

**In the name of the Queen
JUDGMENT**

DISTRICT COURT AMSTERDAM

Division Civil Law, interim injunction judge

case number / docket number: 434415 / KG ZA 09-1626 SR/MV

Judgment in interim injunction proceedings of August 28, 2009

in the matter of

- 1. HIS ROYAL HIGHNESS WILLEM-ALEXANDER, PRINCE OF ORANGE, PRINCE OF THE NETHERLANDS, PRINCE OF ORANGE-NASSAU, JONKHEER VAN AMSBERG, *pro se*, as well as in his capacity as legal representative of his below-mentioned under-aged daughter;**
- 2. HER ROYAL HIGHNESS MÁXIMA, PRINCESS OF THE NETHERLANDS, PRINCESS OF ORANGE-NASSAU, MRS. VAN AMSBERG, *pro se*, as well as in her capacity as legal representative of her below-mentioned under-aged daughter;**
- 3. HER ROYAL HIGHNESS CATHARINA-AMALIA BEATRIX CARMEN VICTORIA, PRINCESS OF ORANGE-NASSAU, JONKVROUWE VAN AMSBERG,**

all residing at Wassenaar,
plaintiffs pursuant to a writ of summons of August 5, 2009,
attorney: Mr H.J.M. Boukema of The Hague

versus

The legal entity under foreign law
THE ASSOCIATED PRESS,
established in New York City (United States of America),
defendant,
attorneys: Mr. R.E. van Schaik and Mr. N.W. Mulder of Amsterdam

Plaintiffs hereafter shall also be referred to as Prince Willem-Alexander, Princess Máxima and Princess Amalia. Defendant hereafter shall also be referred to as AP.

1. The proceedings

At the court's session of August 14, 2009, plaintiffs adduced and claimed as per the writ of summons, a copy of which is attached to this judgment. AP has observed due process and

argued in favour of dismissal of the requested injunction. Both parties submitted exhibits and pleading notes to the court in the course of the proceedings. At the court's session, Mr. Boukema also submitted a ruling of the cantonal judge of the district court The Hague of August 6, 2009, in which Prince Willem-Alexander and Princess Máxima have been authorized to conduct legal proceedings against AP also on behalf of Princess Amalia. Present at the court's session – insofar as relevant – were Mr. Boukema and Mr. O. Anderson (photo-editor of AP's regional office in London) together with Messrs. Van Schaik and Mulder. Following further debate, parties requested that judgment be pronounced.

2. The facts

2.1 AP is an American press agency which places news and news photos at the disposal of its customers (media across the entire world) against payment. AP's head office is established in New York. AP has several regional offices. The regional office for Middle America and South America is located in Mexico. A regional office places photos at someone's disposal by placing them on the "satellite stream" which is run by AP's head office. On that "satellite stream" some 800 to 1000 photos are placed daily at the disposal of all customers.

2.2 On July 20, 2009, the Netherlands Government Information Service (GIS) organized a so-called media moment at which (professional) photographers and journalists were permitted to take photos of (the family of) plaintiffs. Such media moments take place by virtue of the Media Code formulated by the GIS (see www.koninklijkhuis.nl). The Media Code stipulates, amongst others:

1. The GIS takes care of the organization, announcement and possible pooling arrangements for the benefit of media moments.

(...)

3. The privacy of members of the Royal House is respected, that is to say that they may rely on being left in peace at those moments at which they do not come forward in their official functions. Consequently, this also applies to the under-aged members of the Royal House (...).

AP has received an invitation for the media moment of July 20, 2009, which states – in summary – that it is presumed that an invitee accepting the invitation shall observe the Media Code. AP sent a photographer to the media moment on July 20, 2009.

2.3 Plaintiffs have since been photographed during their vacation in Argentina by a photographer affiliated with AP and by a free-lance photographer who offered his photos to AP. According to exhibit 1 of AP it concerns four photos. The photos originate from AP's regional office in Mexico. AP offered these photos to PCM, Metro, GPD, the Katholieke Nieuwsblad, Reporter and Novum. Only PCM purchased the photos and published them in the Algemeen Dagblad and in Trouw. One of the photos, featuring Prince Willem-Alexander, Princess Máxima and Princess Amalia in skiing outfits on a ski slope, was published in the Algemeen Dagblad of July 30, 2009. The caption to this photo read:

Royal summer vacation in the snow

The following text accompanied the photo:

It may be called a summer vacation, but it really is winter in Argentina. Crown Prince Willem-Alexander, Princess Máxima and Princess Amalia have put on their skis near the village Villa La Angostura.

The second photo, showing Princess Máxima while she's abseiling, was published the same day in Trouw. The caption to this photo reads:

Vacation in Argentina

The following text accompanied the photo:

During a photo session on the beach at Wassenaar last week, Crown Prince Willem-Alexander did not yet want to divulge the vacation destination. "We have 200 countries to choose from" he then said. But this week, he, his wife Máxima and their daughters Amalia, Alexia and Ariane were spotted in Villa La Angostura in Argentina.

The photo shows Máxima having a good time abseiling. Further, the family does a lot of skiing – it's winter in Argentina.

2.4 The third photo, showing Prince Willem-Alexander and Princess Máxima (with helmet and clothing that is worn when abseiling), was published on internet together with the two photos referred to under paragraph 2.3 (www.royalblog.nl and www.troonopvolgers weblog). AP has not given permission for this. On the fourth photo Princess Máxima can be seen (in a ski lift wearing ski clothes). It has neither been adduced nor shown that this fourth photo was published (in the Netherlands).

2.5 Several Netherlands media (including the Algemeen Dagblad and Trouw) have promised to no longer publish the photos in question, following a summons to that effect sent on behalf of plaintiffs.

2.6 On July 30, 2009, AP – in summary – was summoned by Mr. Boukema to no longer distribute or publish the photos in question and to confirm that no photos of private affairs of plaintiffs are distributed in future. Further, AP was summoned to send copies of all photos that were taken of plaintiffs in Argentina in July of 2009, as well as a list of names to whom AP had already distributed the photos in question. AP has failed to comply with this summons.

3. The dispute

3.1 In summary, plaintiffs claim as follows:

(1a) Primarily enjoin AP from each and any publication and offering for sale of photos of plaintiffs if that publication does not arise from plaintiffs' public acting, whereby it IS permitted to make and to publish visual recordings in case of a publicly relevant private affair and in case publication legitimately contributes to a public debate on a matter of public interest;

(1b) Alternatively the same is claimed as under 1a, provided that the requested enjoinder is restricted to photos made of plaintiffs during their summer vacation in Argentina and/or during the period that the elementary schools in the region of The Hague have summer vacation in 2009;

(2) one and all on pain of a penalty of Euro 25,000 for each violation or for each day that such violation continues, with a maximum of Euro 250,000;

(3) order AP to payment of (an advance on) compensation for damages, to be determined by the interim injunction judge at her discretion;

(4) order AP to bear the costs of these proceedings.

Mr. Boukema has further specified the claim under (4), in the sense that he claims Euro 6,000 in attorney's salary.

3.2 In support of their claims, plaintiffs adduce – in summary – that they have not given permission to publish the photos, as a result whereof this constitutes an infringement on their right to privacy. In principle this is unlawful, subject to a legally sufficient justification. Whether such justification arises will have to be assessed by weighing the right to privacy against the interests that the infringing acts may reasonably serve. It is true that persons who hold a public office must submit to more than others, but on the other hand the European Court for Human Rights (ECHR) has stipulated in the Caroline von Hannover judgment that also public figures deserve protection of privacy to the extent that they are acting privately. This applies even more to Princess Amalia, because she is entitled to an undisturbed and, as much as possible, normal youth. Publication of photos is only justified if such makes a

contribution to a public debate on a matter of public interest. In the case at bar this is not the case. This concerns vacation photos and publication thereof only occurred to satisfy the curiosity of a certain part of the public. Publication therefore is unlawful, whereby it is important to note that AP makes good money with the sale of the photos. The fact that AP does not publish the photos itself, does not take away from the unlawfulness, because according to settled case law of the Supreme Court also provoking or profiting from someone else's tort is unlawful. Further, the Media Code of the GIS is of importance in order to answer the question whether the publication of the photos in this case is unlawful. Based on that Code plaintiffs – voluntarily – provide the opportunity to make private photos and film recordings of them. On the other hand the Media Code takes the view that those that participate in the photo moments, respect plaintiffs' privacy at other moments (and consequently do not proceed with the publication of private photos). A photographer of AP was present at the last photo moment on July 20, 2009, and took photographs of plaintiffs on that occasion.

To award the claims is in line with the jurisprudence of the ECHR in respect of article 10 ("freedom of speech") of the European Convention for Human Rights (ECoHR). The restriction to the freedom of speech (article 10 paragraph 2 ECoHR) is provided for by law (article 6:162 Netherlands Civil Code, the tort) and necessary in a democratic society. For there is a "pressing social need" and the requested restriction is proportional and functional in view of the way in which the claims have been formulated in the summons. Plaintiffs have a compelling interest in their claims because the photos still can be downloaded from AP's data file, as a result whereof the infringement still continues.

Because plaintiffs have suffered (immaterial) damage as a result of the publications, an advance on the payment of damages must be awarded. It is up to the interim injunction judge to determine the amount of damages to be awarded.

Pursuant to article 13 ECoHR everyone is entitled to "effective legal remedies". Taking action against an infringement on the right to privacy usually costs more than a cost award in civil proceedings produces. Plaintiffs therefore claim an amount of Euro 6,000 in attorney's salary. For the height of this amount they have referred themselves to the court-approved fees that apply in matters of intellectual property.

3.3 In summary, AP has refuted the claims as follows. In this case AP is not the one publishing the photos. It gathers news and photos which it subsequently places at the disposal of its customers (not for profit). A medium which publishes a photo does so entirely at its own risk. Only following publication – depending on the manner and context in which the photos are published – can the different interests (freedom of information and right to privacy) be weighed against each other and can it be determined whether publication by the medium in question is unlawful. AP is not a party thereto and does itself not act unlawfully.

AP further argues that in this case the right to freedom of information outweighs the right to respect for plaintiffs' privacy. It concerns four completely neutral photos which tell nothing but that plaintiffs were on vacation in Argentina. This is a news fact and for that reason the photos may contribute to a public debate on the Royal House. The fact that the royal family goes on a ski vacation has been news already for years. In the past, thousands of photos and films on this topic have been published (and included in the National Archive). The four photos were taken from a respectable distance, not covertly, and in public space. They are neither compromising nor offending photos. The photos are very comparable to photos that are published with plaintiffs' permission (e.g. to the photos taken at the so-called photo moments). The photos have only been placed at the disposal of a limited circle of six customers of AP. Plaintiffs are public figures with a constitutional office and, consequently, must show a high degree of tolerance. Privacy and public interest are difficult to distinguish in

their case. This also holds true for Princess Amalia, who is the first appointed heir to the throne following Prince Willem-Alexander.

The requested enjoinder is worldwide and, therefore, too broadly worded. Moreover, it is not proportional because AP cannot be required to each day check in connection with all distributed photos whether those photos (may) have an unlawful character. Of importance is that AP never before has had a dispute with plaintiffs. To award the claims constitutes preventive censorship. For that reason the requirements of the ECoHR in respect of a justified infringement to the freedom of speech are not met. An appeal to the Caroline von Hannover judgment does not wash, because Caroline von Hannover – contrary to plaintiffs – does not hold any constitutional office.

Plaintiffs have no compelling interest in their claims because all Netherlands media have by now promised to not publish the photos in question. Nor do they have a compelling interest in the claim for compensation of damages – which is not founded in any way. The same applies to the claim for payment of Euro 6,000 in attorney's salary.

3.4 The other (formal) defences of AP – to the extent they are relevant – shall be dealt with below.

4. Assessment

4.1 AP has, in addition to the defence stated at paragraph 3.3, adduced that the writ of summons is null and void. AP is of the opinion that the writ of summons was served on a branch of AP in Amsterdam that is in no way involved in this case or the photos concerned. AP no longer maintained this defence at the hearing.

4.2 Additionally, AP is of the opinion that the wrong legal person was summoned. AP's head office in New York was summoned, whereas according to AP the photos were published by AP's regional office in Mexico. This defence is rejected because AP Mexico placed the photos on the satellite stream of AP's head office and the head office manages that satellite stream. Therefore, the head office of A is regarded as the distributor of the photos.

4.3 In AP's opinion it cannot be ruled out that the question of whether the publication of the photos was allowed should be assessed based on Mexican or Argentinean law rather than based on Dutch law. This defence will also be rejected. It follows from Dutch international private law that a tort is subject to the laws of the country where the damage occurs, regardless of the country where the damage-causing occurrence took place. In the case at bar, the damage adduced occurred in the Netherlands—the plaintiffs reside in the Netherlands—and Dutch law applies.

4.4 AP subsequently adduced that the jurisdiction of the interim injunction judge is limited to the Netherlands and that no cross-border rulings can be made in interim injunction proceedings. Broadly speaking, this defence is incorrect. What is important is that the parties do not disagree about the question of whether the Dutch Court has jurisdiction to assess this dispute and has jurisdiction to impose preliminary injunctions aimed at terminating a tort in the Netherlands. If the plaintiffs wish to also have the injunctions set out in this judgment enforced abroad, then an assessment will have to be made then, *inter alia* depending on the questions of in which country, based on the rules of international private law whether these injunction can be enforced there.

4.5 It has been established that the four photos were not at the instruction of the plaintiffs. Neither did the plaintiffs consent to having their photo taken in public. Based on Article 21 of the Dutch Copyright Act, the publication of such photos is not allowed to the extent that the plaintiffs have a reasonable interest in opposing such. A reasonable interest also includes the protection of the right of privacy of the photographed person. If this right is infringed, the answer to the question of whether the publication is unlawful with respect to the photographed person, can only be answered by weighing the various rights in the case at bar; the right to respect the privacy of the photographed persons, on the one hand, and the freedom of speech of the party that published the photograph, on the other hand. In weighing these interests, all special circumstances of the case must be weighed.

4.6 The special circumstances to which value must be attached in the case at bar are the following. As public figures who hold a public office, the plaintiffs must endure media attention, also when they act in a personal capacity and particularly when they appear in public. However, this does not mean that the plaintiffs, when they appear in public in their capacity as private persons, must constantly be prepared that in that situation photos can be taken which can be offered to the media for publication. On behalf of AP, it was put forward during the hearing that the plaintiffs should always bear this in mind. This position of AP entails that that the plaintiffs would never have any privacy in public. In this respect, AP also pointed out that based on settled case law photos made of passers-by in public may be used as illustrative material, as photos of reality, and that the photos concerned portray nothing other than reality. In this respect, AP repudiates that the photos of the plaintiffs are not of passers-by, but were taken because of who the plaintiffs are. Therefore, AP's comparison will not wash. The final special circumstance in the case at bar is that the plaintiffs have made it clear by means of the Media Code and organising media moments (or having these organised) that they value their privacy. AP, which accepted the invitation—which also refers to the Media Code—to the most recent media moment, was aware of that.

4.7 Based on de special circumstances mentioned at paragraph 4.6, we find for now that the standpoint of AP that plaintiffs, when privately appearing in public, must always be prepared for the possibility of photos taken in that situation being offered for publication to the media, constitutes too large an infringement on everyone's right to privacy as set out in article 8 ECHR. Plaintiffs also deserve protection of privacy during private appearances in public space. Only in case a private photograph involves an item of news and/or contributes to a public debate about a matter of public interest, that private photograph may also be published without plaintiffs' permission.

4.8 Because AP makes the photos and does not publish these (that is done by the clients of AP), a clear distinction must be made in this case between the *making* and the *publishing* of photos. Plaintiffs' objections are not directed at the making of the photos, but at the publishing (making public) of the photos, which – according to plaintiffs – is enabled by AP. At the court session plaintiffs have stated that they do not object to the making of photos (in a private situation in public space) by non-professional photographers, as long as these photos are not published and are only displayed in the limited circle of the photographer's family and friends. In principle, also professional photographers can make photos of plaintiffs in a private situation in public space, as long as this does not happen secretly and is done from a fitting distance, but the question whether these photos may also be published must be answered based on the considerations at paragraphs 4.5 and 4.6 above. A photograph made, which initially may not be published, later on may possibly acquire news value or make a contribution to a public debate on a matter of public interest, as a result whereof publication is

justified. This actually means that in some instances AP at first is not allowed, and later on possibly **is** allowed to put a photograph on the “satellite stream”.

4.9 The four photos at the heart of these proceedings, have been taken during a private vacation of plaintiffs and show them during private activities. The photos are in no way connected to plaintiffs’ public or constitutional acting. The publication of the photos in question does not make a concrete or essential contribution to a public debate on a matter of public interest. The fact that plaintiffs and their family many times have given permission to publish similar photos, does not simply mean that the four photos involve news facts or contribute to a public debate on a matter of public interest. That permission rather seems to have been inspired – just as is the case with the subject photos – in order to satisfy the curiosity of certain parts of the public. Also according to AP, the photos are of a “neutral” character, from which can be deduced that the photos have no news value. The report that plaintiffs are on (ski) vacation in Argentina, if this is to be considered as an item of news, can also be published without photos being printed with the article. It is true that AP in this connection has rightly argued that “we live in an image culture” and that a journalist is free to choose the form in which he wants to bring news, but this undervalues that photos have a much more intrusive character than written text and that, for that reason, privacy will sooner be violated. Furthermore, one of the photos shows Princess Amalia, whose privacy – on account of her being underage – is violated sooner than the privacy of adults. For it is not only of importance what the photos display or how they are made, it is also of importance that the plaintiffs need not *always* be mindful of private photos perhaps being published. Contrary to what AP has argued, this does not constitute censorship, but this follows from article 8 ECHR. That other members of the royal family (parents and grandparents of plaintiffs) in the past cooperated in publishing (ski) vacation photos or that plaintiffs cooperate in media moments during which more or less comparable photos are taken, does not lessen the violation of privacy for plaintiffs. The conclusion for now is that the right to respect for privacy outweighs the right to freedom of speech. The publication of the four photos by the various clients of AP therefore can be deemed to be unlawful.

4.10 The customers of AP who have acted unlawfully, as considered above, have been enabled to do so by AP. AP is the “source” of their unlawful acting. The distribution of the photos to its customers by AP can be considered a form of “publication” as referred to in article 21 Copyright Act. We find that this distribution also is unlawful. AP’s defense that publication would only have taken place in a restricted circle of six customers and for that reason would be permitted, is rejected. For the six customers of AP cannot be considered as “end users”, but in their turn (and directly enabled by AP) publish the photos for the benefit of numerous news consumers. Moreover, as it itself has declared, AP offers single customers the opportunity to purchase the photos. AP’s unlawful acting justifies that an enjoinder be imposed on AP.

4.11 An enjoinder to be imposed on AP must be in agreement with the requirements of article 10 paragraph 2 ECHR in connection with a limitation of the freedom of speech. The enjoinder to further distribute the four photographs meets these requirements. It is provided for by law (article 6:162 Netherlands Civil Code), there is a “pressing social need” (it is in the interest of the protection of the reputation or the rights of others, as described in article 10 paragraph 2 ECHR), it is proportional (in relation to the seriousness of the violation of privacy) and functional (because it was neither argued nor shown that the photographs already are part of the “public domain”). The enjoinder to further distribute the four photos shall therefore be imposed on AP, while the penalty shall be measured and set at a maximum as

described below. In answering the question whether a farther-reaching enjoinder may be imposed, it should be mentioned first and foremost that AP does not have a "history" with the plaintiffs. It cannot be assumed that AP will not let itself be led by the content of this ruling when distributing new or other photos of the plaintiffs. Despite the fact that AP distributes a large amount of photos on a daily basis, it is reasonable to require it to not place any photo in a lighthearted manner on the satellite stream and that it test the photos' lawfulness before distributing them. Whether or not the future distribution of similar or other photos of plaintiffs is admissible, depends on the circumstances (news value) and of the context of such moment. This will have to be assessed at the specific moment. To impose a broad enjoinder at this point, that would cover photos not yet existent at this moment, is, then, not considered proportional and, further, may easily lead to discussions on its execution.

4.12. Neither does the Dutch Media Code justify the award of such a prohibitive injunction beyond those four photos. The Media Code cannot be regarded as a binding agreement between the plaintiffs or the Netherlands Government Information Service, on the one hand, and the press (in this case AP) on the other hand. Neither have the plaintiffs alleged so. The plaintiffs are nonetheless free—just as anyone else—to set conditions to an invitation to photographers to take photo and video shoots in their private lives. However, those who accept such invitation are, as far as publishing private photos taken in public areas without permission of the plaintiffs is concerned, subject to the same rules as those who were not present at such media moments. The Media Code is not decisive when it comes to answering the question whether such private photo's may be published, but, rather, the framework as described above at paragraph 4.5 and 4.6.

4.13. In order to grant a provisional injunction in interim injunction proceedings it is further required that the plaintiffs have an urgent interest in obtaining such. This interest is lacking in their claim as contained in the summons in a (broadly) formulated manner. It has not been alleged nor proven that AP possesses other (or more) private photos of the plaintiffs nor that AP is intending to distribute those (before long) among its customers. However, the plaintiffs do have a pressing interest in obtaining the injunction to further distribute the four photos central to the case at bar. For indeed, AP has not rebutted the allegation that those photos are still available through AP nor did it voluntarily promise not to distribute those photos any more. The fact that its regular customers have now promised to no longer publish the photos is insufficient to constitute proper guarantee that the plaintiffs will not run the risk of being confronted anew with the publication of these photos. Why, agents and individual customers may still purchase the photos from AP and then publish them.

4.14. The claim for (an advanced) payment of compensation for damages shall be dismissed. Apart from the lack of any compelling interest in this claim, the plaintiffs have failed to substantiate in any manner their damage. They have not even as much as mentioned a single amount that should be awarded according to them. If the plaintiffs do not provide any basis, the interim injunction court cannot on its own motion proceed to calculate and formulate potential damages.

4.15. AP as the party (principally) found against, will be ordered to pay the legal costs. The attorney fees will be set at the "normal" court-approved legal costs of €816. It was not until the hearing that Mr. Boukema announced to claim an amount of €6,000, which is in violation of due process, because AP has not been able to prepare for this. Further, the opposing party did not receive an hourly fee invoice in a timely manner.

5. The decision

The Interim Injunction Judge

- 5.1. enjoins AP from any further publication and offer for sale of the four photos that AP submitted as exhibit 1 to the court, on pain of a penalty of €1,000 for each time that AP violates this enjoinder entirely or partially and/or for each day that this violation continues, with a maximum of €50,000.
- 5.2. orders AP to bear the costs of these proceedings, estimated at present on the part of the plaintiffs at €85.98 in summons expenses, €262 in court fees and €816 in attorney fees.
- 5.3. declares this ruling immediately enforceable.
- 5.4. denies any further or other claims.

This ruling was handed down by Hon. S.A. Rullmann, Interim Injunction Judge, with the assistance of M. Veraart, Court Clerk, and pronounced in a public session on August 28, 2009.

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District Court of Amsterdam