COURT OF APPEALS OF WISCONSIN
DISTRICT I
No. 2011AP001769

ROBERT L. HABUSH and
DANIEL A. ROTTIER,

Plaintiffs-Appellants,

v.

WILLIAM M. CANNON,
PATRICK O. DUNPHY and
CANNON & DUNPHY, S.C.,

Defendants-Respondents.

Appeal from the Circuit Court for
Milwaukee County
No. 09-CV-018149
Hon. Charles F. Kahn, Jr.

BRIEF OF PLAINTIFFS-APPELLANTS ROBERT L. HABUSH AND DANIEL A. ROTTIER

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INTRODUCTION

A good name, and the value that resides in it, is one of the most cherished assets that an attorney or any other service professional has. Successful people work tirelessly to build a name and reputation that, over time, serves to attract attention from those who are looking for help. This strong sentiment about the value of a person's name has persisted through time, and the State of Wisconsin affords protection to its citizens' names and reputations because "[p]rivacy and reputation are precious commodities." *Woznicki v. Erickson,* 202 Wis. 2d 178, 195, 549 N.W.2d 699 (1996) (Bablitch concurring).

One of these protections is afforded by Wisconsin's privacy statute which makes the following an invasion of privacy:

> 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.

Wis. Stat. § 995.50(2)(b).

Its fundamental purpose is to prevent the unauthorized exploitation of the commercial value associated with a person's name.

Defendants-Respondents William M. Cannon, Patrick O. Dunphy, and Cannon & Dunphy, S.C. (collectively "Cannon," and separately "Cannon," "Dunphy," or "Cannon & Dunphy, S.C.") are using an internet advertising tactic in which they bid on and pay for the names of Plaintiffs-Appellants Robert L. Habush and Daniel A. Rottier (collectively "Habush and Rottier," and separately "Habush" or "Rottier") in order to generate advertisements for Cannon and a link to the firm's website within the results of searches for Habush or Rottier.

In a typical internet search a user enters a word or phrase she is interested in getting information about, such as "televisions," in the search box on the website of search engines such as Google, Yahoo!, or Bing. The natural results of the search ("organic" results) are produced by the algorithmic processes of the search engine, which seek out

the most relevant information. These search engines have keyword advertising programs whereby advertisers can bid on keywords or phrases that someone might search for. If an advertiser is a successful bidder, any time someone types in that word or phrase, the advertiser's promotional message appears, along with a direct link to the website of the advertiser, before any organic results from the search are listed. The advertiser then pays the bid amount to the search engine each time someone clicks on the link to the advertiser's website. The search engine determines how many sponsored-link advertisements it will permit to be listed at the front of the search results. The order in which the advertisements appear is determined by the amount of the bid. An advertiser can define the geographic location of internet users to which its bid will apply, such as those in Milwaukee County. For example, a dealer might successfully bid on the keywords "used cars," and an ad for that dealer will be triggered whenever those keywords are searched by internet users in the defined area.

In this case, however, Cannon bid on the surnames "Habush" and "Rottier," with the result that advertisements for Cannon (along with a direct link to their website) appear above the organic results in response to searches undertaken by people located in the defined area looking for information about Habush or Rottier. The undisputed purpose and effect of this advertising tactic is to tap into the population of internet users who already know the name or reputation of Habush or Rottier and are looking specifically for more information about them — an audience of people that Cannon would not otherwise have direct access to. It is the bidding on the names of Habush or Rottier that triggers the appearance of Cannon's advertisement in the Habush or Rottier search results.

This violates Wisconsin's privacy statute because Habush's and Rottier's names are being used for competitive advertising purposes, in a manner that takes advantage of the reputation, good will, and public name-recognition associated with their names. The crux of Section

995.50(2)(b), and the misappropriation tort that it codified, is that using another's name to exploit its value is an unreasonable and actionable invasion of privacy.

Although finding that this advertising use of the names of Habush and Rottier was an invasion of their privacy, the court below applied the "unreasonably invaded" language in the prefatory Subsection (1) of Section 995.50 as an additional element and determined that this invasion of privacy was not unreasonable. The lower court incorrectly interpreted the statute. This "unreasonably invaded" reference merely introduces or describes the subsections of Section 995.50(2). Moreover, even if "unreasonably invaded" is viewed as a required element, Judge Kahn equated "unreasonableness" with "irrational," an excessively permissive definition. Most every decision to hijack another's good name has a rational basis. And in its "weighing and balancing" to decide reasonableness, the lower court considered factors which have no grounding in the privacy statute itself or in the common-law misappropriation

tort on which Subsection (2)(b) is based. In so doing, the circuit court rejected a more limited and appropriate definition of unreasonableness — one which would focus on whether the invasion was more than "incidental" or "trivial" — which would preserve the very purpose of Subsection (2)(b); namely, preventing someone from exploiting or capitalizing upon the commercial value associated with a living person's name.

Cannon is using the names of Habush or Rottier in an effort to divert people who have indicated an interest in obtaining information about Habush or Rottier by searching their names. That, in and of itself, makes the complained-of conduct unreasonable and actionable under Wisconsin's privacy statute. Rather than relying solely on their own name-recognition and reputations, Cannon is taking advantage of and utilizing for themselves the hard-earned name-recognition and reputations belonging to Habush or Rottier. This is a blatant violation of Habush's and Rottier's privacy rights to control the commercial exploitation of their

names. Unless this decision is reversed, the lower court's construction will for all practical purposes operate as a *de facto* judicial repeal of Subsection (2)(b). Lawyers and other service professionals will have a green light to piggy-back on the names of their individual competitors in order to get their advertisements in front of potential clients who are not looking for them. Not only is this "reap[ing] where another has sown," it is "a form of commercial immorality." *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 392, 280 N.W.2d 129 (1979). It is also illegal under a proper construction of Section 995.50.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court erred in concluding that "unreasonably" in Wisconsin Statutes section 995.50(1) is a separate and distinct element of an actionable invasion of privacy under Section 995.50(2)(b).

The circuit court decided that a plaintiff must establish not only that a privacy invasion occurred, but also that the invasion was done unreasonably.

2. If "unreasonably" is a separate and distinct element of a cause of action under Wisconsin's privacy statute, whether the circuit court erred in ruling that Cannon's use of Habush's or Rottier's names did not unreasonably invade Habush's and Rottier's privacy rights.

The circuit court decided that Cannon's use of Habush's and Rottier's names was an invasion of Habush's and Rottier's privacy rights under Subsection (2)(b), but was not done unreasonably.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

The decision warrants publication because it will address important individual rights in the commercial use of a person's name. It will enunciate a rule of law based on the privacy statute that will apply to internet advertising and will significantly contribute to the relevant law, since this appears to be a case of first impression.

Given the complexity and importance of the issues involved, oral argument is warranted and requested.

STATEMENT OF THE CASE

Nature of the Case

Habush and Rottier allege that Cannon invaded their privacy rights by using their names without consent for advertising or trade purposes in violation of Wisconsin Statutes section 995.50(2)(b). (A-App.29-52, R.1:1-25.) They seek an injunction prohibiting the use of their names to trigger Cannon's internet advertising. (*See* A-App.38-39, R.1:11-12.) Cannon asserted multiple defenses for their conduct, including purported protection by the First Amendment, alleged "unclean hands," and an alleged failure to establish all the elements of an invasion of privacy claim under Wisconsin law. (R.92:12-24, 32-43.)

Procedural Status and Disposition in the Trial Court

Both Plaintiffs-Appellants and Defendants-Respondents filed cross-motions for summary judgment based upon the undisputed facts of the case. (*See generally* R.105, R.91.) The parties agreed that there were no disputed material facts, that the question of whether Habush's and Rottier's privacy rights are being unreasonably invaded is one

of law, and that the circuit court could determine the outcome of the case based upon the paper record and without a need for a trial. (A-App.56-58, R.130, 131; R.92:11.)

The circuit court granted Cannon's motion for summary judgment, dismissing the case. (A-App.28, R.133:27.) The circuit court's reasoning in reaching this decision is contained in a written opinion. (*See generally* A-App.2-28, R.133:1-27.) While the circuit court found that Cannon invaded Habush's and Rottier's privacy rights by using their names for advertising purposes without consent, and rejected all of Cannon's defenses in this regard, the court decided that this invasion of privacy was not unreasonable and therefore not prohibited by the privacy statute. (A-App.12, 14, 17-18, 27-28, R.133:11, 13, 16-17, 26-27.) Final judgment based on this summary-judgment decision was entered on July 27, 2011. (R.140.)

Standard of Review

This Court's review of the circuit court's summary-judgment determinations is *de novo*. *Hardy v.*

Hoefferle, 2007 WI App 264, ¶ 6, 306 Wis. 2d 513, 743 N.W.2d 843. Interpretation of Wisconsin's right of privacy statute is a question of law that is reviewed *de novo*. *State v. Cole*, 2000 WI App 52, ¶ 3, 233 Wis. 2d 577, 608 N.W.2d 432. And the question of unreasonableness, when a case is decided on a summary judgment "paper record," is a matter of law subject to *de novo* review without deference to the circuit court's ruling. *Garcia v. Regent Ins. Co.*, 167 Wis. 2d 287, 303, 481 N.W.2d 660 (Ct. App. 1992). The parties agree that there are no disputed issues of material fact and that the only issues in this case, including the unreasonableness issue, are questions of law. (R.92:11; A-App.56-58, R.130, 131); *see also In re Commitment of Tremaine Y.*, 2005 WI App 56, ¶ 9, 279 Wis. 2d 448, 694 N.W.2d 462 (application of a statute to undisputed facts is a question of law subject to *de novo* review).

Statement of Facts Relevant to Issues Presented for Review

Habush and Rottier have substantial and well-known reputations and name-recognition, both as personal-

injury trial lawyers and as charitable givers. (A-App.63-64, R.107:17-18; A-App.66-69, R.107:24-27; A-App.122-23, R.107:167-68; A-App.88-89, R.107:130-31.) Cannon engaged in a pay-per-click advertising campaign on search engines such as Google, Yahoo!, and Bing, by which Cannon bid on and paid money for the use of Habush's and Rottier's names as keywords to trigger advertisements when the names "Habush" or "Rottier" are searched by an internet user. (A-App.54, R.107:30.) The resulting advertisements and a link directly to the Cannon website are displayed in a position above the naturally occurring (organic) search results. (A-App.3-4, R.133:2-3.) These advertisements contain a self-aggrandizing promotional message for Cannon, such as "Milwaukee's leading personal injury attorneys—free initial interview." (A-App.4, R.133:3; A-App.41-52, R.1:14-25.) Cannon withdrew any identity defense and agree that the use of the surnames "Habush" and "Rottier" is both legally and factually sufficient to identify the living individuals Robert L. Habush and Daniel A. Rottier. (A-App.54, R.107:30.)

Cannon also bid on the name "Robert Habush" and the names of attorneys other than Habush or Rottier, but discontinued such use sometime after the commencement of this action. (A-App.62, R.107:16; A-App.75-76, R.107:38-39.) The intended and stated goal of Cannon's competitor-keyword advertising campaign on Google and other search engines is to gain visibility in the audience of internet users looking for their competitors (such as Habush or Rottier) and to take advantage of the "local mind share" belonging to their competitors (such as Habush or Rottier). (A-App.77, 82; R.107:42, 47.) The marketing firm employed by Cannon to implement this advertising tactic prepared a document describing the services it would provide:

> **Competitor Terms** – We will add any terms that apply to your competitors' names (for example: Habush or [Redacted]). This will allow you to expand your brand presence into search terms which are normally impossible to rank for organically and take advantage of competitors' local mind share.

(A-App.77, R.107:42 (underscores added).)

In a subsequent similar document, the marketing firm stated:

> **Competitor Terms** – We will add any terms that apply to your competitors' names (for example Habush or [Redacted]). This will allow you to rank highly for

> those branded competitors' terms and gain visibility with your competitors' audience.

(A-App.82, R.107:47 (underscores added).)

Cannon "take(s) advantage of [Habush's and Rottier's] local mind share" in that they can get their advertisements in front of potential users of legal services who had Habush or Rottier in mind due to name-recognition and reputation. (A-App.71-73, R.107:34-36.) Cannon achieves visibility within Habush's or Rottier's audience by targeting the audience of individuals that have already heard something about Habush or Rottier and are interested in contacting or obtaining information about them. (A-App.74, R.107:37.)

Cannon directed the advertising agency they are working with to make sure that bids on Habush's and Rottier's names are sufficient to ensure that Cannon and Dunphy's advertisement be in the first position among the search results for attorneys such as "Habush" or "Rottier." (A-App.80, R.107:45.) This is a recognition of the importance of primacy in getting someone's attention. (*See*

A-App.106, R.107:149.) Cannon has not received consent from Habush or Rottier, written or otherwise, to use Habush's or Rottier's names for advertising purposes. (A-App.62, R.107:16.)

ARGUMENT

I. UNREASONABLENESS IS NOT A SEPARATE ELEMENT UNDER WISCONSIN STATUTES SECTION 995.50(2)(b).

A. THE STATUTORY TEXT INDICATES THAT SECTION 995.50(1) DOES NOT IMPOSE A SEPARATE UNREASONABLENESS ELEMENT.

Construing Section 995.50 to require a separate showing of unreasonableness to succeed on an invasion of privacy claim, the circuit court determined that while Habush and Rottier's privacy had been invaded by Cannon, the invasion was not actionable under Subsection (2)(b) because it was not an unreasonable invasion. (*See* A-App.17-18, 27; R.133:16-17, 26.) Section 995.50 states:

> (1) The right of privacy is recognized in this state. One whose privacy is unreasonably invaded is entitled to the following relief:
> ...

> (2) In this section, "invasion of privacy" means any of the following:
>
> > (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...
> >
> > (c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed...
> >
> > (d) Conduct that is prohibited under s. 942.09 [(prohibiting certain depictions of nudity)]...

Wis. Stat. § 995.50.

Rather than a separate and distinct element of a cause of action, the word "unreasonably" in the prefatory sentence of Subsection (1) was meant to merely introduce and describe the four types of privacy invasions in Wisconsin that are in and of themselves unreasonable and actionable conduct. This is evidenced by an examination of the language of the statute itself. Three of the four invasions of privacy defined in the statute contain an explicit

unreasonableness standard. Subsection (2)(a) proscribes intrusions that would be highly offensive to a "reasonable" person. Subsection (2)(c) proscribes publicity given to private facts, which would be highly offensive to a "reasonable" person if the defendant acted "unreasonably" or recklessly as to whether there was a legitimate public interest. And Subsection (2)(d) relates to a criminal statute that contains a "reasonable expectation" element.

It would be nonsensical to engraft, as the circuit court has done, an additional unreasonableness requirement on top of the already existing unreasonableness elements in Subsections (2)(a), (2)(c), and (2)(d). Conversely, having expressly added reasonableness elements into those subsections, the legislature chose not to include any reasonableness element in Subsection (2)(b). This is a clear indication that the legality of using another person's name without consent for advertising purposes was not meant to depend on a given court's assessment of reasonableness or unreasonableness. If the legislature had meant that result, it

would have added the unreasonableness requirement in the Subsection (2)(b) definition just as it did for the other subsections.

Statutory language should be interpreted "in the context in which it is used; not is isolation but as part of a whole...and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit* Court, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. It also should be read to give reasonable effect to the words to avoid "surplusage." *Id.* And a court may reject words where reasonably necessary or inferable to accomplish the legislative intent. *Foster v. Sawyer County*, 197 Wis. 218, 223, 221 N.W. 768 (1928); *Nichols v. Halliday*, 27 Wis. 406, 408 (1871) (stating that constructions that render a statute ineffectual are to be avoided). The legislature knew how to make "unreasonableness" a necessary element of a Subsection (2)(b) violation just as it did in the other subsections. It determined as a matter of policy in the language of these subsections what the elements of each particular violation

were. To find that "unreasonably invades" in the preamble of the statute, although completely redundant to the other subsections, somehow should relate to Subsection (2)(b) produces an unreasonable, if not absurd, result.

The circuit court in its written decision posed a hypothetical to try to explain why the word "unreasonably" in the preamble is a separate element and not merely an introductory descriptive phrase. (A-App.18, R.133:17.) But the court's hypothetical is not persuasive and is premised on an incorrect interpretation of the language in Subsection (2)(a). Subsection (2)(a) does not permit relief unless the invasion is of a nature that would be highly offensive to a "reasonable" person. This is an objective standard. If, as Judge Kahn posited, a man burst into a women's bathroom because two letters were blocked and he saw only the word "men," this circumstance could readily be excused under the existing language of Subsection (2)(a) on grounds that it would not be highly offensive to a reasonably objective person with knowledge of the circumstances under which this

occurred. Rather than supporting the interpretation that "unreasonably invades" imposes a separate element for an actionable privacy violation, the trial court's example illustrates why it does not. It adds nothing but redundancy to the standard adopted by the legislature in Subsection (2)(a). Moreover, the court never even attempted an explanation of what "unreasonably invaded" might add of substance to Subsections (2)(c) or (2)(d) — likely because it cannot plausibly be done.

The legislature already did the balancing in the language of each of the subsections of Section 995.50(2) to determine when the conduct in question is unreasonable and actionable. If "unreasonably invaded" means anything other than what is already defined by the legislature in Subsection (2) as invasions of privacy, that balancing will be significantly altered. For example, conduct made a crime under Section 942.09 would not be actionable under Section 995.50(2)(d) unless it meets a separate and undefined unreasonableness requirement. In its Subsection (2)(b)

unreasonableness balancing, the legislature did not prohibit using the name of a living person for purposes such as literary works or reporting a newsworthy event. Rather, the legislature limited the reach of the statute (consistent with the underlying misappropriation tort) to those uses of another living person's name for purposes of advertising or trade. *See Flores v. Mosler Safe Co.*, 164 N.E.2d 853, 857 (N.Y. 1959) (trade purpose means a use that would "draw trade to [the defendant's] firm"); *see also* Restatement (Third) of Unfair Competition § 47 (1995). This limitation evinces a legislative determination that if the unauthorized use of a living person's name is for advertising or trade purposes, it is unreasonable and actionable. It is undisputed that the use of the names of Habush or Rottier is for the competitive purpose of getting the advertisements of Cannon in front of internet users who are looking for Habush or Rottier in order to draw trade to Cannon. This is exactly what Subsection (2)(b) was designed to prohibit.

B. EXTRINSIC AIDS SUPPORT THE INTERPRETATION THAT "UNREASONABLY INVADED" IS NOT A SEPARATE ELEMENT.

At minimum, the legislature's use of the phrase "unreasonably invaded" in the context of this statute can be reasonably understood by well-informed persons in different senses and is therefore ambiguous. This should cause the Court to consider extrinsic sources to ascertain the meaning of this language. *See Kalal*, 2004 WI 58, ¶¶ 47, 50.

Legislative history and common law belie the notion that the legislature meant to interject a separate "unreasonableness" requirement into Subsection (2)(b). The Wisconsin statute was modeled after the New York statute, which was described in the legislative history of the act as "quite clear and comprehensive enough" (A-App.133-34.)[1] The New York statute, including the equivalent of Subsection

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[1] The legislative history is a matter of public record, and it is appropriate for this Court to take judicial notice of the drafting history to help determine the meaning of the language used in the statute. *Nekoosa-Edwards Paper Co. v. Pub. Serv. Comm'n*, 8 Wis. 2d 582, 591, 99 N.W.2d 821 (1959). This is particularly proper when the (Continued)

(2)(b) of Wisconsin's law, has no "unreasonably invaded" requirement. And, an analysis of the bill drafted by the Legislative Reference Bureau summarized the proposed statute by saying that "one whose privacy is invaded is entitled to ...", without any reference to an additional separate unreasonableness requirement. (A-App.128.)

The Privacy Statute "shall be interpreted in accordance with the developing common law of privacy...". Wis. Stat. § 995.50(3). Common law supports the view that "unreasonably invaded" was not meant to impose a separate element in an invasion of privacy claim. The thrust of the misappropriation tort upon which Section 995.50(2)(b) is based is that exploiting another's name by using it for advertising purposes without consent is unreasonable conduct and an invasion of privacy. *See* Judith Endejan, *The Tort of Misappropriation of Name or Likeness Under Wisconsin's New Privacy Law*, 1978 Wis. L. Rev. 1029, 1040. The use of

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Court is aiming to adopt a construction that is "consistent with the purpose of the act." *Id.*

another's name without consent "for commercial gain should be actionable [under subsection 2(b)] in nearly every case." *Id.* at 1057.

"When a name or picture has been used for advertising purposes or for the purposes of trade, without the proper written consent, the courts have strictly enforced the statutory prohibition...and have liberally granted relief...". *Beverley v. Choices Women's Med. Ctr., Inc.*, 532 N.Y.S.2d 400, 403 (App. Div. 1988). In *Beverley*, the New York intermediate appellate court held that a violation of New York's privacy statute had occurred because one of the goals of the subject advertisement was "the possible attraction of a viewer of [the advertisement] to do business with the defendant corporation." *Id.*

Indeed, appellate cases in Wisconsin with significant discussion of any subsection of the privacy statute do not set forth unreasonableness as a separate element of an actionable claim on top of the elements defined for each

specific type of invasion.[2] Moreover, there are model jury instructions for privacy invasions under Subsections (2)(a), (2)(c), and (2)(d), and they do not list a separate element of unreasonableness over and above the elements already described for the particular offense. *See* Wis. J.I.-Civil 2550, 2551. A comment to instruction 2550 even states that an instruction for a Subsection (2)(b) claim is not warranted because the statutory description of that claim is self-explanatory. *See* Wis. J.I.-Civil 2550.

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[2] *See, e.g., Poston v. Burns*, 2010 WI App 73, ¶ 28, 325 Wis. 2d 404, 784 N.W.2d 717 (finding as a matter of law that there was no invasion of privacy because there was no intrusion "of a nature highly offensive to a reasonable person"); *Gillund v. Meridian Mut. Ins. Co.*, 2010 WI App 4, ¶¶ 30, 31, 323 Wis. 2d 1, 778 N.W.2d 662 (stating that a violation of subsection (2)(a) does not require a particular state of mind of the actor but "merely requires" the plaintiff to demonstrate that the invasion is highly offensive to a reasonable person, and that an actionable violation of subsection (2)(c) occurs when publicity is given to a person's private life in a way that is highly offensive to a reasonable person and without reasonable regard for whether there is a legitimate public interest); *H&R Block v. Swenson*, 2008 WI App 3, ¶ 26, 307 Wis. 2d 390, 745 N.W.2d 421 (not including unreasonableness as an element in its description of a Subsection (2)(b) claim); *Ladd v. Uecker*, 2010 WI App 28, ¶ 20, 323 Wis. 2d 798, 780 N.W.2d 216 (no stated "unreasonably invaded" requirement); *Pachowitz v. Ledoux*, 2003 WI App 120, ¶ 18, 265 Wis. 2d 631, 666 N.W.2d 88 (same); *Olson v. Red Cedar Clinic*, 2004 WI App 102, ¶ 8, 273 Wis. 2d 728, 681 N.W.2d 306 (same).

Wisconsin's Supreme Court, shortly after enactment of Section 995.50, emphasized that Subsection (2)(b) is supported by the public policy considerations of controlling "the commercial exploitation of aspects of a person's identity" and the "prevention of unjust enrichment of those who appropriate the publicity value of another's identity." *Hirsch*, 90 Wis. 2d at 391. Both public-policy interests are implicated here — Habush and Rottier should be permitted to regain control of the commercial misuse of their names, and Cannon should be prevented from continuing to enjoy the unjust enrichment that their use of Habush's and Rottier's names is providing. Only a person with the name "Habush" or "Rottier" should be able to use and exploit those names for commercial gain.

The Restatement of the Law on the misappropriation tort aptly states that a defendant is liable when he "appropriate[s] to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness."

Restatement (Second) of Torts § 652C cmt. c, "Appropriation of Name or Likeness" (1977) (emphasis added). That sort of free riding on another's name to capitalize on the values associated with it for an advertising purpose is by itself unreasonable and is prohibited by the identity misappropriation tort upon which Section 995.50(2)(b) is based. Imposing the additional requirement that someone whose name is exploited for advertising purposes must also show that this invasion is "unreasonable" would result in a privacy statute much less protective than the misappropriation tort upon which it is based. The touchstone of the tort is taking advantage of (exploiting) the commercial value in someone's name for advertising purposes, not some undefined additional element of unreasonableness.

Statutory provisions are to be harmonized to give effect to the leading idea behind the statute. *Pella Farmers Mut. Ins. Co. v. Hartland Richmond Town Ins. Co.*, 26 Wis. 2d 29, 41, 132 N.W.2d 225 (1965). The proper interpretation of the legislature's inartful use of the words

"unreasonably invaded" in the introduction to the relief clause of the statute is that they were meant merely as a shorthand way to describe or refer to the four distinct prohibitions in Subsection (2). That is the only way to harmonize Subsection (2)(b) of the statute with the misappropriation tort upon which it is based. Any other interpretation substantially undercuts the balancing that the legislature did in adopting these subsections. This language should not be construed, as the circuit court did, to create a safe harbor for actors to purportedly "reasonably" invade another's privacy rights. There is no such concept in any common or statutory law involving the misuse of a living person's name. If the lower court's interpretation that a separate unreasonableness analysis is required each time before a violation of Subsection (2)(b) can be found is allowed to stand, it would put Wisconsin out of step with the identity-misappropriation law throughout the rest of the country. The use of a person's name for a competitive advertising purpose is actionable

under the common law, and was meant by our legislature to be *per se* unreasonable and illegal.

II. EVEN IF UNREASONABLENESS IS A REQUIRED ELEMENT OF A SUBSECTION (2)(b) CLAIM, IT HAS BEEN CLEARLY ESTABLISHED IN THIS CASE.

Even if unreasonableness is a separate element that must be established, Cannon's free-riding on the Habush and Rottier names cannot be correctly viewed as anything other than an unreasonable invasion. The circuit court found in Habush and Rottier's favor on each element of their cause of action, except for the purported additional element of unreasonableness. (A-App.17-18, 27; R.133:16-17, 26.) The court found as a matter of law that Cannon invaded Habush's and Rottier's privacy by using their names for advertising or trade purposes without consent (A-App.11-15; R.133:10-14) and that none of Cannon's affirmative defenses excused their conduct (A-App.6-10, R.133:5-9).

The circuit court's finding that Cannon's bidding on and paying money for Habush's and Rottier's names as keywords was a "use" for advertising or trade

purposes is consistent with cases in the trademark context involving the sort of sponsored-link advertising at issue here. *See Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 129 (2d Cir. 2009); *Hearts on Fire Co. v. Blue Nile, Inc.*, 603 F. Supp. 2d 274, 278, 282 (D. Mass. 2009) ("use" under trademark law is not so narrow as to preclude a finding of "use" in the "purchase of a competitor's trademark to trigger search-engine advertising"). The same rationale applies to finding a "use" under Wisconsin's privacy statute in Cannon's purchase of Habush's or Rottier's names as keywords for search-engine advertising.

However, relying upon a definition of unreasonableness that would eviscerate the reach of Wisconsin's privacy statute, the circuit court found that Habush's and Rottier's privacy was not unreasonably invaded. (A-App.18, 27-28; R.133:17, 26-27.) The circuit court erred.

A. THE STANDARD OF "UNREASONABLENESS" ENUNCIATED BY THE CIRCUIT COURT UNDERMINES THE PURPOSE OF THE PRIVACY STATUTE.

According to the circuit court, "unreasonably" in the context of the privacy statute means "[n]ot guided by reason; irrational or capricious" and "irrational or lacking 'a rational basis.'" (A-App.18, R.133:17.) If the standard of unreasonableness enunciated by the circuit court persists, no invader of another's privacy could be found liable under the privacy statute if the invader acted with a rational and well-thought purpose, since irrational and capricious are the apparent touchstones of the faulty "unreasonableness" standard under which Judge Kahn decided this case. (*See* A-App.18, R.133:17.)

Consider the "peeping-tom" who carefully implements a plan to place video cameras in positions outside a person's bedroom windows to investigate that person's claims for disability benefits. Although he would very likely be found to have intruded upon the privacy of another in a

way that was highly offensive and in a place that the person considered private in violation of Subsection (2)(a), should that conduct be excused as an invasion of privacy because it had the rational purpose of countering the person's disability claim? Or consider an employer who learns highly sensitive and private information about an employee's marriage or children problems and tells other potential employers about these problems. While that would very likely satisfy the requirements of Subsection (2)(c) by giving publicity to matters of another's private life in a way that was highly offensive and unreasonable, should the disclosure be immune from an invasion-of-privacy suit because the employer rationally concluded this was something that other potential employers would like to know? And finally, why should an advertiser who uses the personal name of a well-known competitor to direct potential clients to the advertiser's professional services be excused from a violation of Subsection (2)(b) because his action was not capricious but

rather was motivated by the rational desire to attract more clients?

Virtually any use of another's name or likeness that has an advertising or trade purpose will have a rational or non-capricious basis. Such conduct in most cases will be the end-result of a rational determination to derive some advertising or trade benefit. For example, if a restaurateur, without permission, trades upon a celebrity's well-known name by advertising that the celebrity frequents the restaurant, that exploitive conduct would certainly meet the elements of Subsection (2)(b), and would violate the underlying appropriation tort. But under the circuit court's decision, in Wisconsin, there can be no injunctive or other relief under the statute unless the decision is irrational in light of all the relevant factors.

The circuit court's standard, and the absurd results it leads to, cannot have been what the legislature meant by the inclusion of the words "unreasonably invaded." It is hard to see how any plaintiff that has successfully

established the for-advertising-or-trade-purposes element of Subsection (2)(b) could survive the circuit court's unreasonableness analysis. This is a misguided interpretation of the privacy statute that largely nullifies it and should not be allowed to stand.

The circuit court's definition of unreasonableness as irrational or capricious was taken from a case involving a challenge of a state agency decision as unreasonable and arbitrary. *See Glacier State Distribution Servs., Inc. v. Wis. Dep't of Transp.*, 221 Wis. 2d 359, 370, 585 N.W.2d 2d 652 (Ct. App. 1998). The definition of unreasonable as lacking a rational basis appears appropriate and sensible in the circumstances of challenging an agency action. But that definition makes no sense in the circumstances of an invasion-of-privacy case between private parties who are business competitors.

Being reasonable is what is "'[f]it and appropriate to the end in view.'" *City of Madison v. Baumann*, 162 Wis. 2d 660, 678, 470 N.W.2d 296 (1991)

(quoting *Black's Law Dictionary* 1431 (rev. 4th ed. 1968). Being unreasonable is, obviously, the opposite. Here, the end in view is the protection of individual privacy rights as defined by the legislature, and "unreasonably invaded," if it is determined to be a separate statutory element, should at least be interpreted in a manner that furthers, rather than erodes, this view. A "cardinal rule" of statutory interpretation is that "'the purpose of the whole act is to be sought and favored over a construction which will defeat the manifest object of the act.'" *Kalal*, 2004 WI 58, ¶ 38.

Statutory and common law evinces "a clear recognition of the importance the legislature puts on privacy and reputational interests of Wisconsin citizens" and a public policy in favor of protecting those interests. *Woznicki*, 202 Wis. 2d at 187. Those public policies, the express language used by the legislature in Subsection (2)(b), and the common law are what should drive any interpretation of unreasonableness in the context of an invasion-of-privacy case such as this. Cannon's invasion of Habush's and

Rottier's privacy rights, by using their names to trigger the appearance of Cannon and Dunphy's advertising anytime an internet user searches for Habush or Rottier, cannot be justified and excused because it was a rational effort to place competitive advertising in front of legal consumers.

B. ANY INTERPRETATION OF "UNREASONABLY INVADED" MUST NECESSARILY INCLUDE A USE THAT EXPLOITS THE COMMERCIAL VALUE OF ANOTHER'S NAME FOR AN ADVERTISING PURPOSE.

The word "unreasonably" in Section 995.50(1) should be construed in a fashion that does not undermine the purpose of the statute. The words should be harmonized to give effect to the leading idea behind the statute. *Pella,* 26 Wis. 2d at 41. That is logically accomplished by interpreting this purported unreasonableness element as a substitute for the common law doctrine of "incidental use," which is designed to avoid application of the identity-misappropriation tort to circumstances involving incidental, trivial, or

accidental uses which do not take advantage of (exploit) the commercial value associated with a person's name.

As previously noted, the statute itself requires that it be interpreted in accordance with the common law. Wis. Stat. § 995.50(3). The common-law doctrine of "incidental use" prevents the Subsection (2)(b) tort from being applied to minor or trivial uses of another person's name, or in publications with news or other literary or entertainment value, which do not exploit the commercial value associated with a living person's name. The words "unreasonably invaded" should not be construed any broader than necessary to keep these incidental uses from the statute's reach. This more limited interpretation of the words "unreasonably invaded" is supported by reference to the law of misappropriation in other jurisdictions. *See, e.g., Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999) (stating that under Texas law, a misappropriation tort claim requires use of the plaintiff's name or likeness "for the

value associated with it, and not in an incidental manner or for a newsworthy purpose..." (emphasis added)).

This application of the incidental use doctrine is further demonstrated in *Netzer v. Continuity Graphic Associates, Inc.*, 963 F. Supp. 1308 (S.D.N.Y. 1997), a case that applied the New York invasion of privacy/ misappropriation statute. In *Netzer*, the plaintiff alleged that the defendants invaded his privacy by using his name as an alias for a comic book character without his consent. *Id.* at 1308. While the court recognized that the defendants' conduct had met the literal requirements of the statute, the plaintiff was not entitled to relief because this sort of incidental, "isolated, fleeting, or de minimis" use of a person's name is beyond the reach of the statute. *Id.* at 1325-26. The words "unreasonably invaded" should be construed as accomplishing that same limited purpose under the Wisconsin's privacy statute. In this case, Cannon's systematic and purposeful use of Habush's and Rottier's names for generating internet advertisements cannot be

characterized as a trivial, fleeting, or incidental use that can properly be excluded from the reach of Subsection (2)(b).

The common law clearly shows that where conduct is exploitive in nature — rather than incidental, trivial, or accidental — such conduct is prohibited by the misappropriation tort and privacy statutes that have codified that tort. The Restatement sets forth a bright-line rule for whether an unauthorized use of another's name is unreasonable and actionable, as opposed to merely incidental — namely, whether the user is seeking to obtain the benefit of "the commercial or other values associated with the name...". Restatement (Second) of Torts § 652C cmt. d.

Courts have relied on this Restatement language in finding that the alleged use was not incidental but rather an actionable commercial use from which the defendant received a benefit associated with the plaintiff's name. *Henley*, 46 F. Supp. 2d at 596-97; *James v. Bob Ross Buick, Inc.*, 855 N.E.2d 119, 123 (Oh. Ct. App. 2006) (use of plaintiff's name was not incidental but was actionable because the name had

commercial value); *AFL Philadelphia LLC v. Krause*, 639 F. Supp. 2d 512, 530-531 (E.D. Pa. 2009) (use was not incidental because it was for the purpose of taking advantage of the reputation and good will that plaintiff had developed). Nothing in the undisputed facts of this case remove Cannon's conduct from this rule of universal prohibition.

Here, the undisputed facts demonstrate that Cannon's advertising tactic was designed to, and has the effect of, exploiting (taking advantage of) the reputation and goodwill built up in Habush's and Rottier's names over the course of long and successful careers. *See* Statement of Facts, *supra*, pp. 11-15. Cannon's advertising agency touted the goal of the competitor keyword advertising program to "take advantage" of the "local mind share" of competitors such as Habush or Rottier, and to "gain visibility" in their audience. (A-App.77, 82; R.107:42, 47.) This admittedly enabled Cannon and Dunphy to expand their brand presence into search terms (competitors' names) that normally are "impossible" to rank for organically. *Id.* And Cannon

emphasized that he wanted the bidding on competitors' names to be sufficient to cause his firm's advertising to appear first among the search results for any of the selected competitors, including individual attorneys such as Habush or Rottier. (A-App.80, R.107:45.) Cannon clearly seeks to capitalize on the importance of primacy in capturing the attention of people who are looking for Habush or Rottier. (*See* A-App.106, R.107:149.)

This tactic falls squarely with in the confines of the misappropriation tort upon which Section 995.50(2)(b) is based. By bidding on the names "Habush" and "Rottier" to trigger Cannon's advertisements each time an internet user searches for those names, Cannon is capitalizing upon the name-recognition that is associated with Habush or Rottier. It is Cannon's use of the names of direct competitors that actually triggers the advertising. There is no common-law support for the notion that the unauthorized use of an individual's name by a competitor, in order to capitalize on the name-recognition or other commercial values associated

with that name, and to derive a competitive benefit from that use, is anything other than unreasonable and a violation of the misappropriation privacy tort. If the meaning of the phrase "unreasonably invaded" is construed so broadly that it permits this advertising tactic, the statute will be inconsistent with the common-law tort upon which it is based. Where, as here, the undisputed evidence shows the intentional use of a competitor's name in a manner which seeks to take advantage of the commercial value in that name, such use cannot be viewed as anything but unreasonable, and prohibited by Section 995.50, as a matter of law. Otherwise, the words "unreasonably invaded" will not be harmonized to give effect to the leading idea behind the statute. *Pella,* 26 Wis. 2d at 41.

While the present case appears to be one of first impression in United States courts, a court in Israel recently found a medical company and certain Google affiliates liable for invading the privacy of an Israeli doctor by misappropriating his name and using it as a keyword to generate sponsored links. *See Klein v. Proporzia P.S.C. Ltd.*

et al, C.A. 48511-07 (Tel Aviv-Jaffa Magistrate Court, Sept. 18, 2011).[3] The Tel Aviv court found an invasion of the doctor's privacy and determined that the doctor had a right to demand that his name not be used as part of a sponsored-advertisement campaign without his consent. (A-App.158.) This case, while obviously not controlling, does help illustrate the sound application of the law to these facts. The Israeli court recognized — as Habush and Rottier ask this Court to do — that exploiting the notoriety of someone else's name through an internet search engine in order to derive an advertising benefit violates a basic human right, is not protected by any other competing interest, and is unlawful.[4] (A-App.149, 151, 158.)

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[3] Included in Habush and Rottier's Appendix are a copy of the opinion as originally written in Hebrew (A-App.135-148), a translation of that opinion into English (A-App.149-162), and an affidavit from a certified and registered court interpreter attesting to the accuracy of the translation (A-App.163).

[4] Though not controlling, foreign decisions can add value to a legal analysis. Shirley S. Abrahamson, *All the World's a Courtroom: Judging in the New Millenium*, 26 Hofstra L. Rev. 273, 284-85 (1997-98).

The circuit court completely overlooked the exploitive nature of this advertising tactic in its analysis. The legislature's use of the phrase "unreasonably invaded" could not logically have been meant to bless the intentional and exploitive use of a living person's name by a competitor for advertising purposes that is occurring here. The most important asset of an attorney or any other service provider is the value associated with his or her name. Allowing competitors to trade off that value cannot be viewed as reasonable given the scope and purpose of Subsection (2)(b). The phrase "unreasonably invaded" should be construed in a manner that does not create an exception to Subsection (2)(b) that will end up swallowing the rule.

C. THE CIRCUIT COURT IMPROPERLY ASSESSED THE UNREASONABLENESS OF THE END-RESULT ADVERTISEMENT RATHER THAN THE EXPLOITIVE PROCESS THAT ACHIEVED THAT RESULT.

In analyzing whether this is an unreasonable privacy invasion, the circuit court examined the resulting

advertisement, its location relative to the web listings for Habush and Rottier, historical examples of proximity advertising, and developments in search-engine results. (A-App.19-27, R.133:18-26.) All of these factors focus on the end-result of the unlawful conduct — the advertisement. But it is not the content of the advertisement itself or its positioning that is at issue here. This claim arises by virtue of the use of Habush's and Rottier's names to cause the Cannon's advertisements to appear within searches for Habush and Rottier. Even if "unreasonably invaded" is viewed as a separate element which necessitates the broad weighing of rational factors that the lower court engaged in, the inquiry should properly be focused on the conduct that constitutes the invasion and its purpose — the process of bidding on and paying money for the use of Habush's and Rottier's names as keywords to generate advertisements where they could not otherwise appear — not the advertisement that results from that conduct.

The circuit court considered whether Cannon's advertisements were unreasonable in light of historical practices of related businesses locating near each other, billboards being erected near one another, and the print yellow pages containing advertisements for related business in adjacent space on the page. (A-App.19-21, R.133:18-20.) Proximity advertising, in and of itself, is not the issue. While there may be nothing wrong with proximity advertising in general, such advertising crosses the line and becomes unlawful when it is accomplished by impinging upon the rights of others. The question in this case is not whether internet advertising placement obtained by Cannon is unreasonable; the question is whether Cannon's use of Habush's or Rottier's names in order to achieve that advertising placement is unreasonable. This advertising method is unlawful because it can only be accomplished by the exploitive use of Habush's and Rottier's names. It is the use of Habush's or Rottier's names that causes the advertisement and website link to appear whenever anyone,

who recognizes the Habush or Rottier name or knows of their reputations, searches for information about them. And it is the reputational and recognition value in their names that motivates Cannon to use them. This distinction was completely overlooked by the trial court.

When someone locates a dealership or a billboard next to a competitor's, he is not using the name of the competitor to achieve that result. He is using property which is open and available to locate a business or place an advertisement. Similarly, this advertising tactic is not the equivalent of advertising in the yellow pages. A competitor is not using another living person's name when it purchases an advertisement in the yellow pages or a television advertisement that runs before or after that of a competitor. There is no evidence that an advertiser can even control exactly where its ad is placed within the content of the yellow pages (except for the back cover) or with regard to the proximity of a television advertisement of a competitor.

The yellow pages advertisement appears by virtue of payment for space in the book; a television advertisement appears through the purchase of a time slot. Neither is triggered by the purchase or other use of any person's name. Moreover, such advertising is directed to certain populations at large (*e.g.* drivers on the freeway, persons perusing a telephone book, and television viewers). Conversely, the Cannon advertising is directed at people who have already decided to obtain information about Habush or Rottier. It is the audience of people that already have Habush or Rottier in mind that Cannon is targeting through the use of the Habush or Rottier names. This advertising placement can only be obtained by bidding on and paying for the use of the names of Habush or Rottier. It is the reputational aspects of the names of Habush or Rottier that Cannon is capitalizing on. The trial court completely overlooked these distinctions and the exploitive process by which Cannon's advertising result is achieved in its assessment of unreasonableness.

D. THE CIRCUIT COURT'S UNREASONABLENESS ANALYSIS IS BASED ON IRRELEVANT FACTORS AND COMES TO THE WRONG CONCLUSION.

1. FREE COMPETITION DOES NOT TRUMP INDIVIDUAL PRIVACY RIGHTS.

The circuit court began its unreasonableness analysis by noting that competition is "the fundamental economic policy of this state." (A-App.19, R.133:18.) While it is true that Wisconsin's antitrust law states that competition is a fundamental economic policy, this does not override a living person's privacy rights. Indeed, even the antitrust statute cited by the court states that this fundamental economic policy should be promoted, so long as it is "consistent with the other public interest goals established by the legislature." Wis. Stat. § 133.01 (emphasis added). The subsections of 995.50 "evince a specific legislative intent to protect privacy and reputation." *Woznicki*, 202 Wis. 2d at 185.

The language of Subsection (2)(b) demonstrates that the legislature clearly meant for the rights associated with the use of one's name to trump any rights of free competition. Whereas Subsection (2)(c) expressly makes whether there is a "legitimate public interest in the matter" part of the standard of liability, no such "public interest" element was included in Subsection (2)(b). The legislature clearly knew how to make the name-misappropriation tort embodied in Subsection (2)(b) subject to a "public interest" analysis in any given case if that is what it intended. Not including any such element in Subsection (2)(b) is a clear indication that it is in the public interest to prevent the exploitation of a person's name for advertising even if it in some sense restricts competition.

The legislature passes many laws that put controls on unfettered free competition. The decision of when and how to do so is a legislative function. The trial court's decision wrongly usurps this clear legislative right. The court does not have the right to veto the public policy established by the legislature. This is no less true because the

medium used to trade off of one's name happens to be the internet.

Moreover, there is no compelling public interest in permitting Cannon to take advantage of the value of the names of Habush or Rottier in this fashion. What compelling public interest is there in permitting competitors to obtain a competitive advantage by trading off of a competitor's name? What compelling interest is there in permitting a medical-device supplier to buy the name of a prominent surgeon to advertise its product whenever someone searches for information about that surgeon? What compelling public interest is served by permitting an appellate attorney to buy the name of a Supreme Court justice so that lawyer's advertisement is triggered anytime someone searches for that justice?

There are innumerable other ways that Cannon can get their promotional message in front of legal consumers without using the names of Habush or Rottier to achieve this result. Aside from advertising on television or radio, they can

purchase categories or phrases as keywords so that their advertising appears anytime an internet user searches for "personal injury lawyers," "medical malpractice lawyers," or other generic phrases that a consumer might use when searching for an attorney. No overriding public purpose is served by permitting Cannon to attach their promotional messages to the names of other prominent people.

In *Beverley,* the court held that a privacy-misappropriation violation could not be excused based on the public interest argument that it also served an informative or "educational" purpose because that would "create a loophole in the statute which would invite abuse and virtually vitiate the protection afforded therein to those who are commercially exploited." *See Beverley*, 532 N.Y.S.2d at 404. If the tactic of using the names of other attorneys to attract attention to a competitor's advertisement is condoned, it will be open season for attorneys and other services professionals to jump on the bandwagon. Multiple competitors, or other advertisers, will buy the names of prominent service

providers in order to exploit the value in these names by gaining access to an audience that would not otherwise be accessible. An internet searcher will only see the information he is looking for after working through multiple competitor advertisements. Neither this result nor the practice of taking advantage of the value in the name of another attorney or service professional in this fashion can be viewed as a reasonable in light of Subsection (2)(b).

2. THE QUESTIONS OF CONFUSION AND ENDORSEMENT ARE IRRELEVANT AND WERE NOT CORRECTLY EVALUATED BY THE CIRCUIT COURT.

Without any citation to legal authority, the circuit court viewed the potential for confusion as a factor to be considered in determining the unreasonableness of Cannon's use of Habush's or Rottier's names. (A-App.24, R.133:23.) This is surprising, since nowhere in Section 995.50 is confusion mentioned and nowhere in the Supreme Court's decision in *Hirsch v. S.C. Johnson & Son, Inc* is there

even a hint of a requirement of confusion for a common-law misappropriation claim. In fact, legal authority on the issue states unequivocally that confusion is not a requirement: "[p]roof of deception or consumer confusion is not required for the imposition of liability...." Restatement (Third) of Unfair Competition § 46 cmt. b (1995); *see also Henley,* 46 F. Supp. 2d at 590 (stating that the right of publicity is a "more expansive right" than trademark rights "because it does not require a showing of likelihood of confusion"). Yet the circuit court justified its decision in part because Habush and Rottier purportedly "presented no evidence to show that any particular person ever became confused by the Cannon's sponsored link." (A-App.24, R.133:23.) In so doing, the court engrafted a factor that runs counter to the established law of privacy/publicity rights. Moreover, it ignored the fact that Habush and Rottier's experts did provide testimony that confusion would be likely, including the only published study on the subject which found that only one in six internet

searchers could distinguish between paid for and unpaid search results. (A-App.106-07, R.107:150-51.)

The circuit court commented further that any initial confusion that might exist is fleeting because the misled internet searcher is always free to return back to the original results. (A-App.24, R.133:23.) But this misses the point. By the time an internet searcher realizes that he or she has been misled into clicking on Cannon's advertisement, the damage has already potentially been done. As highlighted in *Faegre & Benson, LLP v. Purdy*, 367 F. Supp. 2d 1238 (D. Minn. 2005), even if an internet user eventually realizes that the Defendant's site is not sponsored by the Plaintiff, the Defendant "will have already gained the benefit of luring the user to his web site by exploiting [the plaintiff's] name." *Id.* at 1248. Although decided on different facts, the point from *Faegre* is that confusion does not really matter. Once the internet searcher clicks on the Cannon website link that appears in response to the search, Cannon will have gained the benefit of attracting the user to its website by taking

advantage of the commercial value in the Habush or Rottier names which caused the user to undertake the internet search in the first place. This is the type of wrong that Subsection (2)(b) of the statute was intended to right.

Likewise, the circuit court's reference to there being no indication that Habush or Rottier are endorsing the Cannon promotional message in its assessment of reasonableness further introduces an element that clearly is not required by established privacy law. 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 28:7 (4th ed. 2009) (stating that "[f]alse endorsement" is not a required element of a misappropriation claim). The circuit court also ignored the possibility that unsophisticated internet users may not understand that there is no association between Habush or Rottier and the Cannon "sponsored" link advertising. There is no good basis for weighing against Habush and Rottier's privacy claim the evidence on confusion and endorsement, requirements that do not even exist in the statute or the common law.

3. THE ISSUE OF ATTORNEY ETHICS IS NOT RELEVANT IN A PRIVACY INVASION CLAIM AND WAS INCORRECTLY EVALUATED BY THE COURT BELOW.

The circuit court also informed its decision on unreasonableness with the fact that no regulatory board or supreme court has determined that this advertising tactic is unethical. (A-App.26, R.133:25.) While this may be true, it is also true that no regulatory board or supreme court has blessed this sort of advertising tactic as permissible under the rules of professional conduct for attorneys. Further, the trial court ignored the evidence offered by Habush and Rottier's experts questioning the ethical propriety of this conduct. (A-App.89-91, R.107:131-133; A-App.108-09, R.107:152-53.) Especially under circumstances where there has been no formal ethical opinion or judicial decision on the subject one way or the other, there is no logical basis for the trial court's conclusion that the absence of a formal opinion finding the conduct unethical is evidence of reasonableness.

In fact, there is no evidence that any more than two or three other attorneys in the entire country have employed this tactic, and then for only a short period of time, so the absence of any ethical ruling on this practice should not be surprising. That only a couple of attorneys other than Cannon have used competing attorneys' names in this fashion, albeit briefly, speaks volumes about the unreasonable nature of this advertising tactic.

Furthermore, Wisconsin's privacy statute protects its citizens at large. It is not a rule of law directed specifically at lawyers or any other group of professionals. Regardless of occupation or notoriety, the privacy rights of individuals in Wisconsin are to be protected. Even though this particular invasion of privacy case happens to involve attorneys, there is no reason for attorney ethics to play a role in deciding whether the privacy statute has been violated. Nothing in the statute or common law supports this consideration. Aside from attorneys, many businesses and

professions do not even have a prevailing ethical code of conduct.

4. HABUSH'S AND ROTTIER'S PRIVACY RIGHTS ARE NOT DIMINISHED BY USING THEIR NAMES IN THEIR FIRM'S NAME.

In its unreasonableness analysis, the lower court concluded that, because the names of Habush and Rottier are intertwined with the name of their law firm, the significance of their individual names, and their ability to protect others from misusing them, has been diminished. Habush's and Rottier's privacy rights are no less protectable merely because they have chosen to permit a service corporation (their firm) to use their personal names as part of the firm's name. (*See* A-App.21-23, R.133:20-22.) The right of publicity in one's name "is in the nature of a property right and is freely assignable to others." Restatement (Third) of Unfair Competition § 46 cmt. g (1995). Nevertheless, the personal interests protected by the right of privacy are not transferred and "invasions of those rights by third persons remain

actionable...". *Id.* This is what Habush and Rottier have done in allowing their law firm to use their personal names in the promotion of the firm's name. But the rights to use their names has been licensed only to the firm, and Habush and Rottier retain the ability to enforce their privacy rights against anyone else who uses their names for commercial purposes without consent. *See also* Restatement (Second) of Torts § 652F cmt. b (1977) (stating that a license to use one's name for advertising purposes does extend to anyone but the licensee). Indeed, Habush and Rottier are "free to protect [themselves] from the exploitation of [their] name[s] and likeness[es] against all the world except" the corporation to which they have assigned the right to use their names. *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144, 147 (Sup. Ct. 1973).

Commercializing one's name through a company does not forfeit or diminish one's right to privacy or make permissible what would otherwise be an impermissible use of that name by others. The intermediate

appellate court in New York considered precisely this issue in *Adrian v. Unterman*, 118 N.Y.S.2d 121 (App. Div. 1952). The plaintiff in *Adrian* assigned his surname, "Adrian," to his own company called "Adrian, Inc." *Id.* at 123, 124. He sued the defendant under New York's privacy law for using the Adrian surname in connection with another business. *Id.* at 124. The court held that Adrian's prior commercialization of his surname through his company did not prevent him from restraining its use by others. *Id.* at 128. So too here — the fact that Habush and Rottier have commercialized their names in connection with their law firm does not diminish their ability to enforce their individual privacy rights in their names against others.

The reasoning of the circuit court — that Habush and Rottier are somehow deserving of less protection of their privacy rights because their names are used as part of their firm's name (*see* A-App.21-23, R:133:20-22) — has no basis in the privacy statute or the common law and is illogical. The court did not persuasively explain why Habush

or Rottier should lose some of the "ability to control the use" of their names simply because they are part of the name of their law firm, and relies on no law to arrive at this bizarre conclusion. (A-App.23, R.133:22.)

Among other things, Judge Kahn ignored the fact that Cannon stipulated that their use of the surnames Habush and Rottier is sufficient from both a factual and legal standpoint to identify the individual plaintiffs Robert Habush and Daniel Rottier. This stipulation was made notwithstanding that Habush and Rottier have allowed their law firm to use their names. (A-App.53-55, R.107:29-31.) By implying that Habush and Rottier, in permitting their law firm to use their names, somehow consented to the commercial use of their names by others, the circuit court also overlooked the fact that Subsection (2)(b) expressly requires actual written consent. If Habush or Rottier became sole practitioners, should they lose the right to prevent others from trading off their names because they decided to form service corporations called Habush Law, S.C. or Rottier and

Associates, S.C.? There is no sensible or legal basis for such a conclusion.

Regardless of whether the names that are capitalized upon by others are also part of the name of a service corporation, there is still an infringement of the rights of the individuals. Habush and Rottier are no less deserving of the ability to control the use of their names merely because they have allowed their firm to use their names. The consent to the firm does not extend to others, who remain liable for unauthorized uses of the names. *See* Restatement (Third) of Unfair Competition § 46 cmt. g; Restatement (Second) of Torts § 652F cmt. b. The only thing that has caused Habush and Rottier to lose any control of the use of their names has been Cannon's advertising tactic, and the circuit court's erroneous endorsement of it as reasonable and not actionable.

If every use of a living person's name which takes advantage of the reputation or other commercial value in the person's name is subjected to an "unreasonably invaded" analysis of the type engaged in by the lower court,

all predictability with regard to the ability of an individual to protect his or her name from being misappropriated will be lost and the statutory protection will be substantially eroded. That result could not have been intended by the legislature.

CONCLUSION

One whose privacy is invaded under Subsection (2)(b), through the use of his or her name for advertising purposes, need not also show that such an invasion is unreasonable. That determination has already made by the legislature. To the extent such a showing is required, the phrase "unreasonably invaded" should be narrowly construed to conform with the underlying purpose of Wisconsin's privacy statute, that is, to excuse only incidental or trivial uses that are not designed to exploit the commercial value in one's name. The undisputed facts compel the conclusion that the advertising name-use in this case seeks to take advantage of the reputational and other commercial values in the names of Habush and Rottier, and therefore is not reasonable. If "free competition" or other public-interest notions are

permitted to override the protection afforded by Subsection (2)(b), its purpose to protect the value in a person's name from being exploited by others will be lost.

An underlying thread of the lower court's opinion is that somehow the evolving nature of the internet should effect the vigor with which an individual's privacy rights are protected. To the contrary, if anything, the potential damage that can be caused by misuse of the internet requires extra vigilance to assure that individual rights are not trampled by this pervasive communication medium. Even the world's information superhighway must have rules. No free flow of news or media interest is implicated here. The internet will not shut down if advertisers like Cannon are not able to trade off of the names of living individuals as a means of intruding on internet searches for information.

The application of our privacy law to the targeting of the value in the Habush or Rottier names, for the purpose of obtaining visibility for the advertising of Cannon, is consistent with persuasive judicial authority and the

underlying purpose of Subsection (2)(b). It is personally offensive and contrary to common notions of decency and fairness to permit anyone to exploit the value, prestige, and good will associated with another person's name.

The fact that this advertising method of capitalizing on the commercial value in a person's name may be new or different does not make it any less deserving of protection under our longstanding policy of protecting the privacy rights in one's name. It is not important how Cannon has exploited Habush's and Rottier's names, but that they have done so. As one court noted:

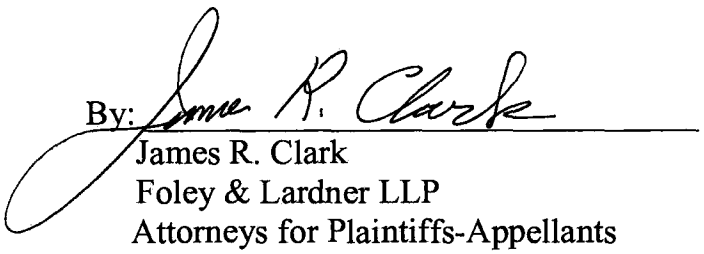
> A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.

White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992).

The circuit court's decision and judgment should be reversed, and the case should be remanded to the circuit court with instructions to enter judgment in favor of

Habush and Rottier, and with further instructions to issue the relief provided by Section 995.50.

Respectfully submitted,

By: 

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,655 words.

Dated: 12/2/2011

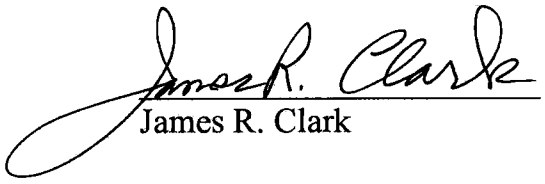
James R. Clark

James R. Clark

E-FILING CERTIFICATION

Pursuant to Wis. Stat. § 809.19(12)(f), I hereby certify that the text of the electronic copy of this Brief is identical to the text of the paper copy of this Brief.

Dated: 12/3/11



James R. Clark

CERTIFICATE OF SERVICE

I hereby certify that I will cause (3) copies of the foregoing Brief of Plaintiffs-Appellants Robert L. Habush and Daniel A. Rottier and the accompanying Appendix to be served on opposing counsel at the address below.

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Dated: 12/2/11

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