

San Luis Obispo College of Law
Torts
Final Examination
Spring 2021
Prof. J. Parker

**This exam includes one fact pattern split into four (4) sections, with five (5) interrogatories. Answer All Five interrogatories.
Total Time Allotted: Four (4) Hours**

Section 1

Dave owned a fully grown Hippopotamus that he had raised from a calf named Herbert. He converted the large pool in his backyard into a hippo habitat, and he fenced the entire habitat with DuraCo fencing. The advertisement for DuraCo is "So strong, a herd of wild animals can't break it." Dan also spent a significant amount of time socializing Herbert, and he spent a lot of money on animal trainers to make sure Herbert was well behaved. He also posted signs around his house warning people that there was a hippopotamus in his backyard.

Patty regularly visited Dave. She has often interacted with Herbert, and Herbert is very friendly and affectionate around Patty. One day, Patty was wearing a new perfume when she visited Dave and Herbert. Herbert was still locked in his habitat, but he went berserk when he smelled Patty's new perfume. Herbert charged Patty. He broke through the DuraCo fencing and trampled Patty. When Dave tried to intervene, Herbert grabbed Dave in his jaws and tossed him across the backyard. Herbert then retreated back to his hippo habitat. Dave and Patty both escaped the backyard and called an ambulance. Patty had numerous broken bones and had to have one of her legs amputated. Dave has had three back surgeries and still suffers chronic debilitating pain.

- 1. Analyze Patty's strict liability claim against Dave, and Dave's assumption of risk defense. Do not discuss damages. (10 points)**

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Sections 2

Dave brought a suit against DuraCo. Dave hired an expert to examine the DuraCo fence. The fencing industry rates strength on the Parker scale: 1 Parker is generally strong enough for normal residential use; 2 Parker is stronger, and thus more suitable for commercial applications; and 3 Parker is strong enough for most heavy-duty industrial uses. The American Zoo Association requires that fencing for medium to large animals be no less than 3 Parker. Dave's expert tested the strength of the DuraCo fence and discovered that it is rated 1 Parker. Furthermore, he determined that several connector pieces were made of thinner metal than the industry standard. Dave's expert testified that he believes these flimsy connectors were major contributors to the fence's failure.

DuraCo's expert testified that each increase in the Parker scale doubles the cost of manufacturing the fence. Furthermore, DuraCo doesn't advertise its 3 Parker fencing to the general public, as it is not an economically viable product for the general consumer. DuraCo testified that its fencing connectors, while thinner than the industry standard, are still suitable for residential use.

2. Analyze the following aspects of Dave's defective design claim, assume all other elements of product liability are met. (20 points)

- a. **Do the thin clamps represent a defective product design?**
- b. **How does the fence's use as a hippo habitat affect liability?**

3. Analyze Dave's claim that DuraCo intentionally misrepresented its product as being fit for housing wild animals. (20 points)

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Sections 3

Dave has a Y'allTube channel where he posts videos about Herbert. He made enough money off of his YouTube advertising to pay all of Herbert's food and vet bills. Dave even appeared on an episode of Hippo King, a documentary about the treatment of hippos in private Zoos. In the episode, Dave was interviewed and he expressed his disapproval of the way hippos are treated by Extraordinary Jim, the subject of the Hippo King documentary. Dave's Y'allTube viewers were very supportive of how Dave was portrayed as an expert in hippo care.

After her accident, Patty was interviewed by the local media. She told the reporter "I'm not surprised that Herbert attacked. Dave keeps poor Herbert locked in cage. My friend Tanya is Dave's neighbor, and she told me that he uses a shock collar to make Herbert do what Dave wants. I think shock collars are inhumane." Channel 1 news aired Patty's comment and posted the video to their webpage. A fan of Hippo King reposted the news video in the comments on Dave's Y'allTube account. Patty was one of the first commenters after the video is reposted. She wrote "Dave, I hope this teaches you that a one-day online course in hippo care isn't enough to host a Y'allTube channel about hippos." In response, Dave posted a picture of himself and Patty, with his degree from veterinary school on the wall behind them. Despite his explanations to his viewers, Dave's viewership decreased significantly, and his Y'allTube earnings no longer cover Herbert's food bill.

4. Analyze each of Patty's statements for defamation. (25 points)

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Section 4

In an effort to rehabilitate his image on Y'allTube, Dave created an advertisement that runs on many of the pro-hippo channels. It portrays a picture of Dave and Herbert in the foreground, with a picture of Extraordinary Dave in a cage in the background. Extraordinary Dave is currently in prison for violating federal hippo treatment laws. The picture was drawn by a professional artist to look like a comic book cover. In the picture, Herbert is wearing a superhero cape, is standing on his hind legs, and is high-fiving Dave, who is also wearing a superhero cape. The caption says "This fence is strong enough for justice." Extraordinary Dave brings a lawsuit against Dave in the hope of getting enough money to fund his appeal.

5. Analyze Extraordinary Dave's claim for misappropriation of likeness. (25 points)

NO ANSWERS OR OUTLINES PROVIDED

10/10
Good!

1)

Strict Liability: No Culpability Required

Under strict liability, an actor is liable regardless whether the actor was negligent or otherwise culpable. Strict liability is imposed only in limited situations; it generally applies to abnormally dangerous activities, injuries cause by animals, and products liability.

Harm

Under strict liability, there must be a harm for which the defendant is being held liable for. Patty has numerous broken bones and had to have one of her legs amputated. This is acquit harm under strict liability.

Animals

Strict liability can arise if an actor's animal harms a victim. The application of strict liability varies, depending on the type of animal involved. The law divides animals into three categories: livestock, domesticated animals, and wild animals.

Livestock

Livestock includes horses, cows sheet, pigs and other kinds of farm animals. This category excludes animals like dogs and cats typically kept as pets. A Hippopotamus is not livestock under this definition even if he was raised from a calf by someone who knows what they are doing. Therefore, Herbert the Hippopotamus is not going to be measured under a livestock standard.

Domesticated Animals

Domesticated animals include those species that are customarily kept as pets, including dogs, cats, and some birds. Again a Hippopotamus is not a domesticated animal under this definition even if he was raised from a calf. Therefore, Herbert the Hippopotamus is not going to be measured under a domesticated animal standard.

Wild Animals

Wild animals include species that have not been generally domesticated and thus are likely to cause personal injury if not controlled. This definition looks to the general characteristics of the animal's species, not the characteristics of the particular animal involved in the claim. Thus, an animal may be considered wild if it belongs to a wild species, even though the individual animal is tame. So a Hippopotamus is considered wild because it belongs to a wild species. Although Dave spent a significant amount of time socializing Herbert and spent a lot of money on animal trainers to make sure that he was raised to be really sweet, at the end of the day Herbert is a Hippopotamus and thus a wild animal.

Strict Liability for Harm Caused by Wild Characteristic of Species

The keeper of a wild animal is strictly liable for any harm resulting from the wild characteristic of the animal's species. Wild characteristic means that if you had a fox and you tripped over the fox that isn't harm caused by the wild characteristic of that animal. You could trip over a dog of the same size so that isn't a wild characteristic. In this case, the fact that Herbert went berserk from smelling a perfume then trampled Patty is a characteristic of him being a wild animal. No domestic animal is as heavy as a Hippopotamus which makes being trampled by a Hippopotamus inherently dangerous. Therefore, unless there is a viable defense, Dave will be held strictly liable for the harm caused to Patty.

Defense of Victim's Voluntary Participation

Some courts reject strict liability altogether if the victim's injuries occurred because the victim voluntarily interacted with the animal or abnormally dangerous activity to gain some personal benefit, even a recreational one. Dave posted signs around his house warning people that there was a hippopotamus in the back yard. Furthermore, Patty, as a regular visitor of Dave's and someone who regularly interacted with Herbert, knew for a fact that there really was a Hippopotamus in the back yard. She was there for a recreational purpose but she wasn't interacting with Herbert at the time. Herbert was still locked in his habitat when he went berserk. She had a reasonable expectation of safety on the outside of the habitat with Herbert locked on the inside. I do not think that this defense will help Dan.

END OF EXAM

#2 19
#3 18

2)

Dave v. DuraCo.

Are thin clamps defective product designs?

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, a design defect, or is defective because of inadequate instructions or warnings. Generally, a product is defective if the danger of the product is greater than the utility of the product, or if the product falls below the ordinary consumer's expectations of that type of product. Additionally, a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe. In addition, a product may be defective because of inadequate instructions or warning when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warning by the seller, the omission of which renders the product not reasonably safe.

Defective Product Test

A product is defective if the danger of the product is greater than the utility of the product. Factors to consider in determining the relative danger to utility is the gravity of the danger, likelihood of that danger occurring, mechanical feasibility of an alternative design, financial cost of improved product, and any adverse consequences to society/consumer relating to the introduction of the alternative design.

In this case, the danger of the weak connectors can be shown by considering the likelihood of harm occurring, multiplied by the cost of this harm occurring. Considering that many persons keep animals, not only hippopotamus, behind fences, including large dogs, the likelihood of a failed connector causing harm is extremely high, and given that many, many persons keep such animals, and the frequency of animals running against fences is high, this will be considered a high cost, given the damages that commonly result from escaping animals. Indeed, even the common dog bite will likely result in many thousands of dollars in damages to the victim. Additionally, the costs associated with even just a few fence failures in private zoos will result in many, many, thousands of dollars in damages, this is a very expensive proposition alone. Additionally, the fencing connectors fall below industry standard, made of thin metal. DuraCo indicates that these materials are "still suitable for residential use," however given that a rating of 1 Parker is the standard for residential fencing, determining the feasibility for residential uses necessitates an evaluation of the product in relation to the dangers that it may impose by being thinner. Indeed, the mechanical feasibility of a stronger connector is clear because DuraCo could have simply used a thicker metal in its production, which would have cost very little in terms of design because a dimensional change in product design is a minimal change in the totality of manufacturing circumstances. Additionally, the financial cost of utilizing a thicker metal, one that would raise the level of safety to outbalance the cost-risk of using a thinner metal, should be slight when compared to the risks discussed above. The facts provide that Parker 3 level fencing is not advertised given it is "not an economically viable product for the general consumer," but that poorly related to the cost/benefit analysis at hand, because the cost in the instant problem relates to the manufacturing of connectors, rather than the entire fence. Indeed, while the cost of increasing fencing thickness may "double manufacturing cost" the increase of manufacturing a stronger connector will represent a smaller increase compared to the overall cost of the fence, because the part of the fence that falls below standard is a small fraction of the overall product. Additionally, the cost to society of introducing an

alternative design, one that is safer because of the thicker connectors, is not a cost but rather a benefit because the introduction of this safer product will benefit society by reducing injury generally.

As a result of the above discuss factors, the cost of *not* utilizing a thicker (Parker 1) connector is great to society, given that there are many foreseeable and common failures that will result from the fencing as a result of this design decision. Regardless of the hippo habitat, the product will be deemed defective because of the nature of the thinner connector.

Consumer Expectation Test

An additional method of determining if a product is defective is to apply the consumer expectation test, which requires that when the safety of the product is below the expectations of ordinary consumers, when the product is used as intended or as reasonably foreseeable manner.

In this case, the utilization of the fencing to create a hippo habitat may or may not be reasonably foreseeable (discussed thoroughly below). In this case however, to show that the product has fallen below the consumer expectation, we can show that by designing the product to use clamps that are below industry standard, the product has fallen below the ordinary consumer's expectation. Indeed, the use of industry standards does not show determinately that the product has fallen below the expectations of consumers, but the way that the standard is structured ("strong enough for normal residential use") indicates that the product has fallen below the expectations of consumers, because the ordinary consumer will expect that the product be able to withstand use in normal residential applications. The connectors will be expected by ordinary consumers to be suitable for normal residential use, because that purpose is why ordinary consumers will purchase the fencing. Consumers will expect that the fence will meet normal residential

use, and as a result of the weak connector, the product will not live up to this expectation. After all, a chain is as strong as its weakest link.

As a result of failing to meet consumer expectations regarding fence strength for residential uses, the connectors (and therefore the entire fence) will be considered defective.

Feasible Alternative Approach

A feasible alternative approach, when shown, will indicate that a product is defective. To show that a product is defective because there is a feasible alternative approach, consider the usefulness and desirability of the product, availability of safer alternative products, the dangers identified at time of trial, the likelihood and probable seriousness of injury, and the obviousness of danger.

In this case, there is a feasible alternative product available, which is simply fencing composed with thicker connectors. Indeed, this alternative design is highly desirable because many consumers will benefit from being able to purchase a fence that is suitable for normal residential use. There are many alternative designs of the product on the market, that is to say, there are many fences available to purchase that utilize safer/thicker connectors in their design. Additionally, the dangers of utilizing such weak connectors in fence design would be well-known at the time of trial, given that this is a basic function of physics, and the result of the use of weak connectors well-known to humans generally. Additionally, the likelihood of the fence failing as a result of the use of connectors that are not suitable for normal residential use would be high (see above for examples). Finally, the obviousness of this danger is low. Many consumers will expect that their residential grade fence be constructed with parts that are suitable for this purpose, and would require a consumer with a-typical experience in the field of fencing to make such a determination. As a result of this hidden condition, many consumers will be unwittingly

exposed to harm, and unable to either assume the risk or guard against its occurrence. As a result of all of these factors taken together, the fence by DuraCo. will be considered defective as a result.

Defective Product - Conclusion

In this case, the clips will be considered defective because they can simply and cost-effectively be replaced by a product that reduces the harm that is likely to occur given ordinary consumer expectations.

How does Hippo Habitat affect liability?

For a product to be considered defective, there must be a causal connection between the defect and the way that this defect caused the harm. The interaction between the consumer and the product is dispositive in this regard, requiring that the consumer used the product, in a foreseeable manner, even if that foreseeable manner is not the intended purpose of the product in question.

In this case, the fence was not utilized in a foreseeable manner, given that the keeping of hippopotamus is rare and uncommon, and would not be considered as a risk that needed to be guarded against by the product manufacturer. Keeping a hippo at home in a habitat is not an activity that is foreseeable because it is not an activity that even rarely occurs, and is an activity that would be expected by almost anyone (most importantly the reasonable person) something else to be done. Certainly it is foreseeable that some fencing would be used to keep some hippos elsewhere, but it is not foreseeable that a consumer would utilize consumer grade fencing to achieve this goal. A foreseeable use of this product would be to fence dogs and children into a yard, or to keep adults out, rather than this many hundred pound animal in. Additionally, the reliance upon the fence for animal captivity, such as hippos, given the slogan of the product is likewise unforeseeable

because the vast majority of persons will not simply rely on this slogan to contain their wild animals.

As a result of this unforeseeable utilization of the product, this results in the proximate cause element of products liability not being met. Even though the product would be considered defective, the resulting harm did not stem from the manufacturer's design, the product did not fail in a foreseeable way, and as a result an action by Dave against the fence manufacturer will fail.

Intentional Misrepresentation

An intentional misrepresentation is a false representation of material fact, characterized by scienter, intended to induce an act in justifiable reliance, which causes damages.

Additionally, fraud is an material misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to act or refrain from acting, is subject to liability for economic loss cause by the other's justifiable reliance on the misrepresentation. Scienter describes the mental state of the statement maker, meaning that the maker (1) knows or believes that the matter is not as he represents it to be, (2) knows that he does not have the confidence in the accuracy of his representation that he states or implies, or (3) knows that he does not have the basis for the representation that he states or implies.

Additionally, the plaintiff must show that they actually relied upon the statement, that reliance was justifiable, and that he suffered a pecuniary loss as a result of that reliance.

In this case, the tort of intentional misrepresentation is indicated because of the product's slogan, "So strong, a herd of wild animals can't break it." This is an intentional misrepresentation because the manufacturer would know that the product does not have this characteristic. We know that this is the case because the product was designed with connectors that fall below even residential use, which was being used by the manufacturer as a cost saving device. The manufacturer knew that the product failed to uphold even

the ordinary consumer use because they used a product which was lower than a Parker 1 on the safety scale, and as a result, they know that the product could never "withstand a herd of wild animals." Even below this high standard, the manufacturer must not have confidence that the product could reasonably hold confidence in the accuracy because no reasonably manufacturer (or layperson) would believe that a product, produced in a way consistent with the design of the product, would be able to withstand the force of a herd of wild animals. Additionally, the third and lowest element of scienter is met because this type of claim of a slogan would require extensive testing, which the manufacturer did not conduct. Only one of the above mentioned elements of scienter would need to be met to be considered in that light.

In addition to a statement made with scienter, the statement was made in order to induce another to act. In this case, the statement is used as a product slogan. Product slogans are designed to increase the attractiveness of a product to consumers, a benefit to the company, and an act done per se to create an act of reliance upon the thing that the company is claiming.

Dave will be able to show that he suffered a pecuniary loss because the harm that the failing of the fence, and his reliance (regardless of whether this was reliable - discussed below), resulted in the design of the habitat to not be able to contain the hippo.

Dave/Patty suffered a pecuniary loss because of the medical costs associated with the harm done to them as a result of this reliance.

Those factors considered, the consumer however will not be able to pursue a claim on these grounds because the consumer did not rely upon the statements in a justifiable manner. Indeed, the use of puffery is a defense to the tort of intentional misrepresentation because consumers should be aware that sales persons use language that is intentionally exaggerated, and therefore are unjustifiable in their reliance upon such

statements or slogans because this is a commonly expected behavior of sales persons and product manufacturers.

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3)

Patty's comment to the reporter

A claim of defamation must show that the statement was defamatory in nature, about the plaintiff, it was published, it was false, and there was the required level of fault.

Defamatory in nature

A statement is defamatory if it lowers a plaintiff in respect from the community or discourages people from associating with them. Libel is defamation in a permanent form and slander is a nonpermanent form of defamation. General damages for libel are assumed and slander requires a showing of special damages. Statements of fact are actionable as defamatory, but opinions that imply that the speaker knows certain facts to be true can also be considered defamatory.

Patty's statement to the media would be considered libel since it was aired on the news and posted on the webpage. This is a permanent publication of her statements. Saying that Dave treats Herbert poorly when he is known for being an expert in hippo care will clearly lower him in the eyes of the hippo enthusiast community. Patty will argue that she was simply stating her opinions, "I'm not surprised Herbert attacked" and "I think shock collars are inhumane", seem to be just assertions of Patty's opinions, but when taken in context with her entire statement, she is clearly implying that Dave treats Herbert inhumanely and that is the reason she was attacked. These statements did have a negative impact on Dave's Y'allTube channel, causing his income to decrease significantly, meaning he suffered the general damages of being lowered in the eyes of the community and he suffered economic damages as well.

Patty's first statement to the media is libel and has a defamatory message.

About plaintiff

In order to bring a claim for defamation, the defamatory message must have been about the plaintiff, and it must be proved that a reasonable third person understood that it was referring to the plaintiff.

In Patty's first statement made to the media, she mentioned Dave by name and discussed his hippo ownership practices. It would be clear to anyone watching the news segment that she was referring to Dave, the owner of the hippo who caused her injuries that she was being interviewed about.

Publication

A defamatory statement must be published in some way. All that is needed is that the statement must be communicated to at least one other person. Libel must be preserved in some relatively permanent way.

In this case, Patty relayed her message to the reporter and the segment was aired on the news and then posted on the website. This was a permanent publication.

Falsity

Modernly, the plaintiff must prove falsity of the statement.

It is likely that these statements are false, since it was stated earlier that Patty often interacted with Herbert and he was friendly and affectionate toward her, so she would know how he was being treated by Dave. If Patty was really so against Dave's treatment of Herbert, she likely would not have been at his house often and would not have been having positive interactions with Herbert, so it likely that they are false. If Patty can

somehow prove that her statement that Tanya told her that Dave uses a shock collar on Herbert is true, she will have a strong defense to Dave's defamation claim.

It is likely that Patty's statement is false, but if proven true she will have a defense to this claim.

Level of fault

If the plaintiff is a public figure and the defamatory message relates to the reason they are famous, they must prove that the defendant had actual malice when making the statement. Malice is knowing the falsity of the statement or being reckless in regards to the truth or falsity of the statement.

Since Dave has a popular Y'allTube channel and he appeared on Hippo King, he is regarded as a hippo care expert and could be considered a public figure in the hippo enthusiast world. Patty's statements were regarding his hippo care, and as someone who came over often she should know how Dave treats Herbert. If the statement is proven to be false, she would have clearly known that it was false but made the statement anyway, possibly due to being angry that she was injured by Herbert. This knowing falsity shows that the statements were made maliciously.

As long as Patty's statement made to the reporter is determined to be false, Dave will have a strong claim for defamation based on her statements aired and posted on the news website.

Patty's comment on Dave's Y'allTube channel

A claim of defamation must show that the statement was defamatory in nature, about the plaintiff, it was published, it was false, and there was the required level of fault.

Defamatory in nature

A statement is defamatory if it lowers a plaintiff in respect from the community or discourages people from associating with them. Libel is defamation in a permanent form and slander is a nonpermanent form of defamation. General damages for libel are assumed and slander requires a showing of special damages. Statements of fact are actionable as defamatory, but opinions that imply that the speaker knows certain facts to be true can also be considered defamatory.

Patty's comment on Dave's Y'allTube video is again not a clear statement of fact, but it easily implies that Dave's only education is a one day online course in hippo care and that he is not qualified to be considered an expert about hippos. Patty may argue that this statement was just her opinion, but it was published on Dave's own post for all of his followers to see, and it clearly had a negative impact on his viewership due to the implication that Dave was not really a hippo expert.

Due to the permanent publication and defamatory message this was libel.

About plaintiff

In order to bring a claim for defamation, the defamatory message must have been about the plaintiff, and it must be proved that a reasonable third person understood that it was referring to the plaintiff.

This comment was addressed to dave, on his own video, so anyone who saw it immediately knew that it was about Dave and aimed at him.

Publication

A defamatory statement must be published in some way. All that is needed is that the statement must be communicated to at least one other person. Libel must be preserved in some relatively permanent way.

This comment was posted on Dave's video for anyone to see. It is clear that other people did see it since his viewership decreased as a result, so there was a publication as needed for a defamation action.

Falsity

Modernly, the plaintiff must prove falsity of the statement.

Patty's implication that Dave only took a one day hippo care course was proven false by Dave showing that he had a veterinary degree, so there is no issue about the truth or falsity of Patty's statement.

Level of fault

If the plaintiff is a public figure and the defamatory message relates to the reason they are famous, they must prove that the defendant had actual malice when making the statement. Malice is knowing the falsity of the statement or being reckless in regards to the truth or falsity of the statement.

Since Patty was in the photo with Dave in front of his veterinary degree, she must have seen the diploma in person. She also went to his house and interacted with Herbert often, so she would have known that Dave had more education than a one day online course in hippo care. This means that her statement was made with malice which would be required

since Dave is a public figure on the topic of hippos and her statements were made regarding his hippo care qualifications.

In addition to Patty's statement to the reporter, her statement in a comment on Dave's video would be considered defamation.

END OF EXAM

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4)

D = Dave

ED = Extraordinary Dave (assuming he's the same as Extraordinary "Jim" in Section 3)

Yup!

Invasion of Privacy

Misappropriation of likeness is an invasion of privacy tort. In order for it (or any I of P torts) to apply, there must be a reasonable expectation of privacy.

ED is was the subject of a documentary, Hippo King, which was about the treatment of hippos in private zoos. D puts himself out as an expert on hippo care and appeared on this documentary to express his disapproval of how ED treats hippos. D created an ad to run on pro hippo channels that featured D and ED, juxtapositioned. D may have invaded ED's privacy by using his likeness in this ad without his permission.

Misappropriation of Likeness

ED would have a claim of misappropriation of likeness if D used ED's name, image or likeness for commercial advantage without permission. It would not violate ED's right of publicity if it added significant creative elements to sufficiently transform the ad into something more than a mere celebrity imitation. The transformative use test factors can be used to balance the right of publicity with the 1st amendment. Transformative use will not be considered an invasion of privacy. It generally looks to see if you are using the celebrity to make money off of the them or are you using the celebrity to make art.

Here, the facts do not state the the ad used ED's name. It did however use a comic book style picture of ED in a cage.

Causation

ED's invasion of privacy must have been caused by D's conduct. Here, D created the ad that portrayed ED in a cage in the background. D also hired the professional artist who did the drawing. D's ad was the actual and proximate cause of ED's invasion of privacy.

5 Transformative Use Factors:

1. Whether ED's likeness is the "sum and substance" of the work

The main purpose behind D's ad was to make D look better than ED with regards to hippo treatment. D lost a substantial amount of followers after P made defamatory statements about him. D had expressed his disapproval of ED's hippo treatment in the past on the Hippo King documentary. Many of D's followers presumably saw this documentary (as hippo enthusiasts) and were aware of D's feelings toward ED. Additionally, ED is currently in prison for violating federal hippo laws so it is known that ED does not treat hippos well. The ad was created as a comparison between D and ED. The superhero capes on D and H added to this statement by making D look even more wonderful - like a superhero saving the hippos.

ED's likeness was the foundation of the ad. If the ED depicted in the ad didn't represent ED in real life then there would be no purpose to the ad because it wouldn't be making a statement about how wonderful D is to hippos.

2. Whether the work is D's own expression as opposed to a recreation of ED's likeness

D hired an artist to create this depiction in comic style. Comic style is a little cartoon like but still fairly realistic. While there was some artistic liberty in the addition of capes on D and H, the majority of the ad was quite realistic. ED was even shown in a cage would could be likened to prison which was representative of reality. The caption regarding "justice" may be D suggesting that ED is in prison because he mistreats hippos and D is not because he does not mistreat hippos, trying to represent reality using ED's likeness.

3. Whether the literal elements of likeness or D's creativity dominates the work

We can look to see which dominates between literal elements or likeness or D's creativity.

Here, literal elements of ED seem to dominate. As previously discussed, there is not much artistic liberty taken in this ad.

4. Whether the economic value of the work derives primarily from the celebrity of ED

D's intent behind this ad was to gain back his followers on Y'allTube. His followers got him advertising money on his YTube. Thus, D's intent behind this ad was to profit. D may argue he just intended to further express his disapproval of ED and the way he treats hippos (as he did in the documentary) rather than try to make money. But this is not a very potent argument as there is so much more to the ad (as discussed).

5. Whether the work exploits the commercial value of ED's celebrity

This factor asks if one of the main things that makes this ad valuable is the use of ED's fame. ED was the subject of a hippo documentary. The fact that ED was the subject of the documentary and D just made an appearance on it suggests that ED may be even more well known in the hippo community than D. It would be in D's economic advantage to exploit this fact. ED's fame gives this ad a lot of value. D could have just shown

himself and H in the ad with superhero capes and that would have made him look good. The fact that D and H were high-fiving sends a positive statement as well, suggesting that D and H were friends because D treats H well. But by adding ED in a cage in the background, D significantly magnified his statement that he treats hippos well. D would not have gotten his point across as well without adding ED in the background and showing ED's poor position in a cage.

Transformative Use Test Conclusion

Based on the transformative use test, D just used ED's likeness for profit which means ED's likeness in this ad was not a transformative use and was therefore likely an invasion of ED's privacy.

Damages

Proof of special damages are not required for invasion of privacy torts. Emotional distress and mental anguish are sufficient damages.

Here, we have no facts that tell us if ED experienced any emotional distress or mental anguish. Presumably he was offended though because a reasonable person would probably be offended if their likeness were used to their disadvantage for another person's gain.

Defenses

Consent is a defense to misappropriation of likeness. However, we have no facts that show that ED gave any consent to this advertisement. It is most likely that he did not because it did not paint him in a good light.

Newsworthiness Exception

A person's picture may be used on the cover of a magazine or newspaper if they or the subject regarding them are considered newsworthy. Something will be considered newsworthy if it is of legitimate public concern.

This exception would not apply here. The purpose of this ad was to help D get his Y'allTube followers back. It was just for personal benefit and gain.

END OF EXAM