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Ross v. Roberts

166 Cal. Rptr. 3d 359 (Cal. Ct. App. 2013)

REBECCA MCCLAIN*

BACKGROUND

Plaintiff Ricky D. Ross ran a cocaine trafficking operation during the 1980s. Over a number of years, he accumulated hundreds of millions of dollars and created a network of drug dealers in at least six states. During a stay in jail, Ross revealed his connection to the Iran-Contra scandal to a journalist, who subsequently published an article on the revelation. Ross, who has been recognized by the names of Rick Ross, Ricky Ross, and “Freeway” Ricky Ross, received national exposure for his involvement with the Nicaraguan Contras.

Defendant William Leonard Roberts II is a famous rap musician known as “Rick Ross.” Compared to Ricky D. Ross’s life, Roberts’s life seems rather tame. Roberts is a former correctional officer, a persona quite contrary to the one portrayed in his rap lyrics, which suggest he ran a large-scale cocaine operation. Roberts claims his stage name comes from his days on the high school football team, where he was known as “big boss.”

In 2006, Ross learned of the musician “Rick Ross” from a magazine article. In June 2010, Ross brought suit against Roberts and several other defendants involved in the production, distribution, and sale of Roberts’s records (collectively, “Roberts”) in the U.S. District Court for the Central District of California. The complaint alleged both federal and state misappropriation claims. The district court dismissed the federal claims and rejected supplemental jurisdiction over the state claims. In December 2010, Ross filed suit in California state court. The complaint alleged six causes of action, all of which centered on the claim that Roberts misappropriated Ross’s name and identity for financial gain.

Roberts moved for summary judgment on the ground that the claim was time barred by the two-year statute of limitations that began running when Roberts first used the name “Rick Ross” in 2005. Based on the “single publication rule,”¹ the trial court found that, by the time Ross filed suit in 2010, the statute of limitations had elapsed and the claims were barred by laches.

Ross appealed, contending the trial court erred in finding the claims

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1. The “single publication rule” limits tort claims based on mass communications or publications to a single cause of action, which arises upon the first publication of the communication. CAL. CIV. CODE § 3425.3 (West 2014). Therefore, the statute of limitations for the claim begins running on the date of first publication. *Id.*

barred by the single publication rule. He argues that subsequent works released by Roberts under the name “Rick Ross” were republications that continued to infringe on Ross’s right of publicity. Roberts asserted a First Amendment defense.

ISSUE

On appeal, the California Court of Appeals for the Second Appellate District addressed whether Roberts’s use of the name “Rick Ross” infringed Ross’s right of publicity or, alternatively, whether the use transformed Ross’s likeness into creative expression protected by the First Amendment.

DECISION

The California Court of Appeals affirmed the lower court’s holding, granting Ross’s motion for summary judgment. Despite the appellate court’s uncertainty about the lower court’s rulings on the statute of limitations and laches, the appellate court found that the First Amendment provided Roberts with a complete defense to Ross’s claims.

REASONING

The court first addressed Roberts’s First Amendment defense, which he first presented on appeal. Courts typically resolve First Amendment issues as a matter of law—when the plaintiff cannot show a triable issue of material fact, courts deem summary judgment appropriate. In this case, the court found it proper to review Roberts’s affirmative defense because if the court reversed the lower court’s decision, the lower court would be required to rule on the issue. Applying California right of publicity law, the court found that Roberts’s motion for summary judgment encompassed the First Amendment defense raised on appeal.

The court then turned to the alleged right of publicity violation. Ross argued that Roberts used his name and celebrity status as a drug lord to create the rapper “Rick Ross.” Ross also claimed Roberts used the line “everyday I’m hustling,” a lyric from a popular Rick Ross song, to describe Ross’s own criminal lifestyle. The court assumed some appropriation had taken place despite Roberts’s arguments to the contrary.

The common law right of publicity in California does not greatly differ from that recognized in federal courts or other state courts. The elements of a right of publicity violation in California are: (1) the unauthorized use of a person’s identity; (2) the appropriation of the person’s name, voice, likeness, signature, or photograph for advantage, commercially or otherwise; and (3) resulting injury. California statutory law also prohibits the knowing use of another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods for purposes of advertising or selling, or soliciting purchases of,

products, merchandise, goods or services, without such person's prior consent.²

Assuming Roberts had infringed Ross's right of publicity, the court then pointed out that a celebrity's right to exploit his or her own likeness must be balanced against the First Amendment right to free expression. The First Amendment affords protection to transformative works that become the transformer's own expression. In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the California Supreme Court based its decision on a First Amendment defense to a right of publicity violation claim on whether the new work merely superseded the original or if it added a new expression, meaning, or message.³ The *Comedy III* court determined that literal depictions or imitations directly trespass on an individual's right of publicity.⁴ But, the court noted, if merely the raw materials of celebrity's likeness are part of a significantly transformed work, the new work will not impact the celebrity's market. On the other hand, if the celebrity's likeness is the very sum and substance of the work, the work violates the celebrity's right of publicity.⁵ If this "Transformative Use Test" reaches unclear results, the court can consider whether the economic value of a defendant's work derives from the individual's likeness or from defendant's creativity, skill, or reputation as an artist.

Applying the test to the case, the court determined that the name "Rick Ross" and Ross's cocaine-dealing persona were raw materials in Roberts's work—Ross's likeness was not the very sum and substance of the work. In addition, the court found Roberts's success stemmed from record sales and that the use of Ross's name and identity in Roberts's work were not the main reason individuals purchased Roberts's music.⁶ The court concluded that Roberts's musical representations were theatrical and were not literal depictions of Ross. Further, the court stated Roberts's musical works had become new expressions entitled to First Amendment protection. In sum, the court held that Roberts's use of Ross's persona met the requirements of the Transformative Use Test because Roberts's use of "Rick Ross" was a "highly altered" and "essentially fantasized" representation of Ross.

2. CAL. CIV. CODE § 3344.

3. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).

4. *Id.* at 808.

5. *Id.* at 809.

6. *Ross v. Roberts*, 166 Cal. Rptr. 3d 359, 368 (Cal. Ct. App. 2013) ("[Roberts] was not simply an imposter seeking to profit solely off the name and reputation of Rick Ross.").

