Minnesota Court of Appeals Finds MySpace Posting

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A panel of the Minnesota Court of Appeals has ruled in an invasion of privacy case that a MySpace.com posting revealing certain private facts about a plaintiff constituted "publicity per se." Although the appellate court ultimately held that the lower court properly granted summary judgment on the invasion of privacy claims in favor of the defendants, the publicity aspect of the ruling is an important because it demonstrates how "old media" publication torts are being applied to new social media.

The plaintiff in Yath v. Fairview Clinics, N.P., Docket No. 27-CV-06-12506, slip op. (June 23, 2009), alleged that a medical assistant in a clinic she attended "snooped" in the plaintiff's medical files without a proper purpose and discussed sensitive personal information she found in the files with another employee of the clinic, one of the defendants in the appeal. The plaintiff also claimed that the employee-defendant, the medical assistant, and others published a MySpace web page about the plaintiff that publicized private information obtained from the her medical records—according to the MySpace page, the plaintiff had a sexually transmitted disease, recently cheated on her husband, and was addicted to plastic surgery.

The plaintiff sued the employee-defendant, the medical assistant, the clinic (on a vicarious liability theory), and one other person for, among other claims, invasion of privacy based on publication of private facts. By the time the matter reached the Court of Appeals, only the employee-defendant and the clinic were still in the case.

The lower court had granted summary judgment in favor of the two defendants on the invasion of privacy claim because the evidence showed that only a few people accessed the MySpace page in the 24 to 48 hours during which the page was live.

However, on review, the Court of Appeals held that the lower court had misapplied the law concerning "publicity" in invasion of privacy cases. "Publicity" is a required element of the publication of private facts tort.

"Publicity," for the purposes of an invasion-of-privacy claim, means that "the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." In other words, there are two

methods to satisfy the publicity element of an invasion-of-privacy claim: the first method is by proving a single communication to the public, and the second method is by proving communication to individuals in such a large number that the information is deemed to have been communicated to the public.

According to the appellate court, the lower court had incorrectly focused on the second prong of the publicity requirement—communication to a sufficiently large number of people—while ignoring the first prong. Just as publication in a newspaper or a magazine of small circulation or in a radio broadcast would constitute "publicity," so did the publication on MySpace in this case. When information passes through a public medium like the Internet, the "publicity" requirement for invasion of privacy purposes is satisfied as soon as the information is disseminated. "[T]he challenged communication here constitutes publicity under the first method, or publicity per se. . . . [Plaintiff's] private information was posted on a public MySpace.com webpage for anyone to view. This Internet communication is materially similar in nature to a newspaper publication or a radio broadcast because upon release it is available to the public at large.

The court's ruling means, in effect, that the number of people who actually view a publicly available website is not relevant to the "publicity" requirement for invasion of privacy purposes. The "publicity" occurs as soon as the information is made publicly available for anyone to view on the Internet. However, as the appellate court acknowledged, the number of people who view such a website may be relevant when calculating the damages the plaintiff suffered (i.e., the more people who view the website, the greater the potential damages).

In reaching its ruling, the Court of Appeals took pains to put invasion of privacy in the context of our "Information Age":

That the Internet vastly enlarges both the amount of information publicly available and the number of sources offering information does not erode the reasoning leading us to hold that posting information on a publicly accessible webpage constitutes publicity. If a late-night radio broadcast aired for a few seconds and potentially heard by a few hundred (or by no one) constitutes publicity as a matter of law, a maliciously fashioned webpage posted for one or two days and potentially read by hundreds, thousands, millions (or by no one) also constitutes publicity as a matter of law.

It is true that mass communication is no longer limited to a tiny handful of commercial purveyors and that we live with much greater access to information than the era in which the tort of invasion of privacy developed. A town crier could reach dozens, a handbill hundreds, a newspaper or radio station tens of thousands, a television station millions, and now a publicly accessible webpage can

present the story of someone's private life, in this case complete with a photograph and other identifying features, to more than one billion Internet surfers worldwide. This extraordinary advancement in communication argues for, not against, a holding that the MySpace posting constitutes publicity.

The Pioneer Press has additional commentary on the case.