

**JOSE SOLANO, JR. Plaintiff-Appellee, v. PLAYGIRL, INC., Defendant-Appellant.
JOSE SOLANO, JR. Plaintiff-Appellant. PLAYGIRL, INC., Defendant-Appellee.**

SUPREME COURT OF THE UNITED STATES

**October 5th, 2009 argued
October 12th, 2009 Decided**

PRIOR HISTORY: ON WRITE OF CERTIORAI TO THE US COURT OF APPEALS
9TH CIRCUIT

DISPOSITION: 292 F.3d 1078, AFFIRMED

COUNSEL: Amanda Cecca argued the cause for the Petitioner. With her on the brief were Josh Berger, Robert Freeman, Liana Heffly, and Tori McClurg

Rachel Merkin argued the cause for the Respondent. With her on the brief were Rebecca Webster, Elissa Snook, Sarah Craig, and Ian Kaye.

JUDGES: POIRIER, J delivered the opinion of the court, in which SCUTT, MCCARTHY, WORMSER, and STEVENS JJ., joined. BETTS, J., filed an opinion concurring in the judgment, in which URAM, DUNN, and HUTTIG, JJ., joined. CLAUS, CJ filed a dissenting opinion.

OPINION BY: JUSTICE POIRIER

OPINION

JUSTICE POIRIER delivered the opinion of the Court.

When considering the actions of *Playgirl Magazine* we have found that they do not portray Mr. Jose Solano in a false light. We find this as Mr. Solano has failed to meet his burden of proof. Because of this, we uphold the ruling of the 9th circuit.

Mr. Jose Solano's claim that *Playgirl Magazine* put him in a false light does not meet the first requirement of the false light test. To do this *Playgirl* would have had to disclose to a third party that the magazine presented information about Mr. Solano as factual, even though it was false. We have found that they did not do this, and thus do not meet the first requirement of the false light test.

The photograph on the cover of the magazine was Mr. Solano. He was shown in his red swimming trunks, the same outfit he wears on the popular program *Baywatch*. The photograph was from a stock house, therefore, Solano did not have the rights to decide if it was to be used or not. The words "TV Guys. PRIMETIME'S SEXY YOUNG STARS EXPOSED" on the cover did not imply that Solano would be seen nude inside the magazine. The word "exposed" is not descriptive enough to imply that Solano could be nude on the inside of the magazine. We find a difference here, from the precedent of

Eastwood v. National Enquirer. In *Eastwood v. National Enquirer* the words on the front cover were descriptive enough to imply that Eastwood had done an interview for the *Enquirer*. The words “Exclusive Interview” were shown on the front cover with Eastwood, but in fact he did not give the magazine an interview.¹ Solano’s case is different in that the word “exposed” does not explicitly insinuate that Solano is nude inside the magazine. Because of this difference we find for *Playgirl Magazine*.

In order for Solano's legal team to successfully sue *Playgirl* magazine on the basis of false light, it would not only have to prove that the cover and headlines purposefully distorted the truth —under the first false light requirement, fictionalization — but also that the material is highly offensive to a reasonable person. Court records contain some cases in which non-offensive material provided basis for successful false light suits, but these cases are old and today are not regarded as authoritative. In the case at hand, *Playgirl v. Solano*, the plaintiff's attorneys failed to prove with clear and convincing evidence that the magazine cover is highly offensive.

Recent precedent that applies to this case lies in *Cibenko v. Worth Publishers*, and *Dempsey v. National Enquirer Inc.*. In *Cibenko v. Worth Publishers*, a U.S. District Court in New Jersey ruled that there was no offensive meaning — especially not a highly offensive meaning — attached to a photograph and caption that appeared in a college sociology text; the photograph depicted a white police officer in a public place apparently prodding a sleeping black man with a nightstick, and the caption discussed the way social status affects an officer's decision to arrest a person, asking, "Would the officer be likely to do the same if the 'offender' were a well-dressed, middle-aged white person?"² If Courts ruled in this case that this caption and the photograph it accompanied do not portray the plaintiff in a false light — as racist — nor do they convey a meaning that is highly offensive to a reasonable person, then it is impossible for this Court to rule that the cover of the January 1999 issue of *Playgirl* conveys a meaning that is highly offensive to a reasonable person, whether or not it misled people to assume that Solano appeared nude inside the magazine.

Similarly, a U.S. District Court in Maine ruled in the case of *Dempsey v. National Enquirer Inc.* that a story in the *National Enquirer* tabloid was not offensive to a reasonable person in its description of physical sensations and predictable fears of a man who fell out of an airplane. The Court ruled that while the tabloid embellished the story somewhat — adding material on what the plaintiff, who survived the fall, had thought about as he clung to the airplane's door rails, despite the fact that the reporter never interviewed the victim and therefore could not know what he was thinking — the exaggerated, arguably fanciful, material was nevertheless not offensive to a reasonable person.³ Therefore, even if this Court were to find that editors at *Playgirl* magazine did purposefully distort the truth for dramatic purposes, in hopes of drawing readers and revenue, the material they used to do so is not highly offensive, so the false light claim cannot stand.

Offensiveness is a fairly relative term and its meaning can be open to interpretation. This Court finds that in the case of *Playgirl v. Solano*, the cover is not

¹ *Eastwood v. National Enquirer*, 123 F.3d 1249, 1255 (1997)

² *Cibenko v. Worth Publishers*, 510 F. Supp. 761, 2 (1981)

³ *Dempsey v. National Enquirer Inc.*, 687 F. Supp. 692, 1 (1988)

offensive to a reasonable person passing it on a magazine display on the street or picking it up at a store. The magazine is sexual by nature, and the cover Solano's image appears on is no more or less so than any other *Playgirl* cover. Also, this Court finds it impossible for an assumption of nudity to be offensive in regard to an actor such as Solano, who makes his living by appearing partially nude, in only a swimsuit, on national television. Solano's career thrives on the sex appeal of *Baywatch* — which not only does the actor not object to, but also profits from — and the portrayal of him on the cover of *Playgirl* is bears no more or less sex appeal than the show.

This Court's majority ruling is in favor of the defendant, though the *Playgirl* legal team did not provide evidence or refer to precedent in refuting the offensiveness requirement of false light in its legal brief. The counselors assert that the material was "non-offensive," but did not prove how or why. They focused instead on the accurate nature of the cover photo and Solano's lack of input about where or how the photo is used because he is a public figure. In the Solano legal team's brief, the counselors' use of the *Eastwood v. National Enquirer* case as binding precedent in proving the offensiveness requirement of false light is misplaced. It follows from this use of precedent that both *Playgirl* in this case and the *National Enquirer* in that case made false suggestions and misled readers, but that similarity does not equate with the Solano legal team's argument for offensiveness, which it failed to prove.⁴

In this case, when considering the issue of Fault, *NEW YORK TIMES CO. v. SULLIVAN* can be used as a precedent for Solano v. *Playgirl*. In the former, *The New York Times* published a full-page ad in 1960 by a group of civil rights leaders accusing public officials in the South of using violent and illegal methods to quell the civil rights movement. While there was some truth to the ad, the ad also contained many factual errors. The police commissioner of Montgomery, Alabama, L.B. Sullivan, sued *The New York Times* for defamation with damages for \$500,000. The Court ruled in favor of The Times because Sullivan could not prove that the paper acted with reckless disregard for the truth or knowledge of falsity. This, as the Court explained, was necessary because Sullivan was a public figure and public figures must prove actual malice.⁵

Jose Solano is clearly a public figure, as the concurring opinion goes on to show, and at the time of the alleged defamation he had just left one of the most popular shows on television. Solano's celebrity status leaves no doubt that he was a public figure. Public figures must prove actual malice and Solano's argument does not fulfill both requirements.

Sullivan can be considered precedent to Solano because it involves an all purpose public figure, and a similar set of facts. Furthermore, Solano's case has even more grey area than Sullivan's. While *The New York Times* actually published factually false information, *Playgirl Magazine* never published any false information - rather a word that had a double meaning. By many interpretations, the word "exposed" was true, since the insides of the magazine featured an interview in which Solano was "exposed" emotionally.

Playgirl, however, did not have knowledge of falsity since the word does have dual meanings, and other more explicit words like "nude" are used when the magazine

⁴ *Eastwood v. National Enquirer*, 123 F.3d 1249, 1255 (1997)

⁵ *NEW YORK TIMES CO. v. SULLIVAN*, 376 U.S. 254 (1964)

actually contains full-frontal nudity. It is true that *Playgirl's* editors may have recklessly disregarded the truth by neglecting to contact Solano for an interview, but even if he had agreed, it does not mean that the magazine would have chosen a different word to use on the cover. And, as stated before, the word “exposed” can arguably be considered the truth. Therefore, since this case does not fulfill both requirements of actual malice, Solano cannot prove that *Playgirl* is guilty of defamation.

Furthermore, Solano argued that *Eastwood v. National Enquirer, Inc* should serve as precedent to justify that *Playgirl* acted with actual malice. We have found that *Solano v. Playgirl* is drastically distinct from *Solano v. Playgirl*. In *Eastwood v. National Enquirer* the National Enquirer intentionally deceived their readers by claiming they had an exclusive interview with Clint Eastwood. During the trial of this case Eastwood’s lawyer proved that the National Enquirer had used specific language to deceive their readers through “the inclusion of such phrases as ‘[Eastwood] said with a chuckle’ suggested that the writer and the movie star had conversed.”⁶ This indicated that Eastwood endorsed the National Enquirer and had agreed to be associated with that publication.

Solano does have an emotionally compelling argument that the headline “Primetime’s Sexy Young Stars Exposed” could imply that there would be nude photographs of Solano and that the editors of *Playgirl* used that specific word to get more people to buy the magazine. In light of this argument we still do not believe that the use of the word “exposed” is strong enough evidence to prove reckless disregard for the truth. *Playgirl* indicated that when they do have nude photographs they explicitly use the word “nude” on the cover. Therefore, since *Playgirl* did not use the word “nude” anywhere on the cover they did not believe a reasonable person would expect to find nude photographs of Solano on the cover. *Playgirl* also claimed that the use of word “exposed” was not meant to indicate Solano being physically exposed but instead they were referring to him being journalistically exposed. This indicates that *Playgirl's* intent was not to intentionally deceive their readers or embarrass Solano and cause any harm to his reputation. Since *Playgirl* did not include any false information about Solano and did not intentionally try to deceive their customers we cannot be find them guilty of knowledge of falsity or reckless disregard for the truth.

...

The first amendments is one of our most precious rights, and Mr. Solano has failed to sufficiently argue any of the requirements of his burden, or proof, we strongly believe that the representation by *Playgirl* does not constitute “false light”.

The Judgment of the US Court of Appeals 9th Circuits is upheld

⁶ *Eastwood v. National Enquirer*, 123 F.3d 1249, 1255 (1997)

It is so ordered.

CONCUR BY: JUSTICE BETTS; JUSTICE URAM; JUSTICE DUNN; JUSTICE HUTTIG

CONCUR

In terms of discussing misappropriation on the part of the Appellant *Playgirl Magazine* we have determined, that they did not in any way misappropriate the image of Mr. Jose Solano. To justify this decision, we must first look at whether Mr. Solano is public or a private figure, and then if his claims meet the standard for “Misappropriation” because, we have not found this, we side with Playgirl Magazine in their cause.

To establish that Mr. Solano is not a public figure, the plaintiff would have to prove several different and difficult aspects. The ruling as to what determines a public figure was first established in *Gertz v. Robert Welch, Inc.* In the case it was ruled by the Supreme Court – more specifically Justice Lewis Powell – that shaping the correct title as public or private figure was defined by,

“In determining the concept of ‘public figure’ for the purposes of the First Amendment rule requiring a public figure as plaintiff in a defamation action against communications media to prove knowledge or reckless disregard of falsity on their part, the United States Supreme Court will not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes; absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life; it is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.”⁷

Following this precedent, it is very difficult to say that Mr. Solano is anything but an all-purpose public figure. The television show *Baywatch*, in which Mr. Solano is one of the starring members, is seen by millions of viewers worldwide. He has also willingly contributed to numerous interviews over the years that have been published, and had pictures taken which have also been published. In short, he meets all of the necessary criteria that Justice Powell describes.

This precedent can also be distinguished from other cases where the Court has ruled that the party involved was not a public figure. In *Time, Inc. v. Firestone*, Mary Allen Firestone was locked in an ugly divorce battle with her husband. *Time*

⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 22 (1974)

inadvertently labeled her an adulteress, and Firestone sued for libel. *Time* argued that she was a public figure because she gave her side of the story in the public. The Supreme Court disagreed, saying she did not assume any “role of especial prominence.”⁸ Mr. Solano has always been in the spotlight since he took his role on *Baywatch*, and he was not brought into the public eye because of this case.

The second thing that Jose Solano must prove is that he willingly chooses to give public access to his private life. Solano voluntarily threw himself into the media in response to the publication of his picture in the *Playgirl* magazine. He tried to sway the outcome of the public opinion by giving them a look into his private life. Because Solano had access to different media outlets he tried to use this to his advantage. Soon after the publication of the magazine Solano appeared on the *Donnie and Marie* show. The *Donnie and Marie* show was a talk show that aired for two years from 1998 to 2000, and was nationally broadcasted. While on the show he discussed how he didn’t actually pose nude for *Playgirl* and that he didn’t even give his consent.

A case that demonstrates many similarities regarding the question of who is and who isn’t a public figure can be seen in that of *Hutchinson v. Proxmire*⁹. In *Hutchinson v. Proxmire*, Senator William Proxmire awarded Dr. Ronald Hutchinson with the “Golden Fleece Award” which stated that the money given to Dr. Hutchinson was the biggest waste of government spending. Proxmire continued to ridicule him through his newsletter, and media interviews. Hutchinson then sued for libel. He didn’t have to prove actual malice because he wasn’t considered a public figure. He was someone “who did not thrust himself or his views into public controversy to influence others or at any time assume any role of public prominence in the broad question of concern about expenditures”. Hutchinson’s research was only seen by a small group of people, and he did not have access to the media. A regular person wouldn’t have viewed Hutchinson as a public figure before this incident had taken place. His right to privacy was invaded. This is in sharp contrast to Mr. Solano, who did throw himself into the public eye, by courting the media over several years.

This Court finds that in the case of *Playgirl v. Solano*, there is no reason to believe that Mr. Solano is anything but an all-purpose public figure. He has had constant access to many different forms of media, and will have nothing but that for the foreseeable future. Because of that fact, and because we believe that he meets all of the criteria for a public figure, we have no choice but to find him as such.

After having established the standing Mr. Solano as a public figure, we next must turn to whether or not *Playgirl* Magazine’s actions reach the level of “appropriation”. To do this we must first look at precedent, for a working definition of what constitutes appropriation.

We would like to bring up precedent in terms of *Comedy III Productions v. Gary*¹⁰, in which the California Supreme Court ruled that the right to publicity in terms of celebrities, “Is often invoked in the context of commercial speech when the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing a product.” We are distinguishing this case from the case at hand due to the

⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 22 (1974)

⁹ *Hutchinson v. Proxmire* 579 F Supp 1027 (1979)

¹⁰ *Comedy III Productions v. Gary Saderup*, 25 Cal. 4th 387 (2001)

nature of the use of Solano's image and the Appellee's right to his image. Solano, as we have already concluded, was a public figure whose stock photos were distributed for sale legally through a photo clearing house. The photo on the cover was used by Playgirl legally and did not require the consent of the subject because of his status as a public figure and the relevant material inside of the magazine, and since the photo was taken from the stock house Retna, Ltd.. A key part to misappropriation is using someone's photo without consent to do so, but consent was not needed because they legally purchased the photo with consent of the distributor and because Solano, cannot control images in stock folders for any kind of public or private use. In short, he had no control over what venue the photo was used for.

It is not for this Court to decide if the magazine is to be considered newsworthy or not, but the Playgirl legal team in their argument brings up relevant precedent and it is appropriate to address the topic without making a decision in terms of the legitimate news claim of the magazine. In the case, *King World Prods*¹¹, it is established that, "protection of the right to information that appeals to the public large and which is disseminated by the media is the corner stone of the free press clause of the First Amendment." It is the opinion of this Court that First Amendment claims not be taken lightly and that the constitutional protection of the freedom of the press should be highly respected in this Court's decision as it stands being challenged by the right to privacy. In another precedent that Playgirl did not bring up but further explains the issue, *Time Inc. v. Hill*¹², the Supreme Court sanctioned that even though publications such as newspapers, books, and magazines are vended for commercial profit, does not mean they are excluded from freedom of speech. Therefore, Playgirl has the right to print that picture regardless of whether Solano did not want the magazine to do so.

In their argument, Solano failed to address right to privacy and right to publicity, two major parts of misappropriation. The right to privacy ensures that the embarrassment an individual has from his likeness being used without consent is shown and proven. Right to publicity defends someone whose likeness has been exposed without his or her permission. Solano mentioned neither of these causes in their argument. Solano did mention that no permission was given to Playgirl to publish the photo, however further explanation using the right to privacy and publicity was not addressed. And as we have already specified, his consent does not matter in this case.

Lastly, a large part of proving misappropriation is proving that the Appellee suffered commercial damages, injury to the career of Jose Solano, or humiliation. The team has failed to demonstrate in terms of quantitative data any reason for this Court to believe that Solano suffered a loss of damages as a direct result of his appearance on the cover of Playgirl magazine. The publication, as established by precedent in *Montana v. San Jose Mercury News*¹³, whether news based or a magazine is based on a foundation of commercialization and profit that does not void its news value. The key in that case is that the subject of the photographs did not endorse the newspaper, as the magazine has proven here that a reasonable person would not conclude that Solano, or any of the other

¹¹ , *King World Prods, Inc.* 898 D. 2d 56, 59 (6th Cir. 1990)

¹² *Time Inc. v. Hill*, 385 U.S. 374 (1967)

¹³ *Montana v. San Jose Mercury News* 34 Cal. App. 4th 790, 797 (1995),

nine actors in the feature article, had endorsed the magazine just by his appearance on the cover.

DISSENT BY: CHIEF JUSTICE CLAUS

When looking at the case, I find have found that Solano has met all the relevant requirements of his burden of proof. Because of that, I believe that Playgirl was in the wrong, and find for Solano, in his cause.

First, when considering false light, we must look at the concept of “Fictionalization”. I find that Playgirl created a misappropriate fictionalization, to create the idea that Solano had involved himself willingly with their magazine. I believe that the cover is the key to this distinction, as it is all the average customer has to see. When taken on face value the difference between “exposed” and “nude” is almost non-existent, and would not cross the mind of anyone just glancing at the cover. I believe that when taken holistically, the average person would be lead to believe that Solano had voluntarily associated himself with, and/or posed for the magazine. I believe that is ruling is line with *Eastwood v National Enquirer*, for the fact that “the editors falsely suggested to the ordinary reader of their publication – as well as those who merely glance at the headlines while waiting at the supermarket checkout counter – that Eastwood had willingly chatted with someone from the Enquirer”¹⁴. If anything I think an every stronger case in made for Solano, as the “average reader” would not be able to even look inside the magazine if they were curious about Solano’s involvement. Only a very technical reading exposes a difference between the two words, and as an argument I find this unconvincing, as an average person could more than reasonably scan the cover and be mislead as to what is contained inside. Because of that, I find that Playgirl did in fact portray Mr. Solano in a fictionalized way.

Next, we look at the idea of the publication in question being “Highly Offensive”. This question is a short one, as I agree with the opinion presented in “*Douglass v Hustler Magazine*” that “To be depicted as voluntarily associated with such a sheet...is unquestionably degrading to a normal person”¹⁵. I find the actual article about Mr. Solano completely unrelated to the question at hand. As shown in *O’Connor v McGraw-Hill*, “defendant is liable for what is insinuated as well as for what is stated explicitly”¹⁶, and the fact that the cover implies that a reader could find more pictures of Mr. Solano inside to be without a doubt harmful to his reputation. Not only on moral grounds, but it could even be considered degrading for the fact that a famed celebrity would stoop to pose for Playgirl magazine.

Finally, when we look at the damages, I find that Mr. Solano has not proven any “real damages” done. Because of this, I can only side with him on punitive grounds, due to the nature of the offense of *Playgirl Magazine*.

¹⁴ *Eastwood v. National Enquirer*, 123 F.3d 1249, 1255 (1997)

¹⁵ *Douglass v Hustler*, 749 F.2d 527; 4 (1984)

¹⁶ *O’Connor v McGraw-Hill*, 159 Cal. App 3d 478; 206 (1984)

