

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANN BOGIE,

Plaintiff,

OPINION AND ORDER

v.

11-cv-324-wmc

JOAN ALEXANDRA MOLINSKY SANGER
ROSENBERG A/K/A JOAN RIVERS, IFC
FILMS, LLC, BREAK THRU FILMS, INC.,
RICKI STERN, ANNIE SUNDBERG, and
SETH KEAL,

Defendants.

In this civil action, plaintiff Ann Bogie pursues a state law claim for invasion of privacy pursuant to Wis. Stat. § 995.50 against defendants based on her fifteen second appearance in a documentary *Joan Rivers: A Piece of Work*. The individual defendants Joan Alexandra Molinsky Sanger Rosenberg a/k/a Joan Rivers, Ricki Stern, Annie Sundberg and Seth Keal have moved to dismiss for lack of personal jurisdiction. (Dkt. #38.) All defendants have filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), contending that Bogie has failed to state a claim for invasion of privacy. (Dkt. #36.) The court will dismiss the complaint against the defendants Stern, Sundberg and Keal for lack of personal jurisdiction pursuant to Rule 12(b)(2). The court will dismiss the complaint pursuant to Rule 12(b)(6) against the remaining defendants because Bogie fails to state a claim for invasion of privacy pursuant to Wis. Stat. § 995.50.

ALLEGATIONS OF FACT¹

A. The Parties

Plaintiff Ann Bogie is a citizen of Wisconsin. The individual defendants, Joan Rivers, Ricki Stern, Annie Sundberg and Seth Keal are all citizens of the state of New York. Rivers is an actor, comedienne and entertainer by occupation. Bogie alleges that she is in the business of producing cinematic movies and DVDs for commercial sale and public viewing. Bogie also alleges that Stern is a director, producer and writer and that Sundberg and Keal are both producers of cinematic movie and DVDs.

Defendant IFC Films, LLC is a citizen of Delaware and New York.² Bogie alleges that IFC Films is in the business of producing, selling and distributing movies and DVDs for commercial sale and public viewing. Defendant Break Thru Films, Inc. is incorporated in the state of New York and has its primary place of business in New York City, New York. Break Thru Films is allegedly in the business of producing movies and DVDs for commercial use and public viewing.

¹ The court accepts as true all well-pleaded facts and allegations in the complaint, drawing all reasonable inferences in favor of plaintiff. *London v. RBS Citizens, N.A.*, 600 F.3d 742, 745 (7th Cir. 2010).

² In the amended notice of removal, defendants trace the citizenship of IFC Films, LLC to a corporation, Rainbow Media Enterprises, Inc., which is incorporated in the state of Delaware with its principal place of business in the state of New York. (Am. Notice of Removal (dkt. #45) ¶¶ 9-12.)

B. Production of Documentary

Between February 2009 and June 2010, Bogie alleges that defendants collaborated to produce and distribute a documentary entitled *Joan Rivers: A Piece of Work*.³ Rivers was the actor and comedienne. Break Thru Films produced it; IFC Films distributed it. Stern was the writer, executive producer and director. Sundberg and Keal were both co-producers.

The documentary was released on or about June 11, 2010, and viewed throughout the United States, including in at least two theaters in Wisconsin. On or about December 14, 2010, the documentary was released as a DVD for sale. Plaintiff alleges that the DVD was sold to, and viewed by, substantial numbers of citizens of Wisconsin. Defendants also collaborated to sell and ultimately sold the documentary for showing on cable television and pay per view, including within the state of Wisconsin.

C. Rivers' February 2009 Performance

The documentary consists of various segments. In "segment 12," running approximately nine minutes, Rivers is travelling in and talking about Wisconsin and Wisconsin citizens. Although it should hardly have come as a surprise given Rivers'

³ Bogie referenced the documentary in her complaint, and defendants attached it as an exhibit to a declaration filed in support of their motion to dismiss. (*See* Am. Compl. (dkt. #24) ¶ 11; Declaration of Autumn Nero ("Nero Decl."), Ex. A (dkt. #10-1).) The court has reviewed the relevant portion of the documentary and discusses its content below in the opinion. *Sullivan v. Cuna Mut. Ins. Soc.*, 683 F. Supp. 2d 918, 923 ("[A] court is not bound by the party's characterization of an exhibit and may independently examine and form its own opinions about the document.").

particular brand of humor, Bogie complains that Rivers talks about Wisconsin and its citizens in “a condescending and disparaging manner.” (Am. Compl. (dkt. #24) ¶ 17.)

Part of “segment 12” consists of a stand-up show by Rivers in February 2009 at the Lake of the Torches Casino located in Lac Du Flambeau, Oneida County, Wisconsin. Bogie attended the performance. During the performance, Rivers joked about deaf people. A man in the audience shouted that he had a deaf son.

Central to Bogie’s lawsuit is the filming of an event which took place backstage at the casino after Rivers’ performance. Bogie approached Rivers with a book for Rivers to sign, and in a 15-second clip from the documentary, Bogie and Rivers have the following exchange:

Bogie: Thank you. You are so . . . I never laughed so hard in my life.

Rivers: Oh, you’re a good laugher and that makes such a difference.

Bogie: Oh, I know. And that that rotten guy

Rivers: Oh, I’m sorry for him.

Bogie: I was ready to get up and say . . . tell him to leave.

Rivers: He has a, he has a deaf son.

Bogie: I know.

Rivers: That’s tough.

Bogie: But he’s gotta realize that this is comedy.

Rivers: Comedy.

Bogie: Right.

(Nero Decl., Ex. A (dkt. #10-1) 1:07:52-1:08:08.)

Bogie alleges that this inclusion of Bogie in the documentary “constituted an invasion of Plaintiff’s privacy of a nature highly offensive to a reasonable person, and without Plaintiff’s knowledge and without Plaintiff’s written or oral consent, back stage in a place that a reasonable person would consider private.” (Am. Compl. (dkt. #24) ¶ 22.) Bogie further alleges that she has “image, reputation prestige and social standing and other value in her name and image,” and that defendants’ inclusion of Bogie “constituted the use of the publicity value of Plaintiff’s image and valued reputation, prestige, social standing or other value of her name and image.” (*Id.* at ¶ 23.)

D. Procedural Posture

Bogie filed this lawsuit in Oneida County Circuit Court on March 24, 2011. Defendants removed the action to federal court on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332.⁴ Plaintiff later filed an amended complaint which is the subject of the present motions.

OPINION

Defendants have filed two motions to dismiss. First, defendants have moved to dismiss the complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6), arguing that Bogie has failed to state a claim for invasion of privacy pursuant to Wis. Stat. § 995.50 and that any repleading would not save her claims. Second, the individual defendants

⁴ Defendants subsequently filed an amended notice of removal, containing sufficient allegations as to the citizenship of defendant IFC Films, LLC. (Dkt. #45.) Based on this filing, the court determines that diversity of citizenship exists, the amount in controversy exceeds \$75,000, and therefore this court has jurisdiction pursuant to 28 U.S.C. § 1332.

(Rivers, Stern, Sundberg and Keal) have moved to dismiss the complaint for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2).

Defendants invite the court to consider their motion to dismiss first and only consider the four individual defendants' challenges to personal jurisdiction to the extent the court "allows this matter to go forward." (Defs.' 12(b)(2) Mot to Dismiss (dkt. #38) I.) Though the court would otherwise accept defendants' invitation -- dismissing this case solely on the merits would be a much simpler solution and require less effort than muddling through the parties' arguments on personal jurisdiction -- the Seventh Circuit has repeatedly warned against bypassing jurisdiction questions to reach easier issues on the merits. *See, e.g., Kromrey v. U.S. Dept. of Justice*, No. 10-2941, 2011 WL 2419879, at *1 (7th Cir. May 11, 2011) ("Before deciding any case on the merits, a federal court must ensure the presence of both subject-matter jurisdiction and personal jurisdiction."). As such, the court first turns its attention to the individual defendants' motion to dismiss for lack of personal jurisdiction.

I. Motion to Dismiss for Lack of Personal Jurisdiction

"A district court sitting in diversity has personal jurisdiction over a nonresident defendant only if a court of the state in which it sits would have jurisdiction." *Purdue Research Foundation v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 779 (7th Cir. 2003). To determine whether a Wisconsin state court would have jurisdiction over the individual defendants requires a two-step process. First, the court determines whether Wisconsin's long-arm statute subjects the individual defendant to personal jurisdiction. Wis. Stat. §

801.05. Second, if the individual defendants are covered by the Wisconsin long-arm statute, then the court determines whether this court's exercise of jurisdiction "comports with the requirements of federal due process." *Id.*

The plaintiff bears the burden of establishing personal jurisdiction. *Id.* at 782. Because no evidentiary hearing was held to determine personal jurisdiction, however, the plaintiff "need only make out a *prima facie* case of personal jurisdiction." *Id.* (internal citation omitted). "In evaluating whether the *prima facie* standard has been satisfied, the plaintiff is entitled to the resolution in its favor of all disputes concerning relevant facts presented in the record." *Id.* (internal quotation marks and citation omitted). Even applying this lenient standard, plaintiff fails to make out a *prima facie* case of personal jurisdiction as to defendants Stern, Sundberg and Keal.

A. Wisconsin's Long-Arm Statute

Wisconsin courts "construe [§ 801.05] liberally in favor of exercising jurisdiction." *FL Hunts, LLC v. Wheeler*, 2010 WI App 10, ¶ 7, 322 Wis. 2d 738, 780 N.W.2d 529 (citing *Lincoln v. Seawright*, 104 Wis. 2d 4, 9, 310 N.W.2d 596 (1981)). Relevant to defendants' motion, § 801.05 provides in pertinent part:

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:

(1) Local presence or status. In any action whether arising within or without this state, against a defendant who when the action is commenced:

...

(d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

...

(3) Local act or omission. In any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.

(4) Local injury; foreign act. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

(a) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or

(b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

Wis. Stat. § 801.05. Section 801.05(1)(d) is similar to the test for general jurisdiction under the due process clause, whereas § 801.05(4) mirrors the exercise of the same test for specific jurisdiction. *Ricoh Co., Ltd. v. Asustek Computer, Inc.*, 481 F. Supp. 2d 954, 957 (W.D. Wis. 2007).

Plaintiff's opposition to defendants' motion to dismiss for lack of personal jurisdiction focuses on defendant Rivers. Plaintiff contends that the court has general jurisdiction over Rivers because she had "continuous and systematic general business contacts with Wisconsin." (Pl.'s 12(b)(2) Opp'n (dkt. #39) 10.) In the alternative, plaintiff contends that the court may exercise specific jurisdiction over Rivers under § 801.05(3), because the act which caused plaintiff's alleged injury occurred within this state, or under § 801.05(4), because the documentary was screened in Wisconsin theaters

and the DVD was sold in Wisconsin stores. (*Id.* at 11-12.) Plaintiffs' argument as to defendants Stern, Sundberg and Keal is less clear, but she appears to argue that there is specific jurisdiction over them because of their efforts in producing, selling and distributing the documentary. (*Id.* at 17-20.) Plaintiff also specifically alleges that defendant Stern contacted the Lake of the Torches Casino to set up "filming logistics." (*Id.* at 18.)

1. General Jurisdiction

In support of her argument that Rivers is subject to general personal jurisdiction, plaintiff points to three Wisconsin performances, the first being Rivers' 2009 performance at Lake of the Torches Casino. (*Id.* at 10.) In addition to this show, Rivers also performed in Milwaukee in June 2010 and in Madison in October 2010. (*Id.*)

Three shows, the last occurring approximately five months before the filing of plaintiff's lawsuit, over a two-year period are insufficient for the court to find that Rivers was "engaged in substantial and not isolated activities within this state." Wis. Stat. § 801.05(1)(d); *see also FL Hunts, LLC v. Wheeler*, 2010 WI App 10, ¶ 11, 322 Wis.2d 738, 780 N.W.2d 529 (finding error in circuit court's consideration of "contacts preceding the commencement of the action-that is, the time when a summons and a complaint naming the person as defendant are filed with the court" in order to determine whether general jurisdiction exists).

2. Specific Jurisdiction

In order to determine whether there is specific jurisdiction over any defendant, the court must consider Bogie's allegations of injury. First, Bogie alleges that defendants' recording of her backstage at the casino constituted an intrusion of her privacy of a highly-offensive nature. Second, Bogie alleges that defendants violated her rights to privacy by using her image to endorse the documentary. (Am. Compl. (dkt. #24) ¶ 25.)

Plaintiff's first alleged injury arose "out of an act . . . within this state." Wis. Stat. § 801.05(3). In response, defendants reasonably point out that Bogie's alleged injury involved the *use* of Bogie's image, rather than the recording of it. (Defs.' 12(b)(2) Reply (dkt. #43) 5.) But since the allegedly-unauthorized recording of Bogie's image in Wisconsin was a crucial first step to its allegedly illegal use (not to mention the only act in which Rivers appear to have played a direct role), the court is not willing to divorce the two acts for purposes of a specific contacts analysis.

Which bring us to defendants other argument: Rivers was not involved in the writing, directing or production of the documentary, and that she came to Wisconsin "independently for her own business purposes, not for any purpose related to the film." (*Id.* at 5-6.) Defendants conclude, therefore, that the recording and use giving rise to plaintiff's alleged injury were not acts by Rivers. (*Id.* at 5.) Plaintiff disputes this based on alleged statements by Rivers about her involvement in the documentary. (Pl.'s 12(b)(2) Opp'n (dkt. #39) 12 (citing Declaration of Mark A. Seidl (dkt. #27) ¶ 14.) While paper thin, the court will credit this allegation of Rivers' involvement in the documentary, and will resolve this dispute, as required, in plaintiff's favor. *Purdue*

Research Foundation, 338 F.3d at 782. As such, Rivers' presence during the recording of Bogie backstage at the casino is sufficient to find that plaintiff has alleged an injury arising "out of an act or omission within this state by the defendant" pursuant to Wis. Stat. § 801.05(3).

As for defendant Stern, her only alleged contact with Wisconsin "involved calling the casino in Oneida County, on behalf of Break Thru Films, to arrange the logistics of filming Joan Rivers's stage show." (Declaration of Ricki Stern ("Stern Decl.") (dkt. #5) ¶ 3.) One or two phone calls to Wisconsin is insufficient to find specific jurisdiction over Stern pursuant to § 801.05(3). See *Cram v. Med. Coll. of Wis.*, 927 F. Supp. 316, 320 (E.D. Wis. 1996) ("I do not believe that two phone calls to individuals in the state constitutes 'an act or omission within this state.'" (quoting Wis. Stat. § 801.05(3))). As for the other two individual defendants, Sundberg and Keal, plaintiff does not even allege that either had contact with the State of Wisconsin.

Alternatively, plaintiff contends that specific jurisdiction over the individual defendants is appropriate under § 801.05(4) because the documentary was screened in Wisconsin theaters, as well as distributed and sold as a DVD to retail outlets in Wisconsin. But this provision covers defendants' acts outside of Wisconsin so long as the "[p]roducts, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade," which begs the question whether the documentary is a product of the individual defendants. The record supports a finding that the corporate defendants Break Thru Film and IFC Films, LLC were responsible for the distribution and sales of the documentary, both in theaters and

by DVD. Plaintiff has offered no evidence, however, that the individual defendants were involved in the distribution and sale of the documentary, much less that they were responsible for the distribution of the documentary to Wisconsin theaters or by DVD in Wisconsin retail outlets. Absent some piercing of the corporate veil theory, the individual defendants are also not legally responsible for the corporate defendants' actions. Wis. Stat. § 801.03(1) (“Defendant’ means the person named as defendant in a civil action, and where in this chapter acts of the defendant are referred to, the reference attributes to the defendant any person’s acts for which acts the defendant is legally responsible.”); *see also Nelson v. Bulso*, 149 F.3d 701, 703 (7th Cir. 1998).⁵

B. Due Process

Having found personal jurisdiction proper as to defendant Rivers because of her presence at the filming of Bogie backstage at the Lake of the Torches Casino located in Lac Du Flambeau, Wisconsin, the court must evaluate whether the exercise of personal jurisdiction in this case would comport with due process standards. The court’s analysis

⁵ Plaintiff relies on two cases, *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010), and *Calder v. Jones*, 465 U.S. 783 (1984), in support of her argument that specific jurisdiction exists as to each of the individual defendants. These cases are distinguishable from the allegations at hand here. In both cases, the plaintiffs were the targets of “tortious conduct specifically directed at the forum.” *Tamburo*, 601 F.3d at 705; *see also Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Houston Metroplex, PA.*, 623 F.3d 440, 444 (7th Cir. 2010) (describing the holding in *Calder* as “constitutionally sufficient contacts can be imputed to a defendant if the defendant is accused of committing an intentional tort by actions that are ‘expressly aimed’ at the forum state”). Plaintiff does not allege, and there is nothing in the record to suggest, that the individual defendants were specifically targeting Bogie or Wisconsin in the distribution and sale of the documentary.

of Wisconsin's long-arm statute informs the due process clause analysis, and there is a rebuttable presumption that federal due process requirements are also met when jurisdiction is found to be proper under § 801.05. *Druschel v. Cloeren*, 2006 WI App 190, ¶ 13, 295 Wis. 2d 8585, 723 N.W.2d 430 (“Our conclusions that [the defendant] falls within Wisconsin's long-arm statute creates a rebuttable presumption that federal due process is also satisfied.”).

Whether or not exercising personal jurisdiction under Wisconsin's long-arm statute comports with due process depends on whether the defendant has established minimum contacts in the forum state such that “maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Illinois v. Hemi Grp. LLC*, 622 F.3d 754, 757 (7th Cir. 2010) (quoting *Kinslow v. Pullara*, 538 F.3d 687, 691 (7th Cir. 2008)); see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945). The court considers whether “the defendant should reasonably anticipate being haled into court in the forum state, because the defendant has purposefully availed itself of the privilege of conducting activities there.” *Kinslow*, 538 F.3d at 691. If barely, Rivers' performance at the casino and, more to the point, apparent active participation in the video recording where plaintiff's alleged injury occurred is sufficient to find that Rivers established minimum contacts with Wisconsin to satisfy the due process clause.

II. Motion to Dismiss for Failure to State a Claim

As this case demonstrates, however, having personal jurisdiction to proceed against a defendant is very different from having a *meritorious* claim. Bogie's complaint alleges a single cause of action -- invasion of privacy pursuant to Wis. Stat. § 995.50. Specifically, plaintiff alleges invasions of privacy in violation of subsections (2)(a) and (2)(b), which define "invasion of privacy" as:

(a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.

(b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.

Wis. Stat. § 995.50; *see also Ladd v. Uecker*, 2010 WI App 28, ¶ 20, 323 Wis. 2d 798, 780 N.W.2d 216 (listing categories of activities which could form the basis of a claim under Wis. Stat. § 995.50(2)). Moreover, to state a claim under § 995.50, the privacy invasion must be unreasonable. Wis. Stat. § 995.50(1) (providing that "[o]ne whose privacy is unreasonably invaded is entitled" to relief).

Plaintiff's allegations, taken as true, do not state a claim for invasion of privacy, and therefore dismissal of plaintiff's complaint is appropriate. *See Ladd*, 2010 WI App 28, ¶ 20 (upholding dismissal because the plaintiff had "not plead facts that satisfy an invasion of privacy claim").

A. Subsection (2)(a): Intrusion

Bogie has failed to allege a violation of Wis. Stat. § 995.50(2)(a) because (1) a reasonable person would not consider the backstage of the Lake of the Torches Casino private and (2) plaintiff fails to allege facts sufficient to demonstrate that any intrusion was “highly offensive.”

First, no reasonable person could have had an expectation of privacy in the backstage area of the casino where the filming took place. The conversation between Bogie and Rivers occurred in what appears to be a relatively-crowded backstage area, with the din of chatter in the background. The camera, and thus the camera person, appear to be in close proximity to Rivers and Bogie. Bogie also appears to be standing in a line waiting to talk with Rivers and have her sign a book. While Bogie alleges that a reasonable person would consider the back stage of the casino private, the documentary shows otherwise, and it is the exhibit, rather than Bogie’s allegations, which control. *Sullivan v. Cuna Mut. Ins. Soc.*, 683 F. Supp. 2d 918, 923 (W.D. Wis. 2010 (“Where an exhibit and the complaint conflict, the exhibit typically controls); *Barry Aviation, Inc. v. Land O’Lakes Mun. Airport Comm’n*, 366 F. Supp. 2d 792, 796 (W.D. Wis. 2005) (“[A]ttachments [to a complaint] trump contradictory allegations.”).

Indeed, a court considering nearly-identical facts dismissed privacy actions for lack of a reasonable expectation of privacy. *See e.g., People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1282 (Nev. 1995) (holding that there was no reasonable expectation of privacy in backstage area of a hotel casino, where “the filming was of a subject that could be seen and heard by any number of persons”).

While plaintiff alleges that the public was prohibited from entering the backstage area,⁶ this allegation does not render the area private or render Bogie's expectation of privacy reasonable. "[C]ourts have consistently refused to consider the taking of a photograph as an invasion of privacy where it occurs in a public fora." *United States v. Vazquez*, 31 F. Supp. 2d 85, 90 (D. Conn. 1998) (citing several cases in support). As the court explained in *People for the Ethical Treatment of Animals* -- as already noted, also concerned filming in the backstage area of a hotel casino -- "the videotaping did not take place in a private bedroom (*see Miller v. Nat'l Broadcasting Co.*, 232 Cal. Rptr. 668 (1986)), or in a hospital room (*see Estate of Berthiaume v. Pratt*, 365 A.2d 792, 796 (Me. 1976)), or in a restroom (*see Harkey v. Abate*, 346 N.W.2d 74 (Mich. 1983)), or in a young ladies' dressing room (*see Doe by Doe v. B.P.S. Guard Servs. Inc.*, 945 F.2d 1422 (8th Cir. 1991)), or in any other place traditionally associated with a legitimate expectation of privacy." 895 P.2d at 1282.

Second, and relatedly, Bogie's allegations fail to support any finding that the alleged intrusion was "of a nature highly offensive to a reasonable person." Wis. Stat. § 995.50(2)(a). Bogie pleads that the alleged privacy intrusion was "highly offensive to a reasonable person" because the documentary depicts her "approving the condescending and disparaging remarks of Defendant Rivers," including Rivers' remarks relating to "the State of Wisconsin, the conditions in, and the citizens of, Wisconsin, and a member of

⁶ Presumably entry was allowed based on some sort of pass. In her brief in opposition to defendants' 12(b)(6) motion, Bogie states that she was "invited" back, but the complaint does not provide any allegations as to how she gained entry to the backstage of the casino.

the audience at the stage presentation who announced to Joan Rivers that his child was a deaf person after Joan Rivers joked to the audience about deaf persons.” (Am. Compl. (dkt. #24) ¶¶ 21-22.) The recorded portion of Bogie’s conversation with Rivers spanned approximately 16 seconds, during which Bogie revealed no information that could be found by a reasonable person to be of a highly personal, much less highly offensive, nature.

Even Bogie’s apparent concern -- that her laughter and approval of Rivers’ “insult comedy” about Wisconsin, its people and a person in the audience -- falls flat. As an initial matter, whether or not a reasonable person might find Rivers’ brand of comedy highly offensive, it would be an unreasonable stretch for a person to find the recording of an audience member enjoying some of this humor during a public appearance or at a backstage “meet and greet” to be an unqualified endorsement of everything Rivers said. Moreover, § 995.50 does not protect one from being associated with highly offensive material, but rather from a highly offensive intrusion on privacy. Bogie *chose* to put herself in these public forums, listening, laughing and approving of some of Rivers’ humor. She cannot now credibly claim to have acted with an expectation of privacy.

Plaintiff is apparently embarrassed by her presence and her comments, but “[n]o illegal intrusion takes place by . . . photographing or videotaping even if the fact of the person’s presence or actions at that public place is embarrassing to that person.” 1 J. Thomas McCarthy, *The Rights of Publicity & Privacy* § 5:97 (2d ed. 2011). No reasonable jury could find, therefore, the intrusion into Bogie’s privacy -- assuming such took place -- offensive, and certainly not “highly offensive.”

B. Subsection (2)(b): Appropriation

Bogie also alleges an invasion of her privacy pursuant to § 995.50(2)(b), which prohibits the “use for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person[.]” This subsection is aimed at “protect[ing] the property interest in the publicity value of one’s name (or portrait or picture) from commercial exploitation by others.” *Hannigan v. Liberty Mut. Ins. Co.*, No. 98-2643, 1999 WL 667303, at *10 (Wis. Ct. App. Aug. 26, 1999) (citing *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 387, 280 N.W.2d 129, 132 (1979); see also *Gaiman v. McFarlane*, No. 02-cv-48-bbc, 2010 WL 897364, at *5 (W.D. Wis. Mar. 12, 2010) (explaining that § 995.50(2)(b) is “aimed at preserving the individual’s right to control over commercial aspects of one’s identity”).

In limiting to commercial uses, Wisconsin’s appropriation claim is narrower than that adopted by the Restatement (Second) of Torts. See Jacqueline Hanson Dee, Comment, *The Absence of False Light from the Wisconsin Privacy Statute*, 66 Marq. L. Rev. 99, 112 (1982-83) (“A plaintiff can press a complaint for appropriation in Wisconsin if his name or likeness is used for commercial purposes without written consent. The *Restatement* does not limit claims to commercial appropriation or appropriation for pecuniary benefit, but would allow an action for any unauthorized use for the purposes and benefit of the defendant so long as it is not merely incidental.” (footnote omitted)).⁷

⁷ Plaintiff also contends that subsection (2)(b) is not limited to famous people. (Pl.’s 12(b)(6) Opp’n (dkt. #40) 11-12.) While leading scholars opine that the appropriation category of an invasion of privacy tort covers both “a personal dignity interest and a commercial interest,” 1J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 5:61 (2d ed. 2011), this court could not find any Wisconsin cases allowing a claim to go forward

Plaintiff alleges that she has “image, reputation, prestige, and social standing and other value in her name and image,” and that the defendants’ filming and use of her image “constituted the use of the publicity value of Plaintiff’s image and valued reputation, prestige, social standing or other value of her name and image.” (Am. Compl. (dkt. #24) ¶ 23.) Putting aside the issue of whether this allegation would meet the pleading requirements of Federal Rule of Civil Procedure 8, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (“A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’”), Bogie does not allege in her complaint that defendants used her image for commercial use. Normally, the court would dismiss without prejudice to allow repleading, but plaintiff’s complaint suffers from a fatal flaw, which cannot be corrected by further pleading.

“To use a person’s name for advertising or trade purposes, there must be a *substantial* rather than an *incidental* connection between the use and the defendant’s commercial purpose.” *Stayart v. Yahoo! Inc.*, No. 10C0043, 2011 WL 3625242, at *2 (E.D. Wis. Aug. 17, 2011) (emphasis added); *see also Hagen v. Dahmer*, No. CIV. A. 94-C-0485, 1995 WL 822644, at *5 n.4 (E.D. Wis. Oct. 13, 1995) (“Even the incidental use

purely based on “injury to the psyche” as compared to “injury to the pocketbook,” *id.* at § 5:63. Indeed, commentary after the passage of now Wis. Stat. § 995.50 suggests that Wisconsin’s appropriation claim protect “the individual’s ‘right to publicity’ and not the right to be let along in the classical sense. This concept of appropriation sought to prevent the use of a celebrity’s personality without consent. Thus, the tort represents the protection of a property interest.” Judith Endejan, Comment, *The Tort of Misappropriation of Name or Likeness under Wisconsin’s New Privacy Law*, 1978 Wis. L. Rev. 1029, 1030 (1978). The court, however, is reluctant to read a limitation into the plain language of the statute and, therefore, does not dismiss Bogie’s claim because it fails to plead a claim for injury to the commercial value of her name and identity.

of a name is insufficient to constitute an invasion of the right to privacy.”). In other words, the fact that a defendant may profit from the business of publication is not enough to make the incidental use of a name or image a commercial use. *Stayart*, 2011 WL 3625242, at *2 (citing Restatement (Second) of Torts § 652C cmt. d (1977)).

In her opposition to defendants’ motion, Bogie contends that Segment 12 is an important part of the documentary, and therefore there is a substantial connection between the use of her image and defendants’ commercial purpose. (Pl.’s 12(b)(6) Opp’n (dkt. #40) 12-13.) The documentary itself wholly belies such a claim. Bogie’s image is used in a 16-second clip, the focus of which is mainly on Rivers’ treatment of a heckler. Even if segment 12 were the highlight of the video, no reasonable jury could find that this 16-second clip in an hour and twenty-four-minute documentary is a non-incidental use of Bogie’s image for a commercial purpose. Accordingly, plaintiff has failed to state a claim pursuant to Wis. Stat. § 995.50(2)(b).

The court will grant defendants’ motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Furthermore, the pertinent segment of the documentary demonstrates that plaintiff cannot plead a cause of action under any set of facts. Accordingly, the court will dismiss her claims with prejudice. *See Garcia v. City of Chicago, Ill.*, 24 F.3d 966, 970 (7th Cir. 1994) (“A district court does not abuse its discretion in denying leave to amend if the proposed repleading would be futile[.]”).

ORDER

IT IS ORDERED that

- 1) The motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) by defendants Joan Alexandra Molinsky Sanger Rosenberg a/k/a Joan Rivers, Ricki Stern, Annie Sundberg and Seth Keal (dkt. #38) is GRANTED IN PART AND DENIED IN PART. The motion is granted as to defendants Stern, Sundberg and Keal and denied as to defendant Rivers;
- 2) Defendants' motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is GRANTED;
- 3) Plaintiffs' complaint is dismissed with prejudice; and
- 4) The clerk of the court is directed to close this case.

Entered this 16th of March, 2012.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge