[DE] Injunction claim against future broadcasting of scenes from “Die Auserwählten” rejected

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In a decision of 18 May 2021 (case No. VI ZR 441/19), the *Bundesgerichtshof* (Federal Supreme Court – BGH) ruled that the plaintiff was not entitled to an injunction against future broadcasting of scenes from the film “Die Auserwählten” in order to protect his own image rights and dismissed his application.

The legal dispute was linked to sexual abuse suffered over a period of several years by the plaintiff, among others, as a pupil at the Odenwaldschule in the 1980s. Since 1998, he had been trying to raise awareness of the abuse through the press and by participating in a documentary film. In 2011, he also published an autobiography describing what had happened at the Odenwaldschule. He later received the *Geschwister-Scholl-Preis*, at which point he stopped using his pseudonym. In 2014, the ARD broadcast the film “Die Auserwählten”, which portrays the sexual abuse at the Odenwaldschule and shows where it actually occurred. The plaintiff is depicted as the main character in the film, in which he refused to take part before production began. Claiming that his right to privacy in the form of his own image rights had been violated, he filed for an injunction against further broadcasting of scenes from the film.

After the initial claim was rejected by the district court and a subsequent appeal was also dismissed, the matter was referred to the 6th civil chamber of the BGH. However, the BGH also refused to grant the injunction. It disagreed with the plaintiff’s argument that the portrayal of the fictional character would lead to viewers drawing conclusions about him and therefore concluded that the broadcasting of scenes from the film did not infringe his own image rights under Article 22(1) of the *Kunsturhebergesetz* (Art Copyright Act – KUG), which was based on the right to privacy enshrined in the German constitution. The mere portrayal of a real person by an actor was not a portrait of the person, according to the BGH. Only the actor himself could make such a claim, since he retained his own personality while playing the role and remained recognisable in his own right. In order for someone’s own image rights to be violated, there would need to be a deceptive likeness between himself and the actor, i.e. his character would need to be played by someone who looked like him. Since this was not the case here, the plaintiff could not claim a breach of Article 22(1) KUG. His application for an injunction under Articles 1004(1)(1) and 823(1) of the *Bürgerliches Gesetzbuch* (Civil Code – BGB) in conjunction with Articles 2(1) and 1(1) of the *Grundgesetz*

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(Basic Law – GG) on the grounds that his general privacy rights had been violated was also dismissed. Although the BGH recognised that the plaintiff was affected by the parallels between his own story and that of the character in the film, his privacy rights carried less weight because he himself had openly discussed the subject in public in the past. The defendant's artistic and film-making freedom therefore took priority.

Pressemitteilung des BGH

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021097.html;jsessionid=5A8543E67593F55FD9824AB70C690354.1_cid368

Federal Supreme Court press release

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