

de Havilland vs Feud - FX Wins Round in California Court of Appeal

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It is hard to imagine that any one person could initiate separate lawsuits resulting in decisions of substantial importance to the entire U.S. entertainment industry. And when that person is iconic actress Olivia de Havilland – best known for her roles in “Gone With the Wind,” “The Heiress” and dozens of other films from Hollywood’s golden age – and the time between those two decisions spans more than seventy years, the scenario seems even more farfetched. But Ms. de Havilland is indeed the plaintiff whose 1944 lawsuit against Warner Brothers resulted in the decision that effectively broke the control movie studios then exercised over their talent, and she is also the plaintiff whose 2017 lawsuit against the FX Networks cable channel has now resulted in a decision that

confirms the wide-ranging ability of filmmakers to depict real people like de Havilland in entertainment properties like the miniseries “Feud.”

Television producer Ryan Murphy created “Feud: Bette and Joan” as the first installment in a series of television docudramas dedicated to chronicling famous real-life feuds. Airing in 2017, this first installment, starring Susan Sarandon and Jessica Lange, portrayed the bitter rivalry between film stars Bette Davis and Joan Crawford, and how that rivalry was the product of the way Hollywood studios, dominated by men, treated women – especially older actresses.

De Havilland was a longtime friend of Davis and a fellow actress with her at Warner Brothers in the 1930s and 1940s. In “Feud,” de Havilland, portrayed by the actress Catherine Zeta Jones, appears in a fictitious interview conducted at the 1978 Academy Awards ceremony, in which she comments on the rivalry between Davis and Crawford, and the problems women in Hollywood encountered during their era. (Kathy Bates, portraying the late actress Joan Blondell, also appears in a similar, fictitious interview.) In addition, “Feud” shows Davis and de Havilland together in the past, including at the 1964 Academy Awards ceremony and during the making of the film “Hush ... Hush, Sweet Charlotte,” in which de Havilland replaced Crawford as Davis’ co-star. Over eight episodes of “Feud,” the de Havilland character appears in only seventeen minutes of screen time – 4.2% of the series as a whole.

Notwithstanding the brevity of her portrayal, de Havilland, now age 101 and a longtime resident of Paris, France, sued FX and related defendants for violations of her rights of publicity and privacy, as well as false light, arguing that no one has the right to portray her in a film or otherwise without her permission, such that the mere inclusion of her in a fictionalized docudrama like “Feud” violated her rights. She also argued that she was presented in “Feud” as a person who spread malicious gossip, and who used the word “bitch” to describe her sister, the equally iconic actress Joan Fontaine. (While the relationship between de Havilland and Fontaine could itself be the subject of a whole other installment of “Feud,” Murphy has announced that the next airing will be entitled “Feud: Charles and Diana”).

FX and the other defendants immediately moved to strike de Havilland’s complaint under California’s anti-SLAPP statute, relying heavily on the First Amendment and the argument that filmmakers and the authors of creative works have the right to depict actual persons in docudramas like “Feud,” but their motion was denied. The trial court held that the realistic portrayal of de Havilland was insufficiently transformative, such that no First Amendment defense to de Havilland’s right of publicity claim was available under California law. The trial court also held that a reasonable jury could conclude that de Havilland’s portrayal in “Feud” cast her in a false light with respect to her use of vulgar terms like “bitch” to describe Fontaine, and the repeating of gossip (specifically, about the drinking habits of Frank Sinatra).

Working under an expedited appeal schedule due to de Havilland’s advanced age, three California court of appeal judges rejected the trial court’s findings, holding that the First Amendment protects FX’s portrayal of de Havilland in a docudrama without her

permission. The court held that the right of publicity cannot be used to control a celebrity's image by censoring disagreeable portrayals consistent with First Amendment and free speech considerations. The court also held that de Havilland's portrayal in "Feud" was transformative, particularly her appearance in the interview "framing device" that articulates the series' broader concerns about the treatment of aging women, especially in Hollywood. Finally, the court rejected de Havilland's false light claim, finding that, with one possible exception, she was portrayed more favorably than any other person appearing in "Feud." The court also held that de Havilland's claims of damage resulting from her alleged portrayal as a gossip who used inappropriate language were not cognizable, in light of prior interviews de Havilland had given over many decades recounting lighthearted stories about the peccadillos of others, including her co-stars, and her documented use of the words "dragon lady" to describe her sister.

So what's next? Under California's anti-SLAPP law, the defendants can recover attorneys' fees and costs from de Havilland, but she has vowed to appeal further. In addition, her lawyers have characterized the appellate court's ruling as an "industry decision" written by a judge who used to work for NBC and the firm representing FX. So it seems that there will be yet another episode of "Feud: de Havilland v. FX" coming soon to this blog. Stay tuned!