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Nevada Right to Publicity Statute

I. ISSUES PRESENTED

The client has requested research regarding Nevada's right to publicity statute codified in Nevada Revised Code ("NRS") §597.770 – 810. The following are the key issues in this matter:

1. **Damages**:

    a. What factors do the courts consider when awarding damages and what is the amount of damages generally awarded in Right to Publicity cases?

    b. Are there mitigation factors such as explicit verbal consent and/or implicit consent that may decrease the amount of damages awarded?

    c. What is the burden of proof relating to damages?

    d. When are special damages awarded in a right to publicity case and what is the amount of special damages generally awarded?

    e. What types of evidence will a court review in assessing damages?

2. **Statute of Limitations**: What is the statute of limitations for filing a Right to Publicity claim in Nevada?

3. **Borrowing Statute:** Where does a claim arise in a Right to Publicity claim for purposes of Nevada's borrowing statute which bars claims from Nevada courts that *arose* in a different state and were time-barred from the courts in that state?

II. BRIEF ANSWER

There is surprisingly little case law interpreting the Nevada Right to Publicity Statute. The three Nevada cases that discuss the statute at some length indicate that at least a minimum of $750 in damages must be awarded to a plaintiff under the statute even if actual damages are not proven. Case law interpreting the right to publicity in other jurisdictions demonstrates, however, that damage awards to plaintiffs have ranged from as little as six cents to millions of dollars. Nevada's Right to Publicity Statute and case law are silent for the most part as to issues pertaining to factors considered when deciding damages, the type of evidence accepted, and the burden of proof for proving damages. Cases from other states shed some light on the procedures of other jurisdictions but it is unclear which method Nevada may adopt in the future.

The Right to Publicity statute is also silent as to a statute of limitations. If Nevada hears a case on this issue it will likely decide that a Right to Publicity suit will either fall into the libel and slander category of the Nevada Statute of Limitations, meaning it must be brought within two years, or under the "liability created by statute" category giving it a three year statute of limitations.

Lastly, Nevada has never interpreted a case in which it considers when a Right to Publicity claim arises for purposes of the state's borrowing statute. However, one 9th Circuit decision and some Nevada law dealing with contract claims and the borrowing statute indicate that Nevada favors a method in which a claim "arises" wherever the defendant resides. However, there is persuasive case law from other jurisdictions stating that a claim should arise wherever the tort took place. Again, it is unclear which method Nevada will adopt in the future for the Right to Publicity statute.

III. RELEVANT CASE LAW

1. Damages

A. What factors do the courts consider when awarding damages and what is the amount of damages generally awarded in Right to Publicity cases?

NRS §597.810 provides that a plaintiff bringing suit under the Right to Publicity statute may recover "(1) Actual damages, but not less than $750; and (2) Exemplary or punitive damages, if the trier of fact finds that the defendant knowingly made use of the name, voice, signature, photograph or likeness of another person without the consent required by NRS §597.790."

While there is no Nevada case in which a specific amount of compensatory damages or punitive damages is discussed, it is clear from the language of the statute that the legislators intended, at minimum, to award damages in the amount of $750 to the plaintiff. *Hetter v. Eigth Judicial District Court of the State of Nevada*, 874 P.2d 762, 765 (Sup. Ct. of Nevada 1994). Moreover, the Nevada Supreme Court emphasized in *PETA v. Berosini*, 111 Nev. 615 (1995), that "the right to publicity seeks to protect the *property*

interest that a celebrity has in his or her name; the injury is not to personal privacy, it is the economic loss a celebrity suffers when someone else interferes with the property interest that he or she has in his or her name." As such, compensatory damages should bear some relation to the economic damages caused to a person's property interest in his name.

At least one Nevada court has relied on *Berosini* to hold that compensatory damages in a Right to Publicity claim are purely economical. *Hetter*, 874 P.2d at 765. In *Hetter,* the plaintiff brought a Right to Publicity suit against her doctor claiming that he had shown her before-and-after pictures to other clients in an attempt to secure their business. In arguing for compensatory damages, the plaintiff claimed that she should receive a copy of the patient list and then be awarded $750 for each client that saw the pictures. *Id.* The Supreme Court rejected this logic stating that there was no evidence in the statute or in the legislative intent indicating this as the proper means for calculating damages. *Id.* The Court held that the plaintiff's "damages would be limited to the commercial value of the use of her likeness, or what she could have received for sale of her before-and-after pictures." *Id.*

Other state courts have engaged in more detailed discussion regarding the appropriate amount of damages in a Right to Publicity claims as well as the factors to look at.[1] Factors considered by other state courts include "the fame of the celebrity, the

[1] The states cited in the following cases do not necessarily have a Right to Publicity statute. The damages they awarded were either under their own Right to Publicity statutes or under a similar common law tort action. Still, since there is no Nevada case that is on-point, these cases provide some idea of the type of damages courts will award when someone's likeness is used for commercial purposes without their permission.

amount the plaintiff has received on earlier occasions for similar uses, and expert testimony concerning the licensing fees paid for comparable uses to similarly situated persons." 19 LYLAELJ 479 (Publicity Rights in the United States and Germany, 1999) (citing Cal. Civ. Code §3344(a); Okla.Stat.Ann.Tit. 12, §1449(A); Tenn. Code Ann. 47-25-1106(d); Tex. Prop. Code Ann. § 26.013(a)(2)).

The range of awards in these other courts has been as high as $5.5 million in compensatory damages (*Midler v. Young Republicans, Inc*., Nos. 90-55027, 90 – 55028, 1991 U.S. App. LEXIS 22641 (9th Cir. Sept. 20, 1991)) to as low as six cents for unauthorized use of an actress's name and picture in an ad. (*Harris v. H.S. Gossard Co.*, 194 App. Div. 688, 185 N.Y. Supp. 861 (1st Dept. 1921)).

In *Clark v. Celeb Pub., Inc*., 530 F.Supp.979 (S.D. N.Y. 1981), for example, a New York district court awarded both compensatory and pecuniary damages to an actress who brought suit against a low-caliber pornographic magazine for publishing her photos without permission. In calculating her compensatory damages, the Court first calculated the money she would have made had she agreed to pose for the magazine, and awarded her $67,500 for those losses. *Id.* at 983.[2] The Court then added $7,000 to her compensatory damages for the economic injury her reputation suffered when the images were published. *Id.* at 984.[3] Lastly, the court awarded plaintiff punitive damages in the

[2] The Court reached this number by looking to the money the plaintiff made when posing for Penthouse magazine earlier in her career. *Clark*, 530 F.Supp. at 983.
[3] The Court arrived at this number by looking at the model's projected modeling income for the year 1981 had she not appeared in a such a low-caliber magazine which caused her reputation to suffer. *Id.* at 984.

amount of $25,000 based on the fact that the magazine continued to publish issues of the magazine even after the plaintiff's lawyers requested them to stop. *Id.* at 984.

Similarly in *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102-03 (9th Cir. 1992), the Ninth Circuit awarded the plaintiff $75,000 for injury to the goodwill and future publicity value of a singer ("Waits") whose voice was imitated in a Frito-Lay commercial without his permission. The factors considered by the court included the fact that Waits had cultivated a reputation in which he never endorsed any products, as well as testimony from Wait's expert witness who stated that any commercial the singer did in the future would pay him $50,000 to $150,000 less because the Frito-lay commercial had aired. *Id.* at 1104. The Court also awarded punitive damages to Waits in the amount of $2 million dollars because Frito-Lay was aware of the legal risk it was taking by imitating Waits' voice in the commercial. *Id.* at 1104-1105.

Thus, even though there is no case law in Nevada about the range of damages awarded in a Right to Publicity case, it is clear that in Nevada, a plaintiff will receive at least $750.

B. Are there mitigation factors such as explicit verbal consent and/or implicit consent that may decrease the amount of damages awarded?

Nevada cases interpreting the Right to Publicity statute do not entertain any discussion of mitigating factors when assessing damages. As such, it is difficult to ascertain exactly what circumstances may lead to a decrease in the damages awarded. The plain language of the Right to Publicity statute seems to indicate clearly that written consent is the only consent-related defense to a Right to Publicity claim. NRS §597.790(2). Accordingly, there is no reason to believe that implied or verbal consent

from the plaintiff may work in favor of the defendant to help mitigate compensatory damages.

In terms of punitive damages, there is some authority from other states that appropriating the likeness of others without malice or knowledge may have a bearing on punitive damages in that it may help lower them. *See e.g. Clark,* 530 F.Supp. at 984; *Waits,* 978 F.2d at 1104. In these cases, the Right to Publicity action required that malice be proven in order for punitive damages to be awarded. However, since the Nevada statute does not require malice for punitive damages to be awarded, it is unclear whether lack of malice would help lower the amount of punitive damages awarded. NRS § 597.810.

C. What is the burden of proof relating to damages?

The Nevada statute does not mention any burden of proof that is required for proving damages. The only Nevada case that touches on the issue is *Hetter*. The Supreme Court of Nevada stated in that case that the legislature clearly intended to "allow plaintiffs a minimum of $750 in damages ***even if no actual damages could be proven*** in order to discourage such appropriation." *Hetter,* 874 P.2d at 765 (emphasis added).

The only other burden of proof issue that is discussed in some state courts dealing with the Right to Publicity is the clear and convincing standard for punitive damages. In *Waits,* supra, for example, the Ninth Circuit held that the plaintiff would only be awarded punitive damages if he could show clear and convincing evidence that defendant has been guilty of oppression, fraud or malice. *Waits*, 978 F.2d at 1104.

D. When are special damages awarded in a Right to Publicity case, and how much is generally awarded?

There is nothing in the Nevada statute or the case law interpreting it that indicates that special damages are an option. The Nevada statute is unambiguous in stating that a plaintiff can recover compensatory and punitive damages under the statute. NRS §597.810. As such, there is no reason to believe that Nevada would award special damages in addition to compensatory and punitive damages.

E. What type of evidence will a court review in assessing damages?

The Right to Publicity statute is silent as to the type of evidence that can be used to establish damages. Case law does not provide much more clarification. The only Nevada case to touch upon this issue is *Hetter*, 874 P.2d at 765-766, in which the Nevada Supreme Court held that the patient's discovery requests for the defendant's tax information and patient lists were not appropriate for calculating damages. The Court held that there was no indication in the statute that the patient was entitled to $750 for each patient that saw her before-and-after pictures. *Id.* at 766. As such, she could not request the list to establish damages. *Id.* Moreover, the court also did not allow her to gain access to the doctor's tax information because the financial condition of the practice was irrelevant to her compensatory damages. *Id.*

On the other hand, the *Hetter* court did point out that the financial condition of the defendant can be used as evidence when determining *pecuniary* damages as long as the plaintiff has a factual basis for collecting pecuniary damages. *Id.*

Courts in other states have allowed evidence ranging from the personal testimony of the plaintiff to the testimony of a professional who could calculate how much money

plaintiff would have made had she consented to posing for a magazine that published her pictures without her permission. *Clark,* 530 F.Supp. at 983; *See also, Waits,* 978 F.2d at 1103. Expert witness is common in cases involving damages under a Right to Publicity claim.

2. Statute of Limitations

The Right to Publicity statute does not contain a statute of limitations provision. As such, we turn to the Nevada's Statute of Limitations for guidance. Nevada's Statute of Limitations require that actions for "libel, slander, assault, battery, false imprisonment or seduction must be brought within two years. NRC 11.190 §4(c). Nevada courts have held that "invasion of privacy" claims must also be brought within two years. *Turner v. County of Washoe*, 759 F.Supp. 630, 637 (Dist. Of Nevada 1991). Accordingly, it is possible that a Nevada court would categorize the Right to Publicity similarly and require that it be filed within two years of its occurrence.

On the other hand, Nevada's Statute of Limitation also states that actions on a "liability created by statute" can be brought within three years. §NRC 11.190 §3(a). A liability created by statute is one "that would not exist but for the statute." *Gonzalez v. Pacific Fruit Express Co.* 99 F.Supp. 1012, 1015 (D. Nev. 1951).

It is possible that the Right to Publicity may fall under this provision since it creates liability from statute. Moreover, the Nevada Supreme Court has been explicit about the fact that an invasion of privacy tort claim is completely different from the statutory Right to Publicity. In *Berosini,* the court did not allow invasion of privacy and the Right to Publicity to be used interchangeably:

> We now draw our attention to the other privacy tort pursued by Berosini in this case, namely, the tort of invasion of privacy based upon appropriation of name or likeness. There is considerable confusion in the cases and in the literature regarding this tort, primarily because the difference between the appropriation tort and the right of publicity tort is often obscured. The common law appropriation tort ordinarily involves the unwanted and unpermitted use of the name or likeness of an *ordinary, uncelebrated* person for advertising or other such commercial purposes, although it is possible that the appropriation tort might arise from the misuse of another's name for purposes not involving strictly monetary gain. The right of publicity tort, on the other hand, involves the appropriation of a *celebrity's* name or identity for commercial purposes. The distinction between these two torts is the interest each seeks to protect. The appropriation tort seeks to protect an individual's personal interest in privacy; the personal injury is measured in terms of the mental anguish that results from the appropriation of an ordinary individual's identity. The right to publicity seeks to protect the *property* interest that a celebrity has in his or her name; the injury is not to personal privacy, it is the economic loss a celebrity suffers when someone else interferes with the property interest that he or she has in his or her name. We consider it critical in deciding this case that recognition be given to the difference between the *personal*, injured-feelings quality involved in the appropriation privacy tort and the *property*, commercial value quality involved in the right of publicity tort.
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> *Berosini*, 111 Nev. at 636.

This discussion indicates that without the Right to Publicity statute there would be no cause of action for loss of one's *property* interest in his or her name. As such, it appears that the Right to Publicity claim may be more accurately categorized as a "liability created by statute" than an invasion of privacy claim for purposes of the Nevada Statute of Limitations, thus providing a three year statute of limitation.

3. Borrowing Statute

Nevada's Borrowing Statute states that any cause of action *arising* in a different state is barred from Nevada courts if it would have been time-barred in the other state. NRS §11.020. Thus, if a Right to Publicity claim arose in a different state, it cannot be

heard in a Nevada court if the state in which it arose would bar it from adjudication based on the statute of limitations. There are no Nevada cases nor any other state or federal cases that deal with the issue of where a Right of Publicity or Internet advertising claim arises for purposes of a borrowing statute.

In general, even though most states have some type of borrowing state, there is neither uniformity in how they are applied nor any uniformity in figuring out where a claim arises for purposes of a borrowing statute. *Alberding v. Brunzell*, 601 F.2d 474, 477 (9th Cir. 1979). Thus an analysis of the case law provides support for each type of approach to figuring out where a Right to Publicity claim may arise.

For instance, the Ninth Circuit has stated that that the best test for deciding where a claim arises for purposes of a borrowing statute is to see where the defendant lives. *Alberding*, 601 F.2d at 478. Even though, the Ninth Circuit reached this conclusion when deciding a Nevada contract claim case, it did not seem to restrict the types of cases to which this test should apply, and thus it is possible that a Right to Publicity claim in Nevada would arise wherever the defendant lives.

Moreover, Nevada state cases dealing with where a *contract* claim arises for purposes of the borrowing statute also promote the defendant's-residence test for deciding where a cause of action arises. In *Lewis v. Hyams*, 63 P. 126, 127 (Sup. Ct. of Nev. 1900), for example, the Supreme Court of Nevada found that a cause of action arises "in any state against the defendant where he may be found." The Court interpreted this to mean that because the defendant had always resided in New York, a claim for payment on a contract against him could not arise in California, even though his business

partner and co-signor on the contract resided in California. *Id. See also, Wing v. Wiltsee,* 223 P. 334, 336 (Sup. Ct. of Nev.1924).

On the other hand, various cases from other states dealing with whether a claim *arises* for torts in general indicate that a tort claim will typically arise wherever the injury took place, not where the defendant resides. *See e.g., Dalkilic v. Titan Corp.*, 516 F.Supp.2d 1177, 1184 (S.D. Cal. 2007) ("To determine where the cause of action accrued, a court must look to the 'time when, and the place where, the act is unlawfully committed or omitted.")

Persuasive to the present matter are other states' cases in which libel[4] was the tort in question. In those cases, the courts found that the libel claim "arose" wherever the libelous statement was published. *Pledger v. Burnup & Sims, Inc.*, 432 So.2d 1323 (Fla. App. 1983); *Finnegan v. Squire Publishers, Inc.*, 765 S.W.2d 703 (Mo. App. 1989). In *Pledger*, 432 So.2d at 1332, the Florida Court of Appeals applied the Florida borrowing statute in declining to hear a libel case. The Court held that since the libelous statement was first published in New York, the claim "arose" in New York. *Id.* As such, under the borrowing statute, Florida could not hear the case because the New York statute of limitations on the case was up. *Id.*

Similarly, *Finnegan*, 765 S.W.2d at 704, raised an interesting issue in which a lawyer sued a Kansas newspaper in Missouri court for making libelous statements about

[4] As there are no cases dealing with borrowing statutes and a Right to Publicity or invasion of privacy in any state, cases dealing with libel may be the closest analogy that can be drawn to determine how courts deal with privacy torts and borrowing statutes in general.

him. The Kansas statute of limitation had already run when the suit was brought but the Missouri one had not. *Id.* As such, under the Missouri borrowing statute,[5] Missouri would not be able to hear the libel case if it was found to have arisen in Kansas. *Id.* Even though the attorney argued that the libel arose in Missouri because that is where he was licensed to practice and that is where the damage to his professional reputation was done, the Court held that a libel case arises where it originates. *Id.* at 705-706. In other words, because the newspaper was published in Kansas and first circulated to the public in Kansas, the tort originated in that state. *Id.* at 704. As such, the Missouri court refused to hear the case as it was time-barred in Kansas. *Id.* at 706.

The Restatement Second of Conflicts of Law §145 (1971) puts forth yet a third approach to figuring out where a cause of action arises. Under this approach a substantial relationship test is used which states:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties and
>
> (d) the place where the relationship, if any, between the parties is centered.

[5] Missouri's borrowing statute, RSMo §516.190, is almost identical to that of Nevada's and states: "Whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state."

In sum, the above law indicates that there is no set approach to figuring out how a Nevada court would decide where a Right to Publicity action arises but there are three options that could serve as potential methods adopted by the state.

IV. CONCLUSION

There is surprisingly little case law interpreting the Nevada Right to Publicity Statute. The three Nevada cases that discuss the statute at some length indicate that at least a minimum of $750 in damages must be awarded to a plaintiff under the statute even if actual damages are not proven. Case law interpreting the right to publicity in other jurisdictions demonstrates, however, that damage awards to plaintiffs have ranged from as little as six cents to millions of dollars. Nevada's Right to Publicity Statute and case law are silent for the most part as to issues pertaining to factors considered when deciding damages, the type of evidence accepted, and the burden of proof for proving damages. Cases from other states shed some light on the procedures of other jurisdictions but it is unclear which method Nevada may adopt in the future.

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Circuit decision and some Nevada law dealing with contract claims and the borrowing statute indicate that Nevada favors a method in which a claim "arises" wherever the defendant resides. However, there is persuasive case law from other jurisdictions stating that a claim should arise wherever the tort took place. Again, it is unclear which method Nevada will adopt in the future for the Right to Publicity statute.