War and beyond, photographs of war have opened the public's eyes to war's horrors with a vibrancy that text descriptions cannot match. The Colorado Court of Appeals' ruling, if allowed to stand, risks giving courts the power to ban the most salient political images of our time from the public discourse, under the guise of protecting children from distress.

Though the Colorado court attempts to cabin its decision in the facts of the case, the precedent its holding sets cannot be so restricted. At its heart, the Colorado court's holding is this: If a message is deemed by a judge to be in poor taste, and children are reasonably likely to be part of the audience- as in any public forum - and the message is disturbing, then the state can ban the speaker from expressing the message to that general audience, and may instead force him or her to speak only to those who volunteer to listen. *See Saint John's Church in the Wilderness*, 2012 COA at ¶¶ 44-55. To let this precedent stand would be disastrous for the First Amendment.

"No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed." *Brown*, 131 S. Ct. at 2736 (internal citations omitted). This Court must not allow the Colorado precedent to stand.

***22** The Court therefore should grant *certiorari* in this case and strike down the lower court's opinion.

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CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. Rules 13(e), 16(a)(15), in the Supreme Judicial Court for the Commonwealth of Massachusetts, No. 13138, *Tamara Lanier v. President and Fellows of Harvard College & Others*, Brief for the Defendants-Appellees, on behalf of the defendants-appellees President and Fellows of Harvard College, I certify, under the penalties of perjury, that on September 20, 2021, I caused to be served a true and accurate copy of the foregoing, upon the attorneys listed below, by e-mail at their respective e-mail addresses set forth:

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CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R.A.P. Rule 16(k), I hereby certify that the Brief for Defendants-Appellees complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13); Rule 16(e); and Rule 21. Further, I hereby certify that compliance with the applicable length limit of Rule 20 was ascertained by using Times New Roman, size 14, proportionally spaced font, consisting of 10,704 non-excluded words, including headings, footnotes, and quotations. The word-processing program used was Microsoft Office 365, Microsoft Word, Version 2016.

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